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(2020)12ILR A1
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 03.12.2020

BEFORE

THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

Criminal Appeal No. 221 of 2010

Rais Shekh ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Anand Dubey, Manish Singh, Rajesh Singh, Shanker Lal Pandey

Counsel for the Respondent:
Govt. Advocate

Criminal Law – Indian Penal Code,1860 – Sections 323, 504, 308, 304 – Scheduled Caste / Scheduled Tribe Act, 1989 - Section 3 (2) (5) - Criminal appeal has been filed against conviction U/s 323, 504, 308, 304 I.P.C. and Section 3 (2) (5) S.C/S.T. Act.

Hostile Witnesses – The effect of the hostile witness cannot be discarded as whole - relevant parts are admissible, can be used by prosecution or the defence. (Para 23)

Relative Witnesses: - cannot be rejected only on the ground that they are related the deceased - Presence on spot are natural and their statement are trustworthy, should be preferred on the testimony of other witness, because relative witnesses do not implicate false person, leaving real culprit. (Para 34)

There is no illegality in the judgment passed by the Trial court. (Para 43)

Quantum of sentences: - sentence of five years awarded to the appellant for the said offence is reduced to a rigorous imprisonment of three years. (Para 54)

Appeal is partly allowed. (E-2)

List of Cases cited: -

1. State through P.S. Lodhi Colony New Delhi Vs Sanjeev Nanda 2012 Cr.L.J. 4174

2. St. of U.P. Vs Ramesh Prasad Mishra & anr. AIR 1996 SC 2766 & K. Anbazhagan Vs Superintendent of Police & anr. AIR 2004 SC 524

3. Ramesh Vs St.of Har. (2017) 1 SCC 529

4. Masalti & ors. Vs St. of U. P., AIR 1965 SC 202

5. Mohabbat Vs St. of M.P., (2009) 13 SCC 630,

6. St. of M.P. Vs Saleem @ Chamaru, AIR 2005 SC 3996

7. Ramashraya Chakravarti Vs St. of M.P. AIR 1976 SC 392

Case Law discussed:

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

1. The instant criminal appeal has been filed under Section 374 (2) of Criminal Procedure Code (hereinafter referred as "Code") against the judgment and order dated 4.12.2009, passed by Additional Sessions Judge / Fast Track Court No. 7, District Pratapgarh in S.T. No. 125 of 2005 arising out of Crime No. 410 of 2001 *(State of U.P. vs. Rais Shekh)*, under Sections 323, 504, 308, 304 I.P.C. and Section 3 (2) (5) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred as "S.C./S.T. Act") P.S. Kotwali Nagar, District Pratapgarh whereby the accused-appellant (hereinafter referred as "appellant") has been convicted and sentenced for offence under Section 304 II I.P.C. for 5 years rigorous imprisonment and fine of Rs. 5,000/- in default whereof, he has to undergo for six months additional imprisonment.

2. The prosecution case, in brief, is that Vinod Kumar (PW-3), S/o Ram Kumar Saroj, R/o Devkali, District Pratapgarh, filed a written information (Ex.Ka2) at P.S. Kotwali Nagar, District Pratapgarh on 25.06.2001 at about 9:30 p.m., alleging that he, Anand @ Bachha Harijan (hereinafter referred to as deceased), Ashok Kumar (PW-9), Dinesh (PW-6), Harikesh, Ramu and Dileep (PW-5) were taking a cup of tea at the tea stall of Ayub @ Bachai (PW-1), situated nearby Rakesh Auto Service Station, Pitai Ka Purva Purey Nursing Bhan at about 2:30 p.m. Meanwhile, appellant-Rais Shekh, whose electronic shop was situated at Jhoghapur, came by bicycle, to have a cup of tea and started to pass some sledging remarks *(majaak)* on deceased which took place into a hot talk and abusive words *(gaali-galauj)* between them. It is further stated that all the persons present at the place of occurrence, tried to intervene but the appellant took a bamboo stick from the hut of tea stall and caused injuries on the head of the deceased. Deceased was immediately carried to Civil Hospital, Pratapgarh wherefrom he was referred to Swarooprani Nehru Hospital, Allahabad. It is further mentioned that the appellant fled away from the place of occurrence by leaving his bicycle on the spot.

3. The aforesaid information was entered into Police G.D. Report (Ex.Ka-7) and the First Information Report (Chik Report) (Ex.Ka-6) was lodged as Crime No. 410/2001, under Sections 323, 504, 308 I.P.C. and Section 3 (1) (10) S.C./S.T. Act, by Constable Moharir Ram Bahadur Yadav and the investigation of the case was handed over to Dy.S.P. Sri Neeraj Kumar Pandey (PW-10).

4. Dr. C.P. Verma (PW-8), posted as Emergency Medical officer at Civil Hospital, Pratapgarh, examined the deceased who was brought before him by Ashok Kumar (PW-9), on 25.6.2001 at about 3:00 p.m. and noted the following injuries on his body:-

(a) lacerated wound 6.5 c.m. x 1.2 c.m. x bone deep on the left side of head 6 c.m. above the ear and bleeding was also present.

(b) bleeding from left ear.

5. The deceased was advised for x-ray and admitted in hospital in a serious condition. According to this witness (PW-8), all the injuries of the deceased were fresh and caused by any blunt object.

6. During medical treatment, deceased was referred to Swarooprani Nehru Hospital, Allahabad where he died on 30.06.2001. The death information report was sent to Kotwali Police, Allahabad. The inquest of the deceased was conducted by S.I. S.K. Mishra who after preparing the relevant police papers, sealed the dead body of the deceased and sent it to District Hospital, Allahabad for post-mortem examination.

7. Dr. R.P. Singh (PW-11), on 1.7.2001 at about 4:30 p.m., conducted the post-mortem examination of the dead body of the deceased-Anand @ Bachha Harijan and prepared the post-mortem report (Ex.Ka-9) by noting the following ante-mortem injuries on the body of the deceased:-

(i) Surgically stitched wound size 9 inch in length semi lunar in shape, 3 inch above left ear on the left side of the head.

(ii) Surgically stitched wound of size 10 inch in length on the right side of head, 3 1/2 inch above right ear on the right side of the head.

(iii) Contusion 3 c.m. x 1 c.m. present on the lower part of the right side chest.

8. In addition to above, he (PW-11) found that trachea stomy tube and urinary catheter were also present. Both side of temporal bones were fractured, brain was lacerated and clotted blood was present and bladder including intestine were empty. According to this witness, the deceased had died on 30.6.2001 at 10:45 a.m. at Swarooprani Hospital, Allahabad, due to coma as result of ante-mortem injury to brain.

9. During investigation, on the basis of inquest report and post-mortem report, the death information report of deceased was entered in the G.D. (Ex.Ka-8) on 20.7.2001 and the offence under Section 304 I.P.C. was added.

10. Dy.S.P. Neeraj Kumar Pandey, PW-10 (Investigating Officer) inspected the place of occurrence, prepared site plan (Ex.Ka-4), took the bamboo stick (thunni) used in causing injury, prepared recovery memo (Ex.Ka-1), recorded the statements of the witnesses and filed a charge-sheet (Ex.Ka-5), under Section 323, 504, 308, 304 I.P.C. and Section 3 (2) (5) S.C./S.T. Act, against the appellant, before the Chief Judicial Magistrate, Pratapgarh who after providing the copy of relevant police papers to appellant, committed the case for trial to Court of Sessions, Pratapgarh as the case was exclusively triable by Court of Sessions.

11. Appellant, his counsel and counsel appearing for the State were heard on the point of charge. The charges, under Section 323, 504, 308, 304 I.P.C. and Section 3 (2) (5) S.C./S.T. Act, were framed against the appellant to which he denied and claimed to be tried.

12. The prosecution, in order to prove its case, has produced Mohd. Ayub @ Bachai (PW-1), Baladeen Prajapati (PW-2), Vinod Kumar (PW-3), Ramu Vishwakarma (PW-4), Dileep (PW-5), Dinesh (PW-6), Ram Lotan (PW-7), Dr. C.P. Verma (PW-8), Ashok Kumar (PW-9), Dy.S.P. Neeraj Kumar Pandey (PW-10) and R.P. Singh (PW-11), wherein, PW-1 to PW-7 and PW-9 are witnesses of fact whereas PW-8, PW-10 and PW-11 are formal witnesses.

13. After conclusion of prosecution witnesses, the statement of appellant was recorded under Section 313 of the Code wherein he, denying the prosecution evidence, stated that he was innocent and had been falsely implicated. He further stated that the deceased was a motor mechanic and was performing his duty at the time of occurrence by using hydraulic jack but due to slip of jack, severe head injury was caused to the deceased whereby he died.

14. In defence, to rebut the prosecution evidence, S.B. Shukla (DW-1), Pharmacist, District Hospital, Pratapgarh, has been produced by the appellant who has stated that on 25.6.2001, at about 3:00 p.m., injured Anand (deceased) was brought at District Hospital, Pratapgarh for treatment by Ashok Kumar (PW-9) and injuries of deceased had been noted at page no. 20 of Accidental Medical Register. Stating that injuries of accident cases is entered in Accidental Medical Register, he proved photo copy of medico legal injury report of deceased (Ex.Kha.1).

15. Learned trial Court, after conclusion of trial, convicted the appellant for the offence under Section 304-II I.P.C. by acquitting him for offence U/s 323, 504, 308 I.P.C. and Section 3 (2) (5) S.C./S.T. Act, vide impugned judgment and order.

16. Aggrieved by the said judgment, the instant appeal has been preferred.

17. Heard Sri Shankar Lal Pandey, learned counsel for the appellant and Sri Dhananjai Kumar Singh, learned A.G.A. for the State and peruse the record.

18. Learned counsel for the appellant has submitted that the appellant is innocent and has been falsely implicated in this case. Learned counsel further submitted that the deceased was a mechanic in Rakesh Auto Service Station, he had received fatal injury on his head due to slip of hydraulic jack because his injury was noted in Accidental Medical Register, maintained at District Hospital, Pratapgarh where the deceased was immediately carried after the accident. Learned counsel further submitted that all the independent witnesses have not supported the prosecution story and PW-1 to PW-7 have been declared, by the prosecution, as hostile. Learned counsel further submitted that the statement of PW-9 Ashok Kumar is not reliable as he is the cousin of deceased and his presence at the time of occurrence is not natural. Learned counsel further submitted that the learned trial Court, without applying its judicial mind and considering the evidence available on record, has illegally convicted and sentenced the appellant vide impugned judgment and order which is illegal, against the settled principle of criminal jurisprudence and is liable to be set aside.

19. Learned counsel also submitted that though the appellant is innocent having no criminal history, if it is found that the appellant is guilty, a lenient view is required to be adopted in this case in view of the nature of offence as well as the said offence was happened before twenty years.

20. Per-contra, learned A.G.A. vehemently opposing the submission made by learned counsel for the appellant, submitted that the learned trial Judge has not committed any illegality or irregularity in the aforesaid judgment and order. Learned A.G.A. further submitted that only on the account that PW-1 to PW-7 have not supported the prosecution story on some fact, their whole evidence cannot be brushed aside. Learned A.G.A. further submitted that these witnesses have supported the prosecution story on the point of the date, time, place of occurrence and nature of injury and other relevant aspect of the prosecution story. Learned A.G.A. further submitted that the presence of PW-9 Ashok Kumar at the time of occurrence is natural and probable. He (PW-9) is named in the first information report and also had carried the injured from the place of occurrence to the hospital. Learned counsel further submitted that the evidence of PW-9, Ashok Kumar cannot be treated as unreliable only on the ground that he is relative of the deceased. Learned A.G.A. further submitted that neither any delay has been caused in lodging the first information report nor in medico legal examination. The ocular evidence is also supported and corroborated with the medical evidence. Learned A.G.A. further submitted that defence story put up by the appellant that deceased had received injury in accident due to slip of hydraulic jack, is wholly unreliable, as no eye witness has been produced by the appellant to prove this fact. Learned A.G.A. further submitted that the prosecution has successfully proved its case beyond reasonable doubt against the appellant; the impugned judgment and order is liable to be confirmed and the instant appeal is liable to be dismissed.

21. I have considered the rival submission made by learned counsel for the parties and peruse the record.

22. Admittedly, the occurrence was happened on 25.6.2001 at about 2: 30 p.m. and just after the occurrence the deceased was carried to District Hospital, Pratapgarh wherefrom he was referred to Allahabad and died during medical treatment. Vinod Kumar (PW-3) who lodged the first information report, has specifically stated that the said occurrence was happened in his presence and after the occurrence, he along with other person, present at the place of occurrence, had taken away the deceased to District Hospital, Pratapgarh and wherefrom he was referred to Swarooprani Hospital, Allahabad. In first information report (Ex.Ka.2), this fact has been elaborately mentioned by him (PW-3).

23. So far as the submission of the learned counsel for the appellant that all the independent prosecution witnesses (PW-1 to PW-7) have not supported the prosecution story and have been declared hostile by the prosecution whereas the statement of Ashok Kumar (PW-9) is not reliable as he is kith and kin of the deceased, is concerned, it is settled principle of law of criminal jurisprudence that the statement of independent witnesses, produced by the prosecution, cannot be thrown out only on the account that they had been declared by the prosecution as hostile. The statement of hostile witnesses can also be taken into account to that extent to which it supports the prosecution. Similarly, the evidence of the relatives also cannot be held as unreliable only on the ground that they are related to the deceased, if their presence at the time of occurrence are natural and reliable and their statement are reliable and trustworthy, in the facts and circumstances of the case and if it is so alleged by the defence, the defence has to show that why the relative witnesses are telling a lie or falsely implicating the accused-appellant by leaving aside the real culprit.

24. The tendency of witnesses to become hostile to the prosecution story, has become a cancer to the criminal administration of justice. It has been seen in most cases that the prosecution witnesses do not prefer to support the prosecution case because they prefer to avoid or attend the court proceeding as well as to take enmity with the accused and in some cases, they do not support the prosecution case either on the account of threat or allurement given by the accused person. Hon'ble Supreme Court in **State through P.S. Lodhi Colony New Delhi vs. Sanjeev Nanda 2012 Cr.L.J. 4174** while expressing its concern on the tendency of hostility and value of evidence of hostile witnesses, relying on law laid down in **State of U.P. vs. Ramesh Prasad Mishra and another AIR 1996 SC 2766** and **K. Anbazhagan vs. Superintendent of Police and another AIR 2004 SC 524** has held as under:-

"87. Witness turning hostile is a major disturbing factor faced by the criminal courts in India. Reasons are many for the witnesses turning hostile, but of late, we see, especially in high profile cases, there is a regularity in the witnesses turning hostile, either due to monetary consideration or by other tempting offers which undermine the entire criminal justice system and people carry the impression that the mighty and powerful can always get away from the clutches of law thereby, eroding people's faith in the system. This court in State of U.P. v. Ramesh Mishra and Anr. [AIR 1996 SC 2766] held that it is equally settled law that the evidence of hostile witness could not be totally rejected, if spoken in favour of the prosecution or the accused, but it can be subjected to closest

scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted. In K. Anbazhagan v. Superintendent of Police and Anr. [AIR 2004 SC 524], this Court held that if a court finds that in the process the credit of the witness has not been completely shaken, he may after reading and considering the evidence of the witness as a whole with due caution, accept, in the light of the evidence on the record that part of his testimony which it finds to be creditworthy and act upon it. This is exactly what was done in the instant case by both the trial court and the High Court and they found the accused guilty."

25. In **Ramesh Vs. State of Harayana (2017) 1 SCC 529** again Hon'ble Supreme Court, while taking notice the culture of compromise in criminal cases and tendency of witnesses turning hostile has held, as under:-

"39. We find that it is becoming a common phenomenon, almost a regular feature, that in criminal cases witnesses turn hostile. There could be various reasons for this behaviour or attitude of the witnesses. It is possible that when the statements of such witnesses were recorded under Section 161 of the Code of Criminal Procedure, 1973 by the police during investigation, the Investigating Officer forced them to make such statements and, therefore, they resiled therefrom while deposing in the Court and justifiably so. However, this is no longer the reason in most of the cases. This trend of witnesses turning hostile is due to various other factors. It may be fear of deposing against the accused/delinquent or political pressure or pressure of other family members or other such sociological factors. It is also possible that witnesses are corrupted with monetary considerations.

40. In some of the judgments in past few years, this Court has commented upon such peculiar behaviour of witnesses turning hostile and we would like to quote from few such judgments. In Krishna Mochi v. State of Bihar, this Court observed as under:

"31. It is matter of common experience that in recent times there has been sharp decline of ethical values in public life even in developed countries much less developing one, like ours, where the ratio of decline is higher. Even in ordinary cases, witnesses are not inclined to depose or their evidence is not found to be credible by courts for manifold reasons. One of the reasons may be that they do not have courage to depose against an accused because of threats to their life, more so when the offenders are habitual criminals or high-ups in the Government or close to powers, which may be political, economic or other powers including muscle power."

41. Likewise, in Zahira Habibullah v. State of Gujarat, this Court highlighted the problem with following observations: "40. Witnesses, as Bentham said, are the eyes and ears of justice. Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed and it no longer can constitute a fair trial. The incapacitation may be due to several factors like the witness being not in a position for reasons beyond control, to speak the truth in the court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by the court on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and

hirelings, political clouts and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle truth and realities coming out to surface. Broader public and social interest require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State representing by their presenting agencies do not suffer... there comes the need for protecting the witnesses. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth presented before the Court and justice triumphs and that the trial is not reduced to mockery.

41. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who has political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. As a protector of its citizens it has to ensure that during a trial in Court the witness could safely depose truth without any fear of being haunted by those against whom he had deposed. Every State has a constitutional obligation and duty to protect the life and liberty of its citizens. That is the fundamental requirement for observance of the rule of law. There cannot be any deviation from this requirement because of any extraneous factors like, caste, creed, religion, political belief or ideology. Every State is supposed to know these fundamental requirements and this needs no retaliation. We can only say this with regard to the criticism levelled against the State of Gujarat. Some legislative enactments like the Terrorist and Disruptive Activities (Prevention) Act, 1987 (in short the "TADA Act") have taken note of the reluctance shown by witnesses to depose against people with muscle power, money power or political power which has become the order of the day. If ultimately truth is to be arrived at, the eyes and ears of justice have to be protected so that the interests of justice do not get incapacitated in the sense of making the proceedings before Courts mere mock trials as are usually seen in movies."

42. Likewise, in Sakshi v. Union of India, the menace of witnesses turning hostile was again described in the following words: "32. The mere sight of the accused may induce an element of extreme fear in the mind of the victim or the witnesses or can put them in a state of shock. In such a situation he or she may not be able to give full details of the incident which may result in miscarriage of justice. Therefore, a screen or some such arrangement can be made where the victim or witnesses do not have to undergo the trauma of seeing the body or the face of the accused. Often the questions put in cross-examination are purposely designed to embarrass or confuse the victims of rape and child abuse. The object is that out of the feeling of shame or embarrassment, the victim may not speak out or give details of certain acts committed by the accused. It will, therefore, be better if the questions to be put by the accused in cross-examination are given in writing to the Presiding Officer of the Court, who may put the same to the victim or witnesses in a language which is not embarrassing. There can hardly be any objection to the other suggestion given by the petitioner that whenever a child or victim of rape is required to give testimony, sufficient breaks should be given as and when required. The provisions of sub-section (2) of section 327 Cr.P.C. should also apply in inquiry or trial of offences under Section 354 and 377 IPC."

43. In State v. Sanjeev Nanda[10], the Court felt constrained in reiterating the growing disturbing trend:

"99. Witness turning hostile is a major disturbing factor faced by the criminal courts in India. Reasons are many for the witnesses turning hostile, but of late, we see, especially in high profile cases, there is a regularity in the witnesses turning hostile, either due to monetary consideration or by other tempting offers which undermine the entire criminal justice system and people carry the impression that the mighty and powerful can always get away from the clutches of law thereby, eroding people's faith in the system.

100. This court in State of U.P. v. Ramesh Mishra and Anr. [AIR 1996 SC 2766] held that it is equally settled law that the evidence of hostile witness could not be totally rejected, if spoken in favour of the prosecution or the accused, but it can be subjected to closest scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted. In K. Anbazhagan v. Superintendent of Police and Anr., (AIR 2004 SC 524), this Court held that if a court finds that in the process the credit of the witness has not been completely shaken, he may after reading and considering the evidence of the witness as a whole with due caution, accept, in the light of the evidence on the record that part of his testimony which it finds to be creditworthy and act upon it. This is exactly what was done in the instant case by both the trial court and the High Court and they found the accused guilty.

101. We cannot, however, close our eyes to the disturbing fact in the instant case where even the injured witness, who was present on the spot, turned hostile. This Court in Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi), (2010) 6 SCC 1 and in Zahira Habibullah Shaikh v. State of Gujarat, AIR 2006 SC 1367, had highlighted the glaring defects in the system like non-recording of the statements correctly by the police and the retraction of the statements by the prosecution witness due to intimidation, inducement and other methods of manipulation. Courts, however, cannot shut their eyes to the reality. If a witness becomes hostile to subvert the judicial process, the Courts shall not stand as a mute spectator and every effort should be made to bring home the truth. Criminal judicial system cannot be overturned by those gullible witnesses who act under pressure, inducement or intimidation. Further, Section 193 of the IPC imposes punishment for giving false evidence but is seldom invoked."

44. On the analysis of various cases, following reasons can be discerned which make witnesses retracting their statements before the Court and turning hostile:

"(i) Threat/intimidation.

(ii) Inducement by various means.

(iii) Use of muscle and money power by the accused.

(iv) Use of Stock Witnesses.

(v) Protracted Trials.

(vi) Hassles faced by the witnesses during investigation and trial.

(vii) Non-existence of any clear-cut legislation to check hostility of witness."

45. Threat and intimidation has been one of the major causes for the hostility of witnesses. Bentham said: "witnesses are the eyes and ears of justice". When the witnesses are not able to depose correctly in the court of law, it results in low rate of conviction and many times even hardened criminals escape the conviction. It shakes public confidence in the criminal justice delivery system. It is for this reason there has been a lot of discussion on witness protection and from

various quarters demand is made for the State to play a definite role in coming out with witness protection programme, at least in sensitive cases involving those in power, who have political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. A stern and emphatic message to this effect was given in Zahira Habibullah's case as well."

(Emphasis laid down)

26. Now coming to this case, PW-1 Mohd. Ayub @ Bachai has stated that his house and tea stall are situated toward the North to Rakesh Shukla Auto Service Station Telco Company Pitai Ka Purva. He further stated that on 25.6.2001 at about 2:30 p.m., he was present at his tea stall where Anand @ Bachha Harijan (deceased), Ashok (PW-9) and Baladin (PW-2) were present along with other person and they had asked him to serve them a cup of tea. He further stated that as they were having tea, an unknown person came there with his bicycle and by standing his bicycle, sit down beside the deceased. He further stated that after some time, hot altercation took place between them which resulted gathering and the person present on the spot, tried to intervene and pacified both of them. He further stated that thereafter Anand @ Bachha Harijan (deceased) had moved towards courtyard *(Sehan)*, situated in front of Rakesh Shukla Auto Service Station, but the said unknown person withdraw the bamboo stick (thuni) from his hut and started beating the deceased. He further stated that so many persons gathered at the place of occurence and thereafter the said unknown person, by leaving his cycle at the place of occurence, fled away. According to this witness, since the deceased had received severe injuries, he was carried to District Hospital but succumbed to his injuries during the treatment. He further stated that during the investigation, the Investigating Officer had taken into his custody, the bamboo stick (weapons of offence) and had also taken his signature on a plain paper (Ex.Ka.1). This witness was declared as hostile by the prosecution but in cross-examination, he again stated that he did not know the person who caused the said offence.

27. Baladin (PW-2) although has stated in his examination that no occurrence was happened before him but admitted that after the occurrence, he had heard that the deceased Anand @ Bachha Harijan had received severe injury on 25.6.2001 at about 2:30 p.m. whereby he became unconscious. This witness had also not supported the prosecution story and was declared hostile by the prosecution.

28. Vinod Kumar (PW-3), like PW-1, has stated that the said occurrence was happened in his presence on 25.6.2001 at 2:30 p.m. wherein Anand @ Bachha Harijan was beaten by one unknown person to whom he did not know. This witness was also declared hostile by the prosecution as he denied the identity of the accused.

29. Ramu Vishwakarma (PW-4) has stated that at the time of occurrence, he was doing his duty, inside Rakesh Shukla Auto Service Station, Telco Company and he did not know who had caused injury to the deceased. This witness was also declared hostile by the prosecution.

30. Dileep (PW-5) has stated that he was not present at the place of occurrence as he had gone to his house to take lunch and when he returned, he had seen that the deceased was badly injured and was being

carried to the hospital. He further stated that he had also accompanied the deceased to the hospital; and deceased was unconscious due to his head injury. He further stated that due to severe injury, the doctors of District Hospital, Pratapgarh had referred him to Swarooprani Hospital, Allahabad and he had also gone to Allahabad where, after five days during the treatment, deceased had died. He further stated that after some days, he got an information that the deceased was washing the vehicle in Auto Service Station where he had received severe injuries as he fell down due to intoxication. This witness was also declared hostile as he did not supported the prosecution story.

31. Dinesh (PW-6) has stated that at the time of occurrence, he was sleeping at his house and as he got information, he rushed to the place of occurrence and saw that the deceased was being carried to District Hospital. This witness further stated that he had heard that there was quarrel between the deceased Anand @ Bachha Harijan and appellant on a trival issue and meanwhile, the appellant had caused injury to the deceased by bamboo stick (thuni).

32. Ram Lotan (PW-7) has also stated that he was not present at the time of occurrence and he had heard that the deceased was beaten by the appellant Rais Shekh. This witness was also declared hostile by the prosecution.

33. Thus, none of the prosecution witnesses, who has been declared by the prosecution as hostile, have disputed the date, time, manner and factum of the occurrence. Mohd. Ayub @ Bachai (PW-1), Vinod Kumar (PW-3), Dileep (PW-5) have clearly stated that the fatal injury was caused by bamboo to the deceased Anand @ Bachai before him on 25.6.2001 at 2:30 p.m. at the said place of occurrence. They have been declared hostile, only because they denied the identity of accused. Trial Court has not rejected the whole evidence of these hostile prosecution. It has taken their statement into consideration to that extent to which it support the prosecution story. In my view, in view of the law laid down by Hon'ble Supreme Court in Sanjeev Nanda (supra), Ramesh Prasad Mishra (supra) and K. Anbazhagan (supra), trial court has not committed any error.

34. Now coming to the next submission of the learned counsel for the appellant that evidence of Ashok Kumar (PW-9) can not be taken into consideration as he is relative of deceased. It is settled principle of law that testimony of relative witnesses, if their presence on spot are natural and their statement are trustworthy, should be preferred on the testimony of other witness, because relative witnesses do not implicate false person, leaving real culprit.

35. It is very pertinent to quote at this very stage the law laid down in **Masalti and others vs. State of U. P., AIR 1965 SC 202,** wherein Court said as under :

".....But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. Often enough, where factions prevail in villages and murders are committed as a result of enmity between such factions, criminal Courts have to deal with evidence of a partisan type. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of

justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct....."

36. Similarly, in **Mohabbat vs. State of M.P., (2009) 13 SCC 630,** Court held as under :

".....Relationship is not a factor to affect credibility of a witness. It is more often than not a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the Court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible."

37. Ashok Kumar (PW-9) has stated that at the time of occurrence, at about 2:30 p.m., he, deceased, Ramu (PW-4), Dinesh (PW-6), Dileep (PW-6) and Harikesh were having tea at tea stall of Bachai (PW-1). He further stated that meanwhile appellant-Rais Shekh came there and started to have tea. He has further stated that after some time, appellant Rais Shekh began to pass dirty jokes with the deceased Anand @ Bachha Harijan and on objection raised by him, appellant abused and quarreled with him. He further stated that he, Harikesh, Dinesh (PW-6), Ramu (PW-4), Bachai (PW-1) tried to intervene but the appellant caused injury on the head of the deceased by a bamboo (thunni) fixed at the tea stall. He further stated that he along with other person carried the deceased to the hospital by jeep but the doctor had referred him to S.R.N Hospital, Allahabad where he was admitted for treatment. He (PW-9) further stated that at the time of occurrence, he and deceased were employed at Rakesh Auto Service Station where he and deceased were engaged in washing the vehicles. He again stated that at the time of occurrence, he was having tea at the place of occurrence and the deceased Anand was also sitting there. He, in his cross-examination, again stated that meanwhile the appellant-Rais came there by his bicycle and sit beside the deceased. This witness in his cross-examination admitting that he had not lodged the report, has further stated that he was present at the place of occurrence and saw the whole occurrence.

38. From perusal of injury report (Ex.Ka.2), it transpires that the deceased was carried by Ashok Kumar (PW-9) in an injured condition before Dr. C.P. Verma (PW-8), District Hospital, Pratapgarh, for treatment and medical examination. In addition to above, the presence of Ashok Kumar (PW-9) has also been shown in FIR along with other witnesses. Thus, the presence of this witness as well as other witnesses named in the first information report is not disputed. This witness has been thoroughly cross examined by the defence but nothing has come out from his examination whereby his testimony can be disputed. Thus, merely on the ground that he is relative of deceased, his testimony cannot be doubted.

39. Further, the occurrence was happened on 25.6.2001 at about 2:30 p.m and the first information report was lodged on the same day at 9:30 p.m. In the meantime, the deceased was carried by the prosecution witnesses to the hospital, situated at Pratapgarh and thereafter Allahabad for medical treatment. Thus, there is neither delay in lodging the F.I.R. nor in medical examination.

40. So far as the argument of learned counsel for the appellant that deceased had died due to head injury received in accident, caused due to slip of hydraulic jack, is concerned, appellant has not produced any eye witness in his defence who had seen that deceased had received such injury in any accident as submitted by the learned counsel of the appellant. Learned counsel in support of his submission has placed reliance only on testimony of S.B. Shukla (DW-1). Vinod Kumar (PW-3), informant, who was declared hostile by the prosecution has clearly stated that the said injury was caused to deceased by bamboo (thuni). He, in cross-examination by defence counsel, has rejected the suggestion of defence counsel that said injury was received by deceased in accident caused due to slip of hydraulic jack. Similarly, Ashok Kumar (PW-9) has also rejected the aforesaid suggestion, put to him by defence. Dr. C.P. Verma (PW-8) has clearly said that injury on the head of deceased was caused by blunt object. In cross-examination, neither any question nor any suggestion was put to this witness that injury, present on the head of deceased at the time of examination, was caused in accident. S.B. Shukla (DW-1) although has stated that injuries of deceased were noted in Accidental Medical Register but in cross-examination he admitted that he was not medico legal expert and could not tell whether the case, wherein he was deposing, was accidental or not. In my view, where the defence had failed to put any question or suggestion to the doctor (PW-8) who had examined the deceased, as to whether or not injury to deceased was caused in accident, the testimony of defence witness S.B. Shukla (DW-1) cannot affect the prosecution story and trial Court has rightly disbelieved the defence of the appellant. Thus, the submission of learned counsel has no force.

41. In addition to above, appellant has also not stated in his statement U/s 313 of the Code regarding any enmity to prosecution witnesses especially with Vinod (PW-3) who lodge F.I.R. against him and Ashok (PW-9) who being eye witness, fully supported the prosecution story as to why prosecution witnesses have given evidence against him. Thus, failure of appellant to create any doubt in the credibility of these prosecution witnesses further creates doubt in the submission of learned counsel for the appellant.

42. In my view, such portion of statement of prosecution witnesses which supports the prosecution story i.e. time and place of occurrence, manner of causing injury and efforts made by them to save the deceased cannot be discarded. Similarly, the statement of Ashok Kumar (PW-9) whose appearance at the time of occurrence is natural and trustworthy, cannot be disbelieved only on the ground that he is relative of the deceased in view of the law laid down by Hon'ble Supreme Court in Masalti (supra) and Mohabbat (supra).

43. Thus in view of the above, I am of the view that the prosecution has succeeded to prove its case beyond reasonable doubt against the appellant. The judgment of lower court is well reasoned and discussed and there is no illegality in the impugned judgment.

44. Now coming to the question of sentence, whether the sentence passed by the trial Court is just proper, or not?

45. The appellant-Rais Shekh has been convicted for the offence U/s 304-II and sentenced for five years rigorous imprisonment along with fine of Rs. 5,000/-

46. From perusal of Section 304 II I.P.C., it transpires that accused convicted under Section 304 II I.P.C. may be sentenced for a term which may extend to ten years or with a fine or both.

47. In India no guidelines has been provided by Legislature for determination of quantum of sentence. Judiciary, especially Hon'ble Supreme Court, has evolved the theory of proportionality in awarding the sentence, subject to minimum sentence provided by the Legislature. There are several factors, although not exhaustive, which may be taken into consideration for awarding quantum of sentence, for example; gravity and seriousness of offence, age and numbers of offenders, age and number of deceased including injured persons, nature of weapons used in offence, educational and social background of accused, nature of injuries caused to deceased or injured persons, criminal antecedents of accused, motive, cause or intention of offence, weapons carried by deceased or injured persons if any, injuries caused to accused person or any member of his side if any, and duration of pendency of trial or appeal.

48. It is settled principle of sentencing and penology that undue sympathy in awarding the sentence with accused is not required. The object of sentencing in criminal law should be to protect the society and also to deter the criminals by awarding appropriate sentence. In this regard Hon'ble Supreme Court has observed in **State of Madhya Pradesh vs. Saleem @ Chamaru, AIR 2005 SC 3996** which is as under:-

The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal".

49. In **Ramashraya Chakravarti vs. State of Madhya Pradesh AIR 1976 SC 392,** reducing the sentence of young accused, aged about 30 years, convicted for offence under Section 409 I.P.C., from two years to one year, has observed as under:-

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

50. According to the prosecution case, the said occurrence was happened at the spur of moment in 2001 i.e. 19 years ago

and at the time of occurrence, the appellant appeared without any weapon and the occurrence was caused by him by bamboo fixed in hut of tea stall of Bachai (PW-3). In Medico Legal Examination Report (Ex.Ka.2), only two injuries, were found on the head of the deceased. Further in statement under Section 313, the age of appellant has been recorded by the learned trial Court on 12.10.2009 as 35 years which shows that the appellant, at the time of occurrence i.e. in 2001, was aged about 27 years. In addition to above, according to learned counsel for the appellant, he has no criminal history and there was no previous enmity of appellant with deceased.

51. Looking into the facts and circumstances of the case, I am of the view that the conviction of the appellant-Rais Shekh for the offence U/s 304-II requires no interference and is accordingly maintained. But in view of the law laid down by Hon'ble Supreme Court in Saleem @ Chamaru (supra) and Ramashraya (supra), the sentence of five years awarded to the appellant for the said offence is reduced to a rigorous imprisonment of three years.

52. The fine imposed by the trial Court requires no interference.

53. The period of sentence under gone by the appellant, shall be set off as per the provision of Section 428 of the Code.

54. Appeal is **partly allowed.**

55. Let a copy of this judgment along with lower court record be sent to the concerned trial Court for necessary information and compliance.

(2020)12ILR A14
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.11.2020

BEFORE

THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

Criminal Appeal No. 466 of 2016

Sanjay ...Appellant

Versus

State of U.P. ...Respondent

Counsel for the Appellant:
Farhan Alam Osmany, Smriti

Counsel for the Respondent:
Govt. Advocate

Criminal Law – Indian Penal Code,1860 – Sections 363, 366, 376 - Criminal appeal has been filed against conviction U/s 363, 366, 376 I.P.C.

Determination of age of the victim – mention in the matriculation certificate **-** in absence school first attended by the victim – absence of both entries made by the corporation or a municipal authority or a Panchayat. If none of above – medical evidences regarding to age of victim. (Para 25)

At the time of occurrence victim was more than eighteen years and the findings of the Trial Court that victim was below the sixteen years is not with accordance with law.

Minor Contradiction in sexual offences: - prosecution case cannot be disbelieved - non examination of independent witnesses and prosecution can succeed only on the testimony of victim. - (Para 35)

Sole testimony of victim is contradictory to her statement U/s 164 Cr.P.C. and also to the medico legal evidence, she was more than eighteen years at the time of occurrence, independent witnesses have not supported the prosecution story. The prosecution has produced manufactured and concocted

evidence. (Para 39)

The impugned Judgment and order passed by the Trial Court is accordingly set aside. (Para 41)

Appeal allowed. (E-2)

List of Cases cited: -

1. Jarnail Singh Vs St. of Har. (2013) 7 SCC 263

2. Rajak Mohammad Vs St. of H.P. (2018) 3 SCC (Cri.) 753

3. Jaya Mala Vs Home Secretary J & K & ors. AIR 1982 SC 1297

4. Jarnail Singh (supra) Razak Mohammad (supra) & Jaya Mala (supra).

5. Santosh Prasad @ Santosh Kumar Vs St. of Bihar AIR 2020 SC 985

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

1. This criminal appeal, under Section 374 (2) of Code of Criminal Procedure, 1973 (hereinafter referred to as "Code'), has been preferred by the appellant-Sanjay (hereinafter referred to as "appellant), against the judgment and order dated 29.03.2016, passed by Additional Sessions Judge/Fast Track Court, Hardoi, in Sessions Trial No.557/2011, arising out of Case Crime No.110/2009 under Sections-363, 366, 376 I.P.C., Police Station-Lonar, District-Hardoi., whereby the appellant has been convicted and sentenced for offence under Section 363 I.P.C. four years rigorous imprisonment and fine of Rs.2000/-, for offence under Section 366 I.P.C. for six years rigorous imprisonment and fine of Rs.3000/- and for offence 376 I.P.C. for eight years rigorous imprisonment and fine of Rs.8000/-. It has been further directed that the appellant has to undergo one month simple imprisonment in default of payment of fine for offence under Section 363 I.P.C., two months simple imprisonment in default of payment of fine for offence under Section 366 I.P.C. and six months simple imprisonment in default of payment of fine for offence under Section 376 I.P.C. with the further direction that the period of detention already undergone in jail by him shall be set off in aforesaid sentences and all the sentences shall run concurrently.

2. The prosecution story, in brief, is that on 17.02.2009 at about 7:00 p.m., the victim (P.W.-3), aged about 14 years daughter of Munnu Lal (P.W.-5), had gone from her house to ease herself towards the field, outskirt of her village. She did not return to her house untill night. Munnu Lal (P.W.-5) tried to search her throughout whole night and came to know that some relatives of his neighbour-Ram Chandra were present in his house to attend the Mundan ceremony of son of Kallu where one Anil and the appellant were also present. Sensing some conspiracy that the victim might be kidnapped by Anil son of Sukh Sagar, resident of Gheda, Police Station-Sahabad, District-Hardoi and the appellant in connivance with Ram Chandra, Karunesh and Kallu, who were his co-villagers, Munnu Lal (P.W.-5) lodged First Information Report (Ext.-Ka-4) at Police Station-Lonar, District-Hardoi at about 20:45 p.m. on 19.02.2009 against Ram Chandra, Karunesh, Kallu and the appellant with the allegation that they might had kidnapped the victim. The aforesaid information was entered in General Diary (Ext.-Ka-11) and on the basis whereof chik report (Ext.-Ka-10) was prepared by S.I. Virendra Kumar Pandey (P.W.-8) and Case Crime No.110/2009 under Sections-363, 366 & 376 I.P.C. was registered against the aforesaid persons including the appellant.

3. Investigation of the case was entrusted to S.I. Rakesh Kumar Pandey (P.W.-6), who visited the place of occurrence and after its inspection,

prepared site plan (Ext.-Ka-5) and recorded the statement of the witnesses. During investigation, he recovered the victim on 31.03.2009 and prepared the recovery memo (Ext.-Ka-6). The statement of the victim was also recorded by this witness, who stating her age as 14-15 years old, stated that the appellant had kidnapped and raped her. On the basis of her statement, offence under Section 376 I.P.C. was added during investigation. The victim was sent for medical examination to District Hospital, Hardoi where she was examined by Dr. Rekha Gaur (P.W.-4) on 01.04.2009 with consent of Munnu Lal (P.W.-5).

4. In medico legal examination, it was found by Dr. Rekha Gaur (P.W.-4) that secondary sex characteristics of victim was well developed and no mark of injury was found on her body. In internal examination, the the hymen of the victim was found old, torn and healed. A sample of smear was taken from vagina of the victim and was sent for its examination. For determination of her age, she was referred to X-ray department for x-ray of victim's right elbow, right knee and right wrist which was conducted by Dr. R. K. Karunesh, Radiologist, District-Hardoi and x-ray report (Ext.-ka-3) was prepared. On the basis of x-ray report as well as vaginal smear report, a supplementary medico legal report (Ext.-Ka-2) was prepared by Dr. Rekha Gaur (P.W.-4) and according to her the victim, at the time of occurrence, was aged about 18 years and was habitual to sexual intercourse. According to her neither any spermatozoa nor gonococci was found in victim's vagina and no difinite opinion regarding rape could be given.

5. After her medical examination, on 15.04.2009, the victim was produced before the Magistrate, where her statement under Section 164 of the Code was recorded. During investigation, the appellant surrendered before the concerned Magistrate and after investigation the charge sheet (Ext.-Ka-7) was filed by P.W.-6 only against the appellant under Section 363, 366 and 376 I.P.C. before the concerned Magistrate, who took the cognizance of the offence and since the offence was exclusively triable by the Court of Sessions, after providing the copy of relevant police papers as required under Section 207 of the Code, committed the case to the Court of Sessions, Hardoi for trial.

6. The learned trial Court after hearing the counsel for both the parties framed charges for the offence under Sections 363, 366 and 376 I.P.C. against the appellant from which he denied and claimed for trial.

7. The prosecution in order to prove its case, produced Vinod Kumar Dixit (P.W.-1), Sarvesh (P.W.-2), victim (P.W.-3), Dr. Rekha Gaur (P.W.-4), Munnu Lal (P.W.-5) (informant), S.I., Rakesh Kumar Pandey (P.W.-6), Balram Bajpayee (P.W.-7), S.I., Vinod Kumar Pandey (P.W.-8), wherein Vinod Kumar Dixit and Sarvesh (P.W.-2), victim (P.W.-3) and Munnu Lal (P.W.-5) are the witnesses of the facts whereas rest are formal witnesses.

8. After conclusion of the prosecution evidence, the appellant was examined under Section 313 of the Code wherein he denied the prosecution allegations as well as statement of witnesses and stated that he is innocent and has been falsely implicated. In support of his defence, Karunesh (D.W.-1) was examined by the appellant.

9. Learned trial Court after hearing the learned counsel for both the parties and

considering the material available on record, convicted and sentenced the appellant as above by the impugned judgment. Aggrieved by the said judgment, the appellant has preferred this appeal.

10. Heard Ms. Smiriti, learned counsel for appellant and Sri Ashok Kumar Singh, learned A.G.A. for the State.

11. Learned counsel for the appellant has submitted that the appellant is innocent and has been falsely implicated only on account of suspicion. Learned counsel further submitted that independent witness, Vinod Kumar Dixit (P.W.-1) and Sarvesh (P.W.-2) have not supported the prosecution story and have been declared hostile by the prosecution. Learned counsel further submitted that Munnu Lal (P.W.-5) is not an eye-witness and neither the appellant was arrested nor the victim was recovered in his presence. Learned counsel further submitted that the statement of victim is highly improbable and untrustworthy as her statement is neither supported and corroborated by medical evidence nor by her statement under Section 164 of Code. Learned counsel further submitted that the victim was not recovered from the possession of the appellant and as per recovery memo (Ext.-Ka-6), she was recovered on the information of the Sarvesh (P.W.-2) but he did not support the prosecution case. Learned counsel further submitted that at the time of occurrence, as per medico legal examination report as well as per the statement of victim recorded under Section 164 Cr.P.C., she was aged about more than 18 years but the trial Court without any cogent evidence has convicted the accused-appellant on the ground that the victim, at the time of occurrence, was aged about 14 years. Learned counsel further submitted that the school register, proved by Balram Bajpayee (P.W.-7), in order to prove the age of victim, is highly doubtful and cannot be relied upon. Learned counsel further submitted that the trial Court has failed to consider and appreciate the prosecution evidence in the light of settled principle of criminal jurisprudence. The impugned judgment and order passed by the trial Court is illegal and unjustified which is liable to be set aside and appeal be allowed.

12. Per contra, learned A.G.A., vehemently opposing the submission of learned counsel for the appellant, has submitted that the prosecution story cannot be thrown on the ground that independent witnesses have not supported the prosecution case. Learned A.G.A. further submitted that the victim at the time of occurrence was 14 years old, she has corroborated the prosecution story during trial and there is no contradiction in her statement. Her statement also cannot be discarded only on the ground that no spermatozoa was found during medico legal examination or she was found as habitual to sex. Learned A.G.A. further submitted that as per school register proved by Balram Bajpayee (P.W.-7), her age was about 14 years at the time of occurrence. Learned A.G.A. further submitted that there is no contradiction between the statement of prosecution witnesses and prosecution has succeeded to prove its case beyond reasonable doubt against the appellant. Learned A.G.A. further submitted that the impugned judgment passed by trial Court is well discussed, well reasoned, and it requires no interference and the appeal is liable to be dismissed.

13. I have considered the rival submissions of both the parties and perused the record.

14. Munnu Lal (P.W.-5) (informant) is not eye-witness of the occurrence. Supporting the prosecution case, he has stated that at the time of occurrence, his daughter (victim) aged about 14 years, had gone to ease herself at about 7:00 p.m. and when she did not return till one and half an hour, he made a hectic search but she could not be searched out. He further stated that on the day of occurrence there was Mundan Ceremony of son of Kallu of his village. Stating that the appellant-Sanjay is nephew of Kallu, he further stated that Anil was relative of Kallu and Rajewshwar was his nephew (Bhatija) and at the time of occurrence, they were present at the house of Kallu. He further stated that he came to know that the aforesaid persons managed to enticed away his daughter (victim). He further stated that he had gone to police station to lodge the F.I.R. on the very same day but police had not lodged it and after two days of the occurrence, his information (Ext. Ka-4) was lodged by the police. He further stated that the victim was recovered after one and half month of the occurrence by the police near Sahora culvert and after recovery, the victim was medically examined and her statement was also recorded by the Magistrate. According to him, the victim was handed over to him in compliance of order passed by the Magistrate. He further stated that the victim had studied in Class-V at Primary Pathsala, Vishkula.

15. Munnu Lal (P.W.-5) in his cross examination admitted that the victim had gone alone from her house at the time of occurrence. He further admitted that the statement of victim was recorded before Magistrate after 15 days of the recovery and further stated that he did not know that his daughter had solemnized Court Marriage with the appellant. He further stated that he did not know as to when he had given an application for custody of his daughter. Admitting that after the occurrence, his daughter was married with one Anoop without taking permission from the Court, he further stated that he did not know either whereabout of his daughter or of the said Anoop.

16. Vinod Kumar Dixit (P.W.-1), produced by the prosecution in order to prove that the appellant as well as Kallu, Ram Chandra, Karunesh had enticed away the victim, had denied the prosecution story and stated that he did not know as to whether the appellant and other relatives of Kallu were present in the Mundan Ceremony of Kallu's son. He further stated that he did not know whether the victim was enticed away by the appellant or any other accused persons namely Anil, Ram Chandra, Kallu and Karunesh. This witness was declared hostile by the prosecution and was cross-examined but nothing had been come out in his cross-examination to support the prosecution story.

17. Sarvesh (P.W.-2), uncle of the victim, has also not supported the prosecution story. He was produced by the prosecution to prove the fact that victim's age was 14 years at the time of occurrence, she was enticed away by the appellant and he had rung the appellant to return the victim but this witness did not support the prosecution story and was declared hostile by the prosecution. He was cross-examined at length but in his cross-examination nothing had been come out to support the prosecution version.

18. The appellant has been convicted for the offence under Sections 363, 366, 376 I.P.C. by the trial Court for kidnapping and rape with victim, who according to

prosecution, was aged about 14 years at the time of occurrence.

19. Section 361 I.P.C. defines the offence of kidnapping. Section 375 defines offence of rape, Section 363 deals with punishment of kidnapping from lawful guardianship, Section 366 I.P.C. is aggravated form of kidnapping and deals with punishment for offence of kidnapping, abducting or inducing woman to compel her marriage and Section 376 I.P.C. deals with the punishment for the offence of rape. Sections 361, 363, 366, 375 and 376 I.P.C. as it was in the year of 2009 are as under :

"361. ***Kidnapping from lawful guardianship.****--Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.*

363. ***Punishment for kidnapping.****--Whoever kidnaps any person from India or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.*

366. ***Kidnapping, abducting or inducing woman to compel her marriage, etc.****--Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid.*

375. Rape *- A man is said to commit rape" who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions :*

First - Against her will.

Secondly - Without her consent.

Thirdly - With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly - With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly- With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly - ***With or without her consent, when she is under sixteen years of age.***

Exception - Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

Explanation -.....

376. (1) Whoever, except in the cases provided for by sub section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to ten years and shall also the liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both :

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

(2) whoever, ...

20. The victim (P.W.-3), sole star-witness, has stated that it was Fhalgun month of winter season 2009, when the occurrence took place. She further stated that the appellant-Sanjay used to come her village to meet her maternal kindred (Nanihal). She further stated that the appellant by putting cloth in her mouth forcibly, had taken her away in a jeep to Village-Jhammapurva and thereafter to Sitapur. She further stated that she was beaten by the appellant-Sanjay to solemnize Court Marriage with the appellant. She further stated that the appellant-Sanjay had threatened her that if she did not give statement in his favour, he would kill her and also forcibly commit sexual intercourse with her. She further stated that concerned police had arrested her and brought her to Police Line and kept with lady police. She further stated that at that time the appellant-Sanjay and his family members were meeting her and had not permitted her father to meet her. She further stated that her statement was recorded by the Magistrate and she had stated the fact which was happened with her. She further stated that she had given the statement before the Magistrate under the pressure of the appellant because he had threatened her to give statement in his favour otherwise he would kill her. She further stated that she was given in custody of her father and she had studied upto Class-V in primary school of her village. She further stated that she could not tell as to whether her age, recorded in her school, was true or false. In cross examination, admitting that her Court Marriage was solemnized at Hardoi, she further stated that this Court Marriage was solemnized forcibly by the appellant-Sanjay. She further stated that she had stated before the Marriage Officer that she was marrying with the appellant according to her own free will and also had disclosed her age as 19 years. She further stated that such statement was given under threat of appellant-Sanjay. She further stated that after filing application for Court Marriage, she was carried to Sitapur where she stayed 10-12 days and during this period the appellant-Sanjay used to beat her. She further stated that thereafter she was carried to appellant's village where she resided 8 days and thereafter she was surrendered at Sahabad and was taken away by concerned police. She, in cross-examination, further admitted that her father had got information as she was taken into custody and met with her after 2 days. According to her, her medical examination was conducted at District-Hardoi, at the instance of concerned police but the Medical Officer had not enquired her age. She further stated that she did not know how many days, she stayed at police line in police custody and also she did not know the case, pending against her father at District-Hardoi. During cross-examination, she further

admitted that she has been married to one Ashok Kumar Mishra, resident of District-Etah, with the consent of her father. She disowned her statement given before Magistrate under Section 164 of the Code that the appellant was her husband and she was happily residing with him. Upon query made by the trial Court, she again stated that the appellant had carried her away to village-Jhammapurva where brother in-law of appellant resided but she did not know how many females were there. She further stated that she did not talk there to any person and had also not disclosed anything as the appellant had prohibited her. She further stated that when she was carried to Sitapur she stayed at the house of appellant's maternal uncle but she did not disclose anything to appellant's maternal uncle and aunt too. She further stated that at the time of recording her statement before Magistrate, the appellant was not with her and she did not know whether the appellant was arrested by police or not. She further stated that she had given her statement before the Magistrate on oath but she did not disclose any person that she was being forcibly taken away by the appellant.

21. Section 361 read with 363 and Section 366 as well as Section 375 read with 376 prescribe the age of victim for offence of kidnapping as well as rape for certain cases. For offence of kidnapping, if a victim was aged below than 18 years and for offence of rape if a victim was below than 16 years at the time of occurrence, her consent would be treated immaterial. Therefore, it has to be determined whether the prosecution has succeeded to prove the victim of age below 16 years or not.

22. Neither Code nor IPC or POCSO Act 2012 provides procedure for determination of victim's age. Alleged offence was committed on 17.02.2009. Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as the '2007 Rules') framed under Section 67 of the Juvenile Justice (Care and Protection of Children) Act 2000 provides procedure for determination of juvenile's age. This provision is as under :

"12. Procedure to be followed in determination of Age.

(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The Court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year. and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a) (i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the Court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of section 7A, section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law."

23. Hon'ble Supreme Court in ***Jarnail Singh v. State of Haryana (2013) 7 SCC 263,*** deciding the issue of procedure for determination of age of victim of rape, was of the view that the procedure for determination of juvenile's age as provided in Rule 12 (supra) may be adopted for determination of victim's age. The Supreme Court in ***Jarnail Singh (supra)*** has held as under :

"Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW-PW6. The manner of determining age conclusively, has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3),

matriculation (or equivalent) certificate of the concerned child, is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3), envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration, for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. ***It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the concerned child, on the basis of medical opinion."***

(Emphasis supplied)

24. In ***Rajak Mohammad v. State of Himachal Pradesh 2018 (3) SCC (Cri.) 753*** three judges bench of Supreme Court, in case where school certificate regarding age of prosecutrix was found unreliable, considering the medical evidence regarding her age, has held as under;

"6. On the other hand, we have on record the evidence of Dr. Neelam Gupta (P.W.8) a Radiologist working in the Civil Hospital, Nalagarh who had given an opinion that the age of the prosecutrix was between 17 to 18 years.

7. While it is correct that the age determined on the basis of a radiological examination may not an accurate determination and sufficient margin either way has to be allowed, yet the totality of the facts stated above read with the report of the radiological examination leaves room for ample doubt with regard to the correct age of the prosecutrix. The benefit of the aforesaid doubt, naturally, must go in favour of the accused."

(emphasis supplied)

25. Thus it is clear that for the determination of age of victim, primacy shall be given to Date of Birth (hereinafter referred to as 'DoB') mention in matriculation (or equivalent) certificate, in absence thereof DoB mention in the school first attended by the victim shall be taken into consideration, in absence of both, the entries made by a corporation or a municipal authority or a panchayat regarding DoB shall be taken into account and finally if none of the aforesaid document containing DoB is available, medical evidence regarding age of victim, shall be taken into consideration. It is further clear that neither merely ocular evidence nor any other document shall be considered for determination of age.

26. In this case, the trial Court has held that victim's age was below to 16 years at the time of occurrence by relying on statement of victim, her father (P.W.-5) and Balram Bajpayee (P.W.-7), Head Master of Primary School, while discarding medical evidence produced by the prosecution, the statement of victim under Section 164 of the Code and also the statement of Karunesh (D.W.-1).

27. Now the question arises as to whether the evidence produced before the trial Court by the prosecution regarding the

age of the victim is reliable and trustworthy. Admittedly, neither victim had studied upto matriculation nor any matriculation certificate has been filed by the prosecution. Munnu Lal (P.W.-5), in his cross-examination, has stated that victim was aged about 14 years at the time of occurrence and also stated that she had studied upto Class-V in Primary School, Bilkula. This witness has not stated anything regarding month and year when the victim was born. He has not filed any extract of Kutumb Register (Death and Birth Register) maintained at the level of his Village Panchayat/Gaon Sabha. Rakesh Kumar Pandey, Investigating Officer, (P.W.-6) has also not stated in his evidence that as to whether he had made any investigation regarding the certificate of victim's age. He only stated that on the basis of transfer certificate (T.C.) the victim was aged about 14-15 years. In cross-examination, this witness has also admitted that the victim had disclosed her age as 17-18 years at the time of her recovery.

28. Balram Bajpayee (P.W.-7), Head Master of Primary School, Bilkula has filed the photocopy of scholar register (Ext.-Ka-8) and photocopy of second transfer certificate (T.C.) dated 23.03.2009 (Ext.-Ka-9) of the victim. The prosecution had not shown any justification for non-production of first original transfer certificate (T.C.) of victim as well as second transfer certificate of victim issued on 23.03.2009. The photocopy of scholar register (Ext.-Ka-8) proved by this witness (P.W.-7), is very fade and illegible. It contains so many corrections and cutting that entries made therein are illegible. This witness, in cross-examination, has also admitted this fact by stating that there were some cutting in the entry of Sl. No.1181 to 1184 of the photocopy of scholar register and date of birth of victim, written in words, differs from other writing in the register. This witness also stated that he could not disclose who had come with victim for her admission because at that time he was not posted there. Thus on the basis of the aforesaid document, which is not matriculation certificate as well as the statement of Balram Bajpayee (P.W.-7), exact age of victim cannot be determined.

29. In addition to above, the victim (P.W.-3) has also not stated that at the time of occurrence she was below to 16 years. In this regard she has only stated that she had studied upto Class-V in Primary School and according to entries made in school, she was minor but she further stated that she could not state whether the entries were true or false. Thus, the victim herself was not sure whether the entries regarding her age made in scholar register was correct or not. Further she was recovered by police on 31.03.2009 and she was produced on 01.04.2009 for medico legal examination before Dr. Rekha Gaur (P.W.-4), who after medico legal examination has reported that secondary sex characteristics of victim (P.W.-3) were fully developed at the time of examination ; her weight was 43 kg. having 14/14 teeth ; in radiological report her joints of right elbow, knee, wrist were fused and on the basis of said examination, the victim's age was declared at about 18 years at the time of occurrence. In addition to above, her (P.W.-3) statement was recorded before trial Court on 31.10.2013 where she had disclosed her age as 21 years. The occurrence was happened in 2009. It means that again according to this witness, her age was more than 16 years at the time of occurrence. Thus, the prosecution has failed to produce any document as required by 2007, Rules (supra) and also in view of law laid down by Supreme Court in ***Jarnail***

Singh (supra) and ***Rajak Mohammad (supra),*** to prove the age of victim. In addition to above, the evidence produced by the prosecution as discussed above has also been found unreliable.

30. So for as the consideration of medical opinion regarding the age of victim at the time of occurrence is concerned, in view of law laid down by the Supreme Court in ***Jarnail Singh (supra)*** if the prosecution fails to prove her age by a document as required in sub rule (i), (ii) and (iii) of aforesaid Rule 12, medical evidence shall be relied upon as last option to determine her age.

31. According to Dr. Rekha Gaur (P.W.-4) victims' age, at the time of examination, was at about 18 years. It is also pertinent to note that opinion regarding age of any person, based on medical and radiological evidence can not be treated accurate and exact. Such determination of age by medical expert may vary in view of race, gender, geographical area, nutritional status and other factors like colour of pubic and armpit hair, development of sexual characteristics and other changes in the body of the victim. Such variation may be of one or two year of either side.

32. Supreme Court in ***Jaya Mala v. Home Secretary J & K and Ors. AIR 1982 SC 1297*** has held as under:

"However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side."

33. Dr. Rekha Gaur (P.W.-4) on the basis of radiological examination of the victim (P.W.-3) as well as development of her sexual characteristics, had found the age of victim as 18 years. From the perusal of statement of this witness as well as medico legal examination report (Ext.-Ka-1), it transpires that Munnu Lal (P.W.-5) was also present at the time of medico legal examination of the victim and he had given consent for such examination. In addition to above, the victim in her statement under Section 164 of the Code, recorded by the Judicial Magistrate, has specifically stated that at the time of occurrence her father, Munnu Lal (P.W.-5) had disclosed last year her age as 18 years and age mentioned by her father (P.W.-5) in F.I.R. as 14 years was false.

34. The victim (P.W.-3) in her cross-examination has stated that she had given statement before Magistrate under pressure of appellant-Sanjay. The statement of the victim in this regard is not reliable because she was recovered on 31.03.2009 and was produced for medico legal examination on 01.04.2009 in presence of her father (P.W.-5). Her statement under Section 164 of the Code was recorded after 15 days i.e. 15.04.2009 and during this period, she was in police custody. The prosecution has not produced any reliable evidence as to whether she was threatened during police custody by the appellant-Sanjay, to give statement in his favour. Thus, in view of above discussion, I am of the considered view that victim's age at the time of the occurrence was more than eighteen years and the finding of trial court that victim was below than sixteen years is not in accordance with law laid down by the Supreme Court in ***Jarnail Singh (supra) Razak Mohammad (supra) and Jaya Mala (supra).***

35. It is settled principle of law that in the matter of sexual offence only on the account of minor contradictions in

prosecution evidence, non examination of independent witnesses, the prosecution case can not be disbelieved and prosecution can succeed only on the testimony of victim, if her statement is unblemished and reliable. In this regard, to prove its case, the prosecution had produced Vinod Kumar Dixit (P.W.-1), Sarvesh (P.W.-2), Victim (P.W.-3) and Munnu Lal (P.W.-5). Vinod Kumar Dixit (P.W.-1) and Sarvesh (P.W.-2) had not supported the prosecution story. Sarvesh (P.W.-2) is uncle of victim. According to prosecution at the information and instance of this witness, the victim was recovered on 31.03.2009 when she was sitting alone at culvert nearby Sahora Village but this witness had not supported the prosecution story. Munnu Lal (P.W.-5) is not an eye-witness. He has also not stated as to who had seen that the victim was being kidnapped and informed him whereupon he had lodged F.I.R. (Ext.-Ka-4). Thus it has to be seen whether the statement of victim (P.W.-3) is reliable or not.

36. The victim (P.W.-3) has admitted that her court marriage was solemnized in District-Hardoi with the appellant-Sanjay and at that time she had disclosed her age as 19 years. Although, she stated that the court marriage was solemnized under threat of appellant-Sanjay but prosecution has not produced any document as the said marriage has been annulled and cancelled till date. The victim (P.W.-3) in her statement under Section 164 of the Code has specifically stated that the appellant-Sanjay was her husband and she had gone with the appellant with her own free will and consent to Kanpur and had resided there one month as husband and wife. She further stated that since her father (P.W.-5) was against her marriage with the appellant, she had eloped with the appellant-Sanjay and entered into marriage in temple at Kanpur on next day. The aforesaid statement under Section 164 of the Code recorded by the Magistrate was put before the victim in her cross-examination by the defence but she could not place any reliable explanation/justification as to why the said statement was not true.

37. In medico legal examination conducted just after one day of recovery of victim, according to Dr. Rekha Gaur (P.W.-4) neither any mark of injury was found on the body nor on the genital part of the victim. According to this witness (P.W.-4) hymen of the victim was old torn and healed ; no spermatozoa and gonococci were found ; the victim was habitual to sexual intercourse and no opinion regarding rape could be given. Thus prosecution case is also not supported by the medical evidence rather it is based only on the ocular testimony of victim.

38. Supreme Court in ***Santosh Prasad @ Santosh Kumar v. State of Bihar AIR 2020 SC 985*** while allowing the appeal against conviction in a case based on the solitary evidence of prosecutrix, expressing its opinion regarding nature and quality of solitary evidence of victim as well as scope of false implication of accused in sexual offences, has held as under :

"5.2. From the impugned judgments and orders passed by both the courts below, it appears that the appellant has been convicted solely relying upon the deposition of the prosecutrix (PW5). Neither any independent witness nor even the medical evidence supports the case of the prosecution. From the deposition of PW1, it has come on record that there was a land dispute going on between both the

parties. Even in the cross-examination even the PW5 - prosecutrix had admitted that she had an enmity with Santosh (accused). The prosecutrix was called for medical examination by Dr. Renu Singh - Medical Officer and PW7 - Dr. Renu Singh submitted injury report. In the injury report, no sperm as well as RBC and WBC were found. Dr. Renu Singh, PW7 - Medical Officer in her deposition has specifically opined and stated that she did not find any violence marks on the body of the victim. She has also categorically stated that there is no physical or pathological evidence of rape. It is true that thereafter she has stated that possibility of rape cannot be ruled out (so stated in the examination-in-chief). However, in the cross-examination, she has stated that there was no physical or pathological evidence of rape.

5.3. As per the FSL report, the blood group on the petticoat and the semen on the petticoat are stated to be inconclusive. Therefore, the only evidence available on record would be the deposition of the prosecutrix. It cannot be disputed that there can be a conviction solely based on the evidence of the prosecutrix. However, the evidence must be reliable and trustworthy. Therefore, now let us examine the evidence of the prosecutrix and consider whether in the facts and circumstances of the case is it safe to convict the accused solely based on the deposition of the prosecutrix, more particularly when neither the medical report/evidence supports nor other witnesses support and it has come on record that there was an enmity between both the parties.

5.4. Before considering the evidence of the prosecutrix, the decisions of this Court in the cases of Raju (AIR 2009 SC 858) (supra) and Rai Sandeep @ Deepu, (AIR 2012 SC 3157) relied upon by he learned Advocate appearing on behalf of the appellant-accused, are required to be referred to and considered.

5.4.1. In the case of Raju (AIR 2009 SC 858, Para 9) (supra), it is observed and held by this Court in paragraphs 11 and 12 as under:

"11. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration.

12. Reference has been made in Gurmit Singh case [(1996) 2 SCC 384 : 1996 SCC (Cri) 316] : (AIR 1996 SC 1393) to the amendments in 1983 to Sections 375 and 376 of the Penal Code making the penal provisions relating to rape more stringent, and also to Section 114-A of the Evidence Act with respect to a presumption to be raised with regard to allegations of consensual sex in a case of alleged rape. It is however significant that Sections 113-A and 113-B too were inserted in the Evidence Act by the same amendment by which certain presumptions in cases of abetment of suicide and dowry death have been raised against the accused. These two sections, thus, raise a clear presumption in favour of the prosecution but no similar presumption with respect to rape is

visualised as the presumption under Section 114-A is s extremely restricted in its applicability. This clearly shows that insofar as allegations of rape are concerned, the evidence of a prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can never be presumed that her statement should, without exception, be taken as the gospel truth. Additionally, her statement can, at best, be adjudged on the principle that ordinarily no injured witness would tell a lie or implicate a person falsely. We believe that it is under these principles that this case, and others such as this one, need to be examined."

5.4.2. In the case of Rai Sandeep alias Deepu (AIR 2012 SC 3157, Para 15) (supra), this Court had an occasion to consider who can be said to be a "sterling witness". In paragraph 22, it is observed and held as under:

"22. In our considered opinion, the "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a "sterling witness" whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

5.4.3. In the case of Krishna Kumar Malik v. State of Haryana (2011) 7 SCC 130 : (AIR 2011 SC 2877), it is observed and held by this Court that no doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of the prosecutrix is sufficient provided the same inspires

confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality."

5.5. With the aforesaid decisions in mind, it is required to be considered, whether is it safe to convict the accused solely on the solitary evidence of the prosecutrix? Whether the evidence of the prosecutrix inspires confidence and appears to be absolutely trustworthy, unblemished and is of sterling quality?

(Emphasis supplied)

39. Thus in the light of above discussion, it is clear that the sole testimony of victim (P.W.-3), is contradictory to her statement under Section 164 of the Code and also to the medico legal evidence. She was more than eighteen years at the time of occurrence, the independent witness (P.W.-1) as well as her own uncle (P.W.-2) have not supported the prosecution story. The prosecution evidence regarding her age proved by Balram Bajpayee (P.W.-7) is also not reliable and trustworthy. The statement of victim (P.W.-3) in the light of law laid down by Hon'ble Supreme Court in ***Santosh Kumar Prasad (supra)*** is neither trustworthy nor unblemished nor is of sterling quality. The prosecution has produced manufactured and concocted evidence.

40. Trial Court has not properly discussed the prosecution evidence. Prosecution has miserably failed to prove its case beyond reasonable doubt that appellant had kidnapped with intent to compel the victim for marriage and committed rape with her. The impugned judgment and order passed by trial Court is liable to be set aside and the appellant is entitled to be acquitted.

41. I am, therefore, unable to uphold the conviction and sentence of the appellant. The impugned judgment and order passed by the Trial Court is accordingly set aside. The appellant-Sanjay is acquitted. Consequently appeal is allowed.

42. The appellant-Sanjay is in jail. He is directed to be released forthwith unless wanted in any other case.

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

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

(2020)12ILR A29
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.11.2020

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Criminal Appeal No. 1492 of 2010
connected with
Criminal Appeal No. 1491 of 2010

Vishwanath Gupta ...Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Satish Trivedi, Sri Ajay Kumar Pandey, Sri Ram Krishna Mishra, Sri R.C. Yadav, Sri Sudhanshu Pandey.

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

Criminal Law – Indian Penal Code,1860 – Sections 498-A, 304-B, 302, 201 -The criminal appeals have been preferred against the conviction under section 498-A, 304-B, 302, 201 I.P.C.

Burden of proving fact especially within knowledge (106). — When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

Dead body of the deceased in the house of accused / appellant on the date and time of the incident and they have failed to explain the death of deceased. Hence, conviction of the appellant for the murder of the deceased by the Trial Court justified and does not require in interference (Para 30)

Appeals dismissed. (E-2)

List of Cases cited: -

1. Gurmukh Singh Vs St. of Har. reported in 1991 (1) Crimes 112-113

2. St.of H.P. Vs Smt. Manju Rani reported in 2013 Crl.L.J. 101

3. Trimukh Maroti Kirkan Vs St. of Mah. (2006) 10 SCC 681,

4. Shambhu Nath Mehra Vs St. of Ajmer 1956 SCR 199

5. W.B. Vs Mir Mohammad Omar & ors. (2000) 8 SCC 382

(Delivered by Hon'ble Ramesh Sinha, J.)

1. The above two criminal appeals have been preferred against the judgment and order dated 22.2.2010 passed by Additional Sessions Judge, Kushi Nagar Padrauna in S.T. No. 168 of 2001 under section 498-A, 304-B, 302, 201 I.P.C. convicting and sentencing the appellants under section 498-A I.P.C. for two years imprisonment, under section 304-B I.P.C., for ten years imprisonment, under section 302 I.P.C. for life imprisonment and fine of Rs. 10,000/- and in default of payment of fine further imprisonment of one year and under section 201 I.P.C. for three years imprisonment.

2. As the above mentioned two criminal appeals have been preferred against the same judgment and order, hence the same are being heard and decided together by this common judgment.

3. The brief facts of the case are that the First Information Report was lodged by the informant Pooranmasi (hereinafter referred to as 'the informant') stating that he had married his only daughter Km. Vidya (hereinafter referred to as 'the deceased') in the year 1989 with one Aniruddha Gupta son of Vishwanath Gupta resident of village Gaunariya, police station Kaptanganj, District Padrauna. In the marriage he has given sufficient dowry and only one bicycle was left to be given which was continuously demanded by Aniruddha and his father Vishwanath, who used to threatened and also frequently used to abuse, harass and torture his married daughter in various manner. The informant at regular intervals had gone to village Gaunaria and pacify her daughter and son-in-law Aniruddha and demanded time to give bicycle but on account of poverty he could not give bicycle to them. His daughter was also having infant child aged about two and half years, namely, Raj Kumar. In the intervening night of 2/3.1.1996 at about 12 hours his daughter

and her infant child were murdered on account of non fulfillment of demand of dowry and in the night itself the dead body of the deceased Smt. Vidya along with her child was cremated. When the informant and his family members came to know about death and disposal of the dead body of their daughter Smt. Vidya and her infant child then they were shocked and went to the village Gaunaria and came to know about all the facts. When, the informant made a query from Vishwanath and his family members as to why the information about the death of his daughter and her infant child and performance of their last rites were not communicated to them immediately, Aniruddha and Vishwanath got angry and abused him and stated that he immediately leave their house as because of him the said incident had taken place. The informant also informed about the incident at police station Kaptanganj but his F.I.R. was not lodged, hence he informed about the same to Superintendent of Police by submitting the written report on the basis of which the F.I.R. was registered as case crime no. 50 of 1996 under sections 498-A, 304-B, 302, 201 I.P.C., police station Kaptanganj, District Kushi Nagar on 29.3.1996 at 11:30 a.m.

4. After registration of the F.I.R., the Investigating Officer interrogated the witnesses and recorded their statements under section 161 Cr.P.C. He made a spot inspection of the place of occurrence and made site plan (Ex. Ka-4) of the same and also visited the place where the cremation was done and prepared the site plan of the said place which was marked as (Ex. Ka. 5). After investigation, on 5.5.1996 charge-sheet was submitted against appellants Vishwanath Gupta, Harendra Gupta and Aniruddha for the offence under sections 498-A, 304-B and 201 I.P.C. before the Magistrate, who committed the case to the Court of Sessions.

5. The trial court framed charges against appellants Vishwanath Gupta, Harendra Gupta and Aniruddha under sections 498-A, 304-B, 201 I.P.C. on 12.3.2001 and under section 302/34 on 13.9.2001 respectively.

6. During the pendency of trial, accused Aniruddha Gupta died and his trial was ordered to be abated on 10.3.1997.

7. The appellants denied charges framed against them and claimed their trial.

8. The prosecution in support of its case has examined P.W. 1 Pooranmasi, P.W. 2 Smt. Jhinki, P.W. 3 Constable Dinesh Singh.

9. The statements of the appellants were recorded under section 313 Cr.P.C. by the trial court and they did not led any evidence.

10. P.W. 1 Pooranmasi Gupta in his deposition before the trial court has reiterated the prosecution case and stated that the incident had taken place 13 years back. His daughter Smt. Vidya's marriage was performed in village Gaunaria with Aniruddha according to *Hindu* rites and traditions 20 years back and in the marriage he could not give bicycle and after marriage, when his daughter went to her in-law's house, accused Aniruddha and Vishwanath used to demand bicycle and used to abuse her. His daughter had an infant child by the name of Raj Kumar, who was aged about two and half years. On the day of incident, his daughter and her infant child were done to death by accused Aniruddha and Vishwanath and after killing

them their last rites were also performed by accused persons. On receiving information, about the killing of his daughter and her infant child and coming to know about the fact that their bodies have been cremated, from another person of the village, he went to his daughter's in-law's house to enquire about the incident and when query was made by him about the same, Aniruddha and Vishwanath abused him and asked him to go away from their house. Thereafter, he went to the police station to lodge the F.I.R. but when no heed was paid to his request then he approached the Superintendent of Police of the district where he got a written report typed and signed the same. The person, who typed the written report had read over the same to him. The Circle Officer thereafter had gone to the place of occurrence and he met him. The Circle Officer had also gone to his house and thereafter went to the house of his daughter. The statement of the informant was also recorded under section 161 Cr.P.C. He proved the written report (Ex. Ka.1) and his signature on the same stating that it was given at the police station under his signature. In his cross examination, this witness had stated that the information about the death of his daughter Smt. Vidya was given to him at door of his house by a person but he could not tell as to who had given the said information. He stated that the information was given in the presence of Jhinki and Narmada. He stated that the person, who had come to inform about the death of Smt. Vidya at his house, was aged about 25 years. He stated that several letters regarding the demand of bicycle in dowry by the accused persons had come but he had thrown away the same. The witness had stated that he had studied upto class-IV and he could read Hindi. Further, in his cross examination, he has stated that he had given blank paper to Superintendent of Police bearing his signature and what was written on the same, he could not tell. The Circle Officer had not taken his statement under section 161 Cr.P.C. His daughter and her son were ill for several days and because of their ailment both have died. The father-in-law and mother-in-law of his daughter have not tortured her at any point of time.

11. P.W. 2 Smt. Jhinki, who is the mother of the deceased Smt. Vidya and wife of P.W. 1 was examined by the trial court and in her statement, she has stated that the name of her daughter was Vidya and her marriage was performed with Aniruddha in village Gaunaria 20-25 years ago from the date of her deposition before the trial court. After marriage Gauna ceremony was performed. In dowry there was no demand for bicycle. Aniruddha, Vishwanath and Harendra never used to torture her daughter for want of bicycle in dowry. She used to go to the house of her daughter frequently but her daughter did not tell anything to her. It has been stated by her that her daughter had a son aged about two and half years. Her daughter Smt. Vidya and her son both died in her house but she could not tell as to how they died. After the death of her daughter and her child Raj Kumar, information was given to them. On receiving the information, she along with her son Harishchandra had gone to her daughter's in-laws house. She does not know whether for the death of her daughter and her minor son, any report was lodged or not. The Circle Officer and the Sub Inspector had not recorded her statement under section 161 Cr.P.C. This witness was declared hostile by the prosecution.

12. In the cross examination by the A.D.G.C. (Criminal), she stated that when

she reached her daughter's in-laws house then the bodies of her daughter and her child Raj Kumar have already been cremated by her son-in-law and after staying there for a day she come back to her house. She did not met any police personnel and when her statement under section 161 Cr.P.C. was read over to her she denied the same. She denied the suggestion that she in order to save the accused Aniruddha, Vishwanath and Harendra, who had murdered her daughter and her minor son and cremated their bodies for want of bicycle, she is falsely deposing. Further in her cross examination by the defence, it was stated by her that the in-laws of her daughter had never tortured her daughter Smt. Vidya or demanded any dowry from them.

13. P.W. 3 Constable Dinesh Singh in his examination-in-chief before the trial court has deposed that he knew Head Moharrir Constable Shashikant Pandey and is conversant with his signature and hand writing. He proved the chik F.I.R. (Ex. Ka. 2) in the hand writing and signature of Constable Shashikant Pandey. He further proved Ex. Ka.3 of the G.D. entry which was in the hand writing and signature of Constable Tuntun Ram as he was conversant with his writing and signature. He further stated that he also knew Circle Officer Rishipal Singh and was also conversant with his hand writing and signature. He also knew Brij Bhushan Singh, who had worked with him and was conversant with his hand writing and signature and has proved paper no. 7 Ka-1, 7 Ka-2 which were in the hand writing and signature of Brij Bhushan which also bears the signature of Circle Officer Rishipal Singh and proved the same as Ex. Ka. 4 and 5. The witness further deposed that S.I. Mahant Yadav was known to him and he is conversant with his hand writing and signature and has proved Ex. Ka-6 in the hand writing and signature of S.I. Mahant Yadav and further proved Ex. Ka. 7 and stated that the charge-sheet was in the hand writing and signature of S.S.I. Mahant Yadav.

14. The trial court after going through the evidence of the prosecution has recorded the finding of conviction and sentence of the appellants Vishwanath Gupta and Harendra Gupta for the offence under section 498-A/304-B I.P.C. and sentenced them for 10 years R.I. under section 304-B I.P.C. for the death of deceased Smt. Vidya and under section 302/34 I.P.C. for the murder of deceased Raj Kumar for life imprisonment vide impugned judgment and order dated 22.2.2010.

15. Being aggrieved by the impugned judgment and order, the appellants preferred the present appeals against their conviction and sentence.

16. Heard Sri Ram Krishna, learned counsel for the appellants, Km. Meena, learned A.G.A. for the State and perused the impugned judgment and order as well as lower court record.

17. Learned counsel for the appellants submits that the appellant Vishwanath Gupta is the father-in-law of the deceased. He was named in the F.I.R. along with Aniruddha-husband of the deceased Smt. Vidya. So far as appellant Harendra, who is the brother-in-law (Devar) of the deceased Smt. Vidya is concerned, he was not named in the F.I.R. but during the course of investigation his complicity was shown and charge-sheet was submitted against him along with appellant Vishwanath and accused Aniruddha. He submitted that appellant Vishwanath, who is father-in-law of the deceased Smt. Vidya, is aged about 75 years whereas appellant Harendra, who is brother-in-law (Devar) of the deceased Smt. Vidya is aged about 50 years. Both of them are in jail since 22.2.2010. He vehemently submitted that the deceased

Smt. Vidya was living along with her husband and her children and the two appellants had no concern with the affairs of the deceased Smt. Vidya and her husband. They have been falsely implicated in the present case only on account of the fact that they were in-laws of the deceased Smt. Vidya and were living in the same house where the deceased Smt. Vidya was living along with her husband and minor child. He next submitted that though P.W. 1, who is the informant of the case and father of the deceased Smt. Vidya, had supported the prosecution case before the trial court but in his cross examination he denied the prosecution case and denied the involvement of the two appellants in the incident and negated from his earlier statement made before the trial court and stated that the deceased Smt. Vidya and her child died on account of ailment as they were ill for last several days. So far as the evidence of P.W. 2-Smt. Jhinki mother of the deceased Smt. Vidya is concerned, he submitted that she did not support the prosecution case right from beginning and was declared hostile by the prosecution. He further argued that the evidence of P.W. 1 before the trial court in his examination-in-chief also cannot be the basis of conviction of the appellants for the offence in question and the trial court committed gross illegality in convicting and sentencing the two appellants ignoring the fact that the F.I.R. of the incident was lodged after more than three months of the incident by the P.W.1. He submitted that the implication of the two appellants in the present case is an afterthought. He pointed out that even the appellant Harendra was not named in the F.I.R. and the allegation which have been levelled for demand of bicycle and the committing the murder of the two deceased, was with respect to accused Aniruddha, who was the husband of the deceased Smt. Vidya and only bald allegation was made against appellant Vishwanath for the harassment of the deceased Smt. Vidya. He further submitted that the presumption drawn against the two appellants under section 113-B of the Evidence Act for committing the murder of the deceased Smt. Vidya and her son for want of bicycle is against the evidence on record. In support of his argument he placed reliance on the judgment of Punjab and Haryana High Court in the case of ***Gurmukh Singh vs. State of Haryana reported in 1991 (1) Crimes 112-113*** where the Court observed that in a case under section 304, 498-A I.P.C. where the evidence of the parents of the deceased is found to be weak and that of independent witness goes against the complainant, the prosecution case cannot be said to be established beyond reasonable doubt. The next case cited by him in support of his argument is ***State of Himachal Pradesh vs. Smt. Manju Rani reported in 2013 Crl.L.J. 101*** and referred paragraphs 10, 14, 15, 16, 17 and 18 in which it has been observed that the offence under section 498-A, 304-B I.P.C. read with Section 113-B can be invoked only when it is established and proved that there had been demand for dowry. When there are infirmities in the evidence of the prosecution and improvements have been made in the testimony of the witnesses, acquittal would be the only consequence.

18. So far as the conviction of two appellants under section 302/34 I.P.C. for the murder of the deceased Raj Kumar minor child of the deceased Smt. Vidya, by the trial court is concerned, he vehemently argued that the prosecution has failed to bring on record any evidence against the appellants which could establish that it was the two appellants, who committed murder

of deceased Raj Kumar as the onus firstly lies on the prosecution to prove its case beyond reasonable doubt against the appellants and simple raising onus on the accused in view of the Section 106 of the Evidence Act to explain the death of the deceased Raj Kumar within their special knowledge, is not sustainable. He argued that the two appellants no doubt were living in the same house where the deceased Smt. Vidya was living along with her husband and minor child-Raj Kumar and simply because the two appellants were living in the same house where the incident had taken place and they have failed to explain the death of the deceased Raj Kumar in their house, is not alone circumstance or the fact which may hold them guilty for the murder of the deceased Raj Kumar. The trial court had erred in convicting the two appellants for his murder. He submitted that it is quite possible that there was some uncordial relationship between the deceased Smt. Vidya and her husband Aniruddha and because of said fact, the deceased Smt. Vidya and her minor child Raj Kumar died in mysterious circumstances and their last rites were performed by the husband of the deceased Smt. Vidya in the non presence of the family members of the deceased- Smt. Vidya, who did not raise any objection regarding the cremation of the two deceased and after three months of the incident the F.I.R. was lodged against the appellants Vishwanath and accused Harendra, who was the Devar of the deceased Smt. Vidya for harassment and oblique motive. He submits that the explanation given by the prosecution for the delay in lodging the F.I.R. is not at all satisfactory as the informant has stated that after receiving the information about the incident he visited the house of the appellants and thereafter went to lodge the F.I.R. at police station but the same was not lodged, hence he approached the Superintendent of Police and submitted a written report for the same, thereafter, the F.I.R. was lodged. He argued that the conviction of the appellants by the trial court is not sustainable in the eyes of law and the same be set aside and the appellants be acquitted.

19. On the other hand, learned A.G.A. has opposed the arguments of learned counsel for the appellants and submitted that the deceased Smt. Vidya died an unnatural death in her matrimonial home within seven years of marriage and her dead body was also disposed of by the appellants along with her husband Aniruddha without informing the parents of the deceased Smt. Vidya. She further stated that the informant P.W. 1, who is the father of deceased Smt. Vidya had supported the prosecution case in its entirety in his examination-in-chief before the trial court but it appears that thereafter the accused pressurize and won over him, hence he denied the involvement of the appellants in the present case in his cross examination. The evidence of P.W. 1 goes to show that the deceased Smt. Vidya and her minor child Raj Kumar were done to death in the in-laws house of deceased Smt. Vidya where she lived along with her husband and appellants, hence the trial court has rightly convicted the appellants raising presumption of dowry death under section 113-B of the Evidence Act against the appellants and convicted them under section 304-B IPC and sentenced them for ten years R.I. So far as conviction of the appellants under section 302/34 I.P.C. for the murder of the minor child of the deceased Smt. Vidya, namely, Raj Kumar is concerned, the trial court has rightly sentenced and convicted them for life

imprisonment with the aid of Section 106-B IPC as the two appellants failed to explain the death of minor child of deceased Smt. Vidya in their house. She submitted that the fact that the two deceased were ill for last several days and died together appears to be highly improbable and false explanation, thus she argued that the appeals of the appellants have no force and are liable be dismissed.

20. We have considered the submissions advanced by learned counsel for the parties and have meticulously perused the evidence and material brought on record.

21. It is an admitted fact that the marriage of deceased Smt. Vidya was solemnized with co-accused Aniruddha in the year 1989 and in the intervening night of 2/3.1.1996 at about 12 hours the deceased Smt. Vidya along with her infant child, namely, Raj Kumar aged about two and half years died in suspicious circumstances in the house of the appellants. After the incident, the dead bodies of deceased Smt. Vidya and of her infant child was cremated without informing either to the police or to the informant, who is the father of deceased Smt. Vidya, hence neither Panchayatnama nor post mortem of the dead bodies of two deceased were conducted, thus the cause of death of both the deceased could not be ascertained. The F.I.R. of the incident was lodged against appellants-Vishwanath Gupta-father-in-law of deceased Smt. Vidya and Aniruddha-husband of deceased Smt. Vidya, who died during the pendency of trial. During the course of investigation, the involvement of appellant-Harendra Gupta, who is brother-in-law (devar) of deceased Smt. Vidya came into light on account of which charge-sheet was submitted against three accused persons, namely, Vishwanath Gupta, Harendra Gupta and Aniruddha for the offence under sections 498-A, 304-B, 201 I.P.C. and 3/4 D.P. Act by the Investigating Officer.

22. The trial court on 12.3.2001 framed charges against appellants Vishwanath Gupta and Harendra Gupta for the offence under sections 498-A, 304-B, 201 I.P.C. and for the death of deceased Smt. Vidya whereas on 13.3.2001 framed charges against the appellants under section 302/34 I.P.C. for the death of deceased Raj Kumar-son of deceased Smt. Vidya, aged about two and half years.

23. P.W. 1 Pooranmasi Gupta, who is the father of deceased Smt. Vidya has supported the prosecution case in its entirety in his examination-in-chief before the trial court which was recorded on 10.11.2009 but on 1.12.2009 when his cross examination was recorded by the trial court he did not support the prosecution case and resiled from his earlier statement stating that under the influence of some persons of village Gaunaria, he gave evidence against the appellants but he could not disclose the name of the said persons, who pressurize and influence him for giving the said statement before the trial court. He further denied the suggestion that in order to save the accused-appellants he is falsely deposing in cross examination in their favour.

24. P.W. 2 Smt. Jhinki, who is the mother of deceased Smt. Vidya has denied the prosecution case right from its inception before the trial court, hence she was declared hostile by the trial court.

25. Thus, in these circumstances this Court has to evaluate the evidence led by

the prosecution in order to examine whether the conviction and sentence of the appellants for the offence which they have been charged with is justified or not.

26. The contention advanced by learned counsel for the appellants that the deceased Smt. Vidya was living along with her husband and her infant child and the demand of bicycle was being made by Aniruddha-husband of deceased Smt. Vidya and the appellants, who are father-in-law and brother-in-law of deceased Smt. Vidya, have no concern with their affairs and the deceased Smt. Vidya though died an unnatural death in a suspicious circumstances in the house of the appellants, they cannot be fastened with the criminal liability of the death of deceased Smt. Vidya and her infant child, is not sustainable as the appellants used to live in the same house in which the deceased Smt. Vidya and her husband were living, hence the conviction and sentence of the appellants for the death of deceased Smt. Vidya, by the trial court does not suffer from any manifest error at all. Firstly on the ground that the marriage of deceased Smt. Vidya with Aniruddha was solemnized in the year 1989 and *Gauna* ceremony was also performed and within seven years of marriage, the deceased Smt. Vidya in the intervening night of 2/3.1.1996 died an unnatural death in suspicious circumstances and further her infant child Raj Kumar aged about two and half years was also done to death and their dead bodies were disposed of by the appellants without giving information either to the police or to the parents of deceased Smt. Vidya, who on receiving information about the same express their shock and enquired from the appellants as to why they were not informed about the death of both the deceased and their dead bodies were disposed of on which the accused appellants threatened the informant and ousted him from their house. Secondly, as per the evidence of P.W. 1 recorded before the trial court in his examination-in-chief as well as in the F.I.R. in which he categorically stated that the demand of bicycle, which was made by the appellant Vishwanath and accused Aniruddha as the same was not given by P.W. 1 at the time of marriage, could not be fulfilled by the informant on account of poverty due to which the deceased Smt. Vidya was being threatened and also used to torture by the appellant Vishwanath and accused Aniruddha and was done to death in her matrimonial home and her dead body was also disposed of without performing panchayatnama and post mortem of the deceased. So far as the argument of learned counsel for the appellants that the F.I.R. was lodged after inordinate delay of three months which shows that the informant-P.W. 1 after last rites of the two deceased were performed, he for his oblique motive and for harassment of the appellants had lodged the F.I.R. against them after due deliberation and consultation and the prosecution has failed to give plausible explanation for the delay in lodging the F.I.R. of the incident, has no force. Here it would be important to note that in the F.I.R. itself, the informant has stated that when he went to concerned police station, i.e., police station Kaptaganj for informing about the incident, his report was not lodged, hence he gave application to the Superintendent of Police requesting for lodging the F.I.R. of the incident in pursuance of which the F.I.R. was lodged, thus in our opinion the delay which occurred in lodging the F.I.R. of the incident, is not fatal to the prosecution case. The other argument of learned counsel for the appellants that the appellant Harendra

Gupta, who is the brother-in-law (devar) of deceased Smt. Vidya was not named in the F.I.R. as the same was lodged against appellant Vishwanath Gupta and accused Aniruddha husband of deceased Smt. Vidya and during the course of investigation, the involvement of appellant Harendra Gupta has come into light which is an afterthought in order to falsely implicate him in the present case, is also of not much significance as admittedly, the appellant Harendra Gupta was also living in the same house along with appellant Vishwanath and accused Aniruddha and after the incident no effort was made by him also to inform about the incident either to the police or to the parents of deceased Smt. Vidya and the dead body of both the deceased were disposed of in suspicious manner. Both the appellants in their statements recorded under section 313 Cr.P.C. have failed to explain or give reasonable explanation regarding the death of two deceased, who died unnatural death in suspicious circumstances in the house in which they were living and were found present on the date and time of the incident. They have also not led any defence evidence to explain the death of two deceased, who died unnatural death in their house. The argument of learned counsel for the appellants that the evidence of P.W. 1 and P.W. 2 is weak evidence and the case law which has been cited in support of the said argument is also not sustainable on the ground that P.W. 1 Pooranmasi father of deceased Smt. Vidya has supported the prosecution case in toto in his examination-in-chief recorded before the trial court on 10.11.2009 and the cross examination was deferred which was recorded on 10.11.2009 just after one month of his examination-in-chief wherein he retracted his statement made before the trial court in his examination-in-chief and stated that earlier statement which was made by him before the trial court was under the influence of some persons of the village Gaunaria but he could not disclosed the name of the persons, who pressurize or influenced him to give such statement. Further he has stated that the deceased Smt. Vidya and her son died on account of some ailment and further the deceased Smt. Vidya was not harassed and tortured by the appellants nor her daughter made any complaint against them nor the appellants had demanded bicycle from her, the said statement and conduct of P.W. 1 goes to show that he had been won over by the accused persons and the explanation which has come forward through him that the two deceased died on account of ailment is a false explanation as there was no medical document produced either by P.W. 1 or by the accused appellants to corroborate that the two deceased died on account of ailment, thus the trial court after going through the evidence brought on record has rightly convicted and sentenced the appellants for the offence under section 498-A, 201 I.P.C. and sentenced them under section 304-B I.P.C. for 10 years R.I. drawing presumption under section 113-B of the Evidence Act as a case of dowry death proved against the appellants and recorded conviction against them for the said offences.

27. So far as conviction and sentence of two appellants for causing the death of the infant child of deceased Smt. Vidya, namely, Raj Kumar aged about two and half years by the trial court, the statement made by learned counsel for the appellants that the onus on the two appellants in view of Section 106 of the Evidence Act and convicting them under section 302/34 IPC for the murder of deceased Raj Kumar by the trial court is absolutely illegal and

cannot be sustained in the eyes of law, has also no substance as it has come in the evidence that has been referred above that admittedly, the deceased Smt. Vidya along with infant child Raj Kumar was living with her husband in the same house in which the two appellants were also living and on the date and time of incident both of them were present in the house and the deceased Raj Kumar also died in mysterious circumstances and his dead body was also disposed of without getting inquest proceeding and post mortem being conducted in order to know the cause of death of the two deceased. The two appellants failed to explain in their statements recorded under section 313 Cr.P.C., the death of infant child, namely, Raj Kumar in their house in suspicious circumstances. The trial court was absolutely right in coming to the conclusion that as to how it was possible that the infant child, who was living with his mother deceased Smt. Vidya died on the same date and time when deceased Smt. Vidya died and he was also suffering from ailment like his mother as has been stated by P.W. 1 in his cross examination before the trial court. The nature of ailment and any medical treatment given to him for the same has also not been brought on record which goes to show that P.W. 1 was won over by the accused appellants at the time of his cross examination which was recorded after more than one month of his examination-in-chief in order to save the accused-appellants. Since the suspicious and unnatural death of the deceased Raj Kumar had taken place in the house which was shared by the two appellants, hence as per requirement of Section 106 of the Evidence Act, they were required to give plausible and convincing explanation about the circumstances in which the deceased Raj Kumar died in their house. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would be undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation. In the case of ***Trimukh Maroti Kirkan vs. State of Maharashtra (2006) 10 SCC 681,*** the Apex Court whilst applying provision of Section 106 of the Indian Evidence Act, observed in paras 13 to 14 as under:

"13. The demand for dowry or money from the parents of the bride has shown a phenomenal increase in last few years. Cases are frequently coming before the Courts, where the husband or in-laws have gone to the extent of killing the bride if the demand is not met. These crimes are generally committed in complete secrecy inside the house and it becomes very difficult for the prosecution to lead evidence. No member of the family, even if he is a witness of the crime, would come forward to depose against another family member. The neighbours, whose evidence may be of some assistance, are generally reluctant to depose in Court as they want to keep aloof and do not want to antagonize a neighborhood family. The parents or other family members of the bride being away

from the scene of commission of crime are not in a position to give direct evidence which may inculpate the real accused except regarding the demand of money or dowry and harassment caused to the bride. But, it does not mean that a crime committed in secrecy or inside the house should go unpunished.

14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the Courts. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties. (See Stirland v. Director of Public Prosecution 1944 AC 315 quoted with approval by Arijit Pasayat, J. in State of Punjab Vs. Karnail Singh (2003) 11 SCC 271). The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:

(b) A is charged with traveling on a railway without ticket. The burden of proving that he had a ticket is on him."

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation."

28. On the interpretation of Section 106 of the Indian Evidence Act, 1872 we may refer to the classic case of ***Shambhu Nath Mehra Vs. State of Ajmer 1956 SCR 199*** reported more than half a century ago. In paragraph-11 their Lordships have observed thus:

"This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to

the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not."

29. In the case of State of ***West Bengal Vs. Mir Mohammad Omar and others 2000 (8) SCC 382,*** the Apex Court has observed in paras 31 to 33 as under:

31. The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage the offenders in serious offences would be the major beneficiaries, and the society would be the casualty.

32. In this case, when the prosecution succeeded in establishing the afore narrated circumstances, the Court has to presume the existence of certain facts. Presumption is a course recognized by the law for the court to rely on in conditions such as this.

33. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the Court exercises a process of reasoning and reach a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the Court to presume the existence of any fact which it thinks likely to have happened. In that process Court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case."

30. In view of the settled proposition of the law with regard to burden to be discharged by an accused under section 106 of the Evidence Act and taking into account the fact that in the instant case, the appellants, who are father-in-law and brother-in-law of deceased Smt. Vidya were living in the same house along with Aniruddha-husband of the deceased Smt. Vidya where the deceased Smt. Vidya along with her infant child Raj Kumar died unnatural death in suspicious circumstances and they were found in the house on the date and time of incident and they have failed to explain the death of deceased Raj Kumar, who was infant child deceased Smt. Vidya, hence the conviction and sentence of the appellants for the murder of deceased Raj Kumar by the trial court under section 302/34 is fully justified and does not require any interference by this Court as the same does not suffer from any manifest error on fact and law and the prosecution has proved its case beyond reasonable doubt against the appellants, the conviction and sentence of the appellants by the trial court for the offence under section 302/34 I.P.C. with which they have been also charged is hereby upheld.

31. As it has been discussed above, that the conviction and sentence of the appellants for the death of deceased Smt. Vidya, by the trial court under sections 498-A, 304-B, 201 I.P.C. does not suffer from any infirmity and illegality, the

conviction and sentence of the appellants by the trial court for the murder of deceased Smt. Vidya is also hereby upheld.

32. Both the appeals lack merit and are accordingly, dismissed.

33. The appellants are stated to be in jail. They shall serve out the sentence awarded by the trial court.

34. Let the lower court record along with a copy of this order be transmitted to the trial court concerned for necessary information and follow up action, if any.

(2020)12ILR A42
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.10.2020

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE DINESH PATHAK, J.

Crl. Appeal No. 1575 of 2012
connected with
Crl. Appeal Nos. 1594 of 2012 and 1345 of 2012

Rajendra Giri & Ors. ...Appellants(In Jail)
Versus
C.B.I. ...Opposite Party

Counsel for the Appellants:
Sri J.S.P. Singh, Sri Abhilasha Singh, Sri Ashutosh Yadav, Sri Braham Singh, Sri Dharmendra Singhal, Sri Parvez Ahmad, Sri Rajesh Yadaav, Sri Ravi Prakash Singh, Sri Shyam Lal, Sri V.M. Zaidi, Sri Vinod Singh, Sri Yogesh Srivastava

Counsel for the Opposite Party:
Sri Pranay Krishna, A.G.A., Sri Amit Mishra, Sri Gyan Prakash, Sri N.I. Jafri

Criminal Law-Criminal Appeal has been filed against the conviction U/S 120 -B, 302,364 and 218 IPC.

Lapse in investigation- itself would not be sufficient to throw away the entire prosecution-based on manufactured document.

Nothing is found on record which would reveal that the police was in receipt of intelligence.

No FIR had been lodged with regard to the incident of encounter.

No independent investigation regards the incident by competent officer till direction issued by the apex court, no magisterial enquiry U/S 176 Cr.P.C. was held, no information was given to the National Human Right Commission or State Human Right Commission.

Relatives of the alleged criminal/victim/deceased had not been informed by the police.

Prosecution has proved this case beyond reasonable doubts. Sentence awarded to the applicants is minimum. The same requires no interference.

Appeal dismissed. (E-2)

List of Cases cited: -

1. People's Union for Civil Liberties & anr Vs St. of Mah.

2. R.S. Sodhi Advocate Vs St. of U.P.

3. Satyavir Singh Rathi, Assistant Commissioner of Police and ors. Vs St. through Central Bureau of Investigation

4. Rohtash Kumar Vs St. of Hary.

5. Om Prakash Vs St. of Jhar. & ors.

6. People's Union for Civil Liberties (supra)

(Delivered by Hon'ble Mrs. Sunita Agarwal, J. &
Hon'ble Dinesh Pathak, J.)

1. Three connected Criminal Appeals have been preferred by seventeen appellants who have been convicted and

sentenced for life imprisonment. All the appellants except the appellant Jaipal Singh (who is on bail) in Criminal Appeal No. 1345 of 2012, are represented by a battery of lawyers. Sri Dileep Kumar, learned Senior Advocate assisted by Sri Vinod Singh learned counsel has put in appearance on behalf of three appellants namely Dhirendra Singh Yadav, Shamim Khan and Shambhu Datt Sharma. Sri Satish Trivedi, learned Senior Advocate assisted by Sri Sheshadri Trivedi learned counsel has appeared on behalf of the same appellants in the connected criminal appeal.

Sri Sudhir Dixit, Sri Chandra Bhushan Yadav, Sri Ravi Prakash Singh, Sri Braham Singh and Sri Shyam Lal appear for the remaining appellants.

After conclusion of the arguments of the counsels for the appellants, which continued for about a period of one week, a request was made on behalf of Sri Gyan Prakash, learned Senior Advocate for the Central Bureau of Investigation (C.B.I.) for adjournment of the hearing. We made it clear that we were not inclined to adjourn the hearing for absence of the counsel for the C.B.I. at that stage, but no one appeared to assist the Court on behalf of C.B.I.

We are constrained to record our displeasure for absence of the counsel for the C.B.I., without any prior information to the Court or the counsels for the other side.

Sri Dileep Kumar learned Senior Advocate ably assisted by Sri Vinod Singh learned counsel has addressed the Court at length on all issues in the appeals. All other advocates appearing for the remaining appellants have adopted the arguments extended by Sri Dileep Kumar learned Senior Advocate and added only on one or two points which would be dealt with at the appropriate stage in this judgment. It is informed by the learned Advocates that the appellant Doji Singh had died during pendency of these appeals and all other appellants except Jaipal Singh are in jail. Since only one appellant Jaipal Singh (who had been released on bail) is unrepresented, we have appointed Sri Vinod Singh learned Advocate as an Amicus Curiae to assist the Court on his behalf. During hearing, Sri Vinod Singh has adopted the arguments extended by Sri Dileep Kumar learned Senior Advocate, for appellant Jaipal Singh.

2. These appeals are directed against the judgment and order dated 29.3.2012 passed by the Special Judge, C.B.I. Court No. 1, Ghaziabad in Sessions Trial No. 01 of 2002 (C.B.I. vs. Dhirendra Singh Yadav and others) under Sections 120-B, 302, 364 and 218 IPC, Police Station C.B.I., Delhi in R.C. No. 18(S)/93.

Accused Dhirendra Singh Yadav, Raj Kumar, Brij Bhusan Sharma, Rajendra Giri, Shambhu Datt Sharma, Kalwa Singh, Lajwant Singh, Shamim Khan, Dinesh Chandra, Balbir Singh, Ram Niwas, Amarjeet Singh, Kiranpal Singh, Jagat Singh, Rashi Pal Singh and Jaipal Singh have been convicted for the offences under Section 120-B readwith Section 364 and Section 302 IPC and sentenced for rigorous life imprisonment with fine to the tune of Rs. 5000/- each, with the condition that in case of non-deposit of fine, they would have to undergo additional simple imprisonment for one month. The above named appellants except Jaipal Singh have also been convicted under Section 302/34 IPC, additionally, for rigorous life imprisonment and fine of Rs. 5,000/-, with the condition that in case of non-payment of fine, they would have to undergo additional simple imprisonment for one month. In addition to the above, accused

Dhirendra Singh Yadav, Shambhu Datt Sharma, Kalwa Singh, Shamim Khan, Dinesh Chandra, Doji Singh, Jagat Singh, Amarjeet Singh, Rashi Pal Singh and Jaipal Singh have also been convicted under Section 120-B readwith Section 364 IPC for rigorous imprisonment of ten years with fine of Rs. 5,000/- and in case of non-deposit of fine, they would have to undergo additional simple imprisonment for one month. Accused Dhirendra Singh Yadav has also been convicted under Section 218 IPC for three years rigorous imprisonment. All the above punishments are to run concurrently.

3. Before coming to the prosecution story, it would be appropriate to note certain relevant facts of the case. The first information report dated 15.11.1993 namely RC-18(S)/93-SIU.V was registered at about 11:30 AM in Delhi Special Police Establishment SIC-II Branch pursuant to an order dated 15.11.1993 of SP/CBI/SIC.II/New Delhi, which was passed in pursuance of the order dated 8.10.1993 passed by the Supreme Court in Criminal Writ Petition No. 632/92 filed by one S. Sharanjit Singh son of S. Mohinder Singh of Majithia, District Amritsar (Punjab) against Delhi Administration and others. The Apex Court therein had entrusted the matter relating to abduction of deceased Jaswinder Singh @ Jassa son of Bachan Singh resident of Majitha, District Amritsar (Punjab) to the Central Bureau of Investigation (In short as "the C.B.I.") for investigation. In the aforesaid petition, a copy of which was sent to the C.B.I. on the directions of the Apex Court alongwith its order, it was alleged that Jaswinder Singh @ Jassa aged about 30 years, a Sewadar of Gurudwara Rakabganj, New Delhi (in short hereinafter referred to as "the Gurudwara") was forcibly taken away by some unknown police personnel of the U.P. Police, on 30.10.1992 at about 8:30 AM from near a temple outside the Gurudwara. The matter was immediately reported at the Police Outpost North Avenue, New Delhi. In pursuance to the said information, lookout notices were issued to all SHO(s) and DCP(s) Delhi as also to all SP(s) in India including all SSP(s) of the State of U.P. It was alleged that Ajit Singh, the Manager, Delhi Sikh Gurudwara Management Committee had also lodged a written complaint with the Police Station, Parliament Street, New Delhi at 8:50 AM on 30.10.1992 stating therein that deceased Jaswinder Singh @ Jassa was forcibly taken away at about 8:30 AM on 30.10.1992 by unknown persons who came in two vehicles, from the place near Talkatora Road-Gurudwara Rakabganj Road outside the Gurudwara. Some of the persons were said to be in plain clothes while others were in uniform. The Delhi Police registered a case namely FIR No. 400/92 on 17.11.1992 at 8:45 PM under Section 365 IPC. It was alleged that the U.P. Police had also registered a case namely FIR No. 187/92 dated 31.10.1992 under Section 392 IPC readwith Section 3/4 of Terrorist and Disruptive Activities (Prevention) Act, 1987 (In short as "the TADA Act"), at Police Station Baradhpur, District Bijnor (U.P.), reporting therein that the Police party led by Sri Dhirender Singh Yadav, Station House Officer of the Police Station Baradhpur had an encounter with two unknown Sikh militants near Village Kanshiwala and in exchange of fire one unidentified militant had been killed, whereas another managed to escape. After the encounter, the police recovered one AK-56 Rifle bearing No. 17036926, a DBBL Gun and one Magazine with 25 live cartridges of AK-56 Rifle etc. from the spot of encounter. The Apex Court in its order

dated 15.12.1992 in the aforesaid petition had observed that as per the affidavit filed by the Deputy Commissioner of Police, New Delhi District, deceased Jaswinder Singh @ Jassa was taken away by the U.P. Police. A direction was issued to the Director General of Police, U.P. to look into the matter and submit a report. An affidavit was then filed by D.I.G. (Admin) on behalf of the Director General of Police, U.P. on 5th March, 1993 before the Apex Court stating therein that the allegations in the aforesaid writ petition could not be substantiated and that the matter had been entrusted to the Criminal Branch of CID for enquiry.

In view of the aforesaid, following order dated 8.10.1993 was passed by the Apex Court:-

"We have examined the Report produced before us by the Delhi Police during the investigation of the Case. There are material circumstances on the record which give a prima facie indication that Jaswinder Singh was taken away by UP Police from Delhi on 30.10.92. The UP Police has categorically denied the same. In the facts and circumstances of this case, we direct the Central Bureau of Investigation to hold an enquiry into this matter and send a report to this Court within six months from the receipt of the Order. The Registry is directed to send a complete copy of the paper book to the Director, Central Bureau of Investigation, New Delhi within one week from today. To be listed after a report from the CBI is received in this respect."

4. A regular case under Sections 365, 302/34 IPC was then registered by the C.B.I. and the investigation was entrusted to the then DSP/CBI/SIC-II. The order dated 15.11.1993 of the registration of FIR passed by SP/CBI/SIC-II, New Delhi has been exhibited as "Exhibit Ka-63". In the column for registration of said FIR for mentioning the name and address of the accused, "some unknown persons" had been written.

5. As far as the First Information Report No. 400 of 1992 dated 17.11.1992 is concerned, it is relevant to note at this juncture that the said report had been lodged on the written information given by Sub-Inspector, Sukhi Ram, the In-charge Picket Post, North Avenue, New Delhi stating therein that a missing report (written) was given by Ajit Singh, the Manager, Delhi Sikh Gurudwara Management Committee. Lookout messages/notices on wireless sets were sent but no information could be gathered about the missing person namely Jaswinder Singh @ Jassa. A Case under Section 365 IPC was, therefore, to be lodged. On the said report, the Delhi Police registered a Criminal Case under Section 365 IPC on 17.11.1992 at the Police Station Parliament Street, New Delhi and the information about the said FIR was sent to the Senior Officers. The letter of information given by the SHO, Police Station Parliament Street (written in English) alongwith the report of S.I. Sukhi Ram, the In-charge, Picket Post North Avenue (written in Hindi) has been exhibited as "Exhibit Ka-9". An entry of registration of FIR was also made in the Daily Diary No. 20A dated 17.11.1992 at the Police Station Parliament Street. The written report dated 30.10.1992 (typed in English) given by Ajit Singh, the Manager, Delhi Sikh Gurudwara Management Committee had been entered with the receiving DD No. 20A dated 17.11.92 at 08:50 PM in FIR No. 400/92 under Section 365 IPC. The said document dated 30.10.1992 has been exhibited as "Exhibit

Ka-5". Another copy of the said report with Reference No. 5142/2-1 on which S.I., Sukhi Ram, the In-charge, Picket Post North Avenue had submitted his report dated 17.11.1992, has been exhibited as "Exhibit Ka-5/1". The report of Sukhi Ram, S.I., In-charge Picket Post, North Avenue dated 17.11.1992 submitted at 08:45 PM is exhibited as Exhibit 'Ka-5/2'.

There is an endorsement on Exhibit Ka-5 of the SHO, Police Station Parliament Street, New Delhi dated 30.10.1992, wherein In-charge, Picket Post North Avenue had been directed to enquire. The said endorsement has been exhibited separately as Exhibit 'Ka-5/1'. Exhibit 'Ka-3' is the document dated 30.10.1992 written in Gurmukhi (Punjabi) by Satnam Singh, addressed to the Manager, Delhi Sikh Gurudwara Management Committee giving intimation of the incident of abduction of Jaswinder Singh @ Jassa at about 8:30 AM from the road outside Gurudwara Rakabganj. There is an endorsement of Ajit Singh dated 30.10.1992 over the said report to lodge a complaint with the Police Station Parliament Street, which has been exhibited as Exhibit 'Ka-3/1'. Exhibit 'Ka-1' is the document in Gurmukhi (Punjabi) which is the 'Leave Form' of Delhi Sikh Gurudwara Management Committee, stated to have been filled by Jaswinder Singh @ Jassa for seeking sick leave from 4.10.1992 till 18.10.1992.

Exhibit 'Ka-6' is the proforma in Punjabi issued by the Headmistress of the School at Amritsar which records the date of birth of Jaswinder Singh as '12.10.1967'.

Exhibit 'Ka-4' is the Seizure Memo dated 16.12.1993 with regard to seizure of the Personal File of Sewadar Jaswinder Singh @ Jassa containing application for service, papers relating to his transfer, his abduction and correspondence made by the Manager, Delhi Sikh Gurudwara Management Committee and a photograph of Jaswinder Singh as also attendance register of Gurudwara Rakabganj staff for the period from October, 1992 to January, 1993. The said documents were handed over by Satnam Singh, the Supervisor, Delhi Sikh Gurudwara Management Committee to the Investigating Officer, C.B.I. namely DSP/CBI/SIC.II, New Delhi. A note on the seizure memo mentions that each page of the File as well as of the attendance Register had been signed by Sri Satnam Singh, the Supervisor, Delhi Sikh Gurudwara Management Committee, Gurudwara Mata Sundri.

6. As per the prosecution, this is a case of Extra-judicial killing. The deceased Jaswinder Singh @ Jassa son of Bachan Singh resident of Village Majitha, District Amritsar, Punjab was appointed as Sewadar by Delhi Sikh Gurudwara Management Committee on 21.3.1990 and since then he was serving in Gurudwara Rakabganj, New Delhi and was residing in quarter no. 9 located inside the Gurudwara premises. On 30.10.1992 at about 8:30 AM, when Jaswinder Singh @ Jassa came out of Gurudwara Rakabganj, two vehicles, one loaded with persons, some in civil dress and others in police uniform took him away from Talkatora Road-Gurudwara Rakabganj road and he was killed in an encounter on 31st October, 1992 at about 5:30 AM in Kanshiwala Forest within the circle of Police Station Baradhpur, in a conspiracy hatched by the police personnel of the Police Station Baradhpur. The first information of abduction of Jaswinder Singh @ Jassa was given by Ajit Singh, the Manager, Delhi Sikh Gurudwara Management Committee on 30.10.1992.

After killing of Jaswinder Singh @ Jassa on 31.10.1992, false cases were

registered as Case Crime No. 192/92 and 193/92 at Police Station Baradhpur, Bijnor by Dhirendra Singh Yadav, the Station House Officer of the said police station. The accused Dhirendra Singh Yadav had, thus, been charge sheeted under Section 218 IPC, for preparation of false papers being a public servant with the intent to cause loss to the public and thereby to save himself from legal punishment knowing that the offence committed by him would result in punishment. The accused persons/police personnel of the Police Station Baradhpur had been charged of the offences punishable under Section 302 IPC readwith Section 120B IPC and Section 364 IPC readwith Section 34 IPC. The charges were framed by the Additional Sessions Judge/Special Judge, Anti Corruption, U.P. (East), Dehradun which was the then Court of ordinary jurisdiction for trial of such offence. The trial had begun on the charge sheet submitted by the DSP/CBI/SIC-II countersigned by SP/CBI/SIC-II, New Delhi on 29.3.1996 after completion of the investigation conducted on directions issued by the Apex Court vide order dated 8.10.1993 in Criminal Writ Petition No. 632/92.

7. In brief, the prosecution case is that the first report of abduction of Jaswinder Singh @ Jassa by some unknown persons, from outside the gates of Gurudwara Rakabganj, New Delhi, was given on 100 Dial Number on 30.10.1992 by Satnam Singh, the Supervisor, Gurudwara Rakabganj at the Picket Police Post, at North Avenue, New Delhi. On the information given by Satnam Singh (the Supervisor) to Ajit Singh, the Manager, Delhi Sikh Gurudwara Management Committee, a typed report was given by Ajit Singh at the Police Station Parliament Street, New Delhi. The first information report namely Case Crime No. 400 of 1992 was, however, registered on 17.11.1992 at about 8:45 PM at Police Station Parliament Street, New Delhi.

8. After the matter went to the Supreme Court on Criminal Writ Petition No. 632 of 1992 filed by a relative of Jaswinder Singh @ Jassa, the investigation was entrusted to the Deputy Superintendent of Police, C.B.I., SIC-II. The place of encounter as noted above is Kanshiwala Jungle within the jurisdiction of Police Station Bahrapur. The charge sheet was submitted by C.B.I. against 19 persons out of whom trial was concluded against 17 persons who have been convicted for the aforesaid offences, as two accused had died during the course of trial.

9. The investigation revealed that out of 18 firearms which were used for firing in the alleged encounter, 17 firearms had been collected, two (2) empties out of 23 empties, fired by police personnel, were linked to AK-56 Rifle No. 17036926, which was allegedly recovered from the spot besides the dead body of deceased Jaswinder Singh @ Jassa (alleged to have been used by him in the encounter). Total 161 rounds were fired by the police personnel, 67 empties of which could only be recovered, and were deposited by S.O. Dhirendra Singh Yadav, whereas 94 empties were allegedly lost. The recovery of one AK-56 Rifle No. 17036926 alongwith 24 live cartridges and 4 empty cartridges and 2 magazines was shown from besides the dead body of the alleged deceased militant alongwith recovery of one DBBL Gun No. 3122/1360 alongwith 2 empty cartridges which were allegedly left by another alleged militant who managed to escape.

10. In respect of Case Crime No. 192/92 under Section 307 IPC and Section

3/4 TADA (P) Act and Case Crime No. 193/92 under Section 25 Arms Act, the inquest proceedings were conducted by Nishith Kumar, the then Sub-Divisional Officer, Nagina. Sub-Inspectors Satwant Singh; Amrik Singh a retired Sub-Inspector; Sub-Inspector Tulsa Singh, all residents of Village Kanshiwala, and two other persons namely Gurdev son of Mela Singh and Naseeb Singh son of Harnam Singh, both residents of Village Harbanswala were shown as Panch witnesses of the inquest. The inquest was allegedly conducted on the spot, in the Jungle of Village Kanshiwala, Bijnor, on 31.10.1992 between 14 hours (2:00 PM) to 16:30 hours (4:30 PM).

11. The postmortem of the dead body was conducted by Dr. Ram Kumar Gupta, the Senior Medical Officer, District Hospital Bijnor on 1.11.1992. As per the postmortem report, deceased Jaswinder Singh @ Jassa had sustained seven gunshot injuries on both forearms, chest, stomach and right thigh. The injury on right hand palm of deceased had burning of skin and scorching. The cause of death was determined as shock and hemorrhage as a result of multiple firearm injuries. After the postmortem, the body was cremated at Ganga Barrage, Bijnor on 1.11.1992 itself.

12. During the investigation by C.B.I., the contention of accused police personnel of Baradhpur Police Station was that a police party headed by Station House Officer, Dhirendra Singh Yadav comprising of Sub-Inspector Nahar Singh, Constables Sambhu Datt Sharma, Kalwa Singh, Shamim Khan, Shishpal Singh, Dinesh Chander, Doji Singh, Amarjit Singh, Jagat Singh, Rishi Pal Singh and Jaipal Singh had left the police station at about 17:10 hours on 29.10.1992 for combing and search of militants. They went by Police Station Jeep No. UP20/0371 driven by Constable Driver (as recorded in G.D. No. 29) and a Vehicle No. UP20/4473 driven by Constable Driver Kailash Chandra which arrived at Police Station Baradhpur at 18:30 hours from the Police Line, Bijnor and joined the police party (as recorded in G.D. Entry No. 35). The said statement of police personnel was found to be false. The investigation report records that in fact police party headed by S.H.O. Dhirendra Singh Yadav accompanied with Nahar Singh (Sub-Inspector), Avtar Singh and Satwinder Singh, both residents of Village Kot Juwan and Harbhajan Singh resident of Village Choharwala first came to the Police Line Bijnor in police station Jeep and red colour Maruti van No. UP20/9651 owned by Sri Mohesh Chander resident of Baradhpur, which was driven by Chander Prakash resident of Baradhpur. From the Police Line, Vehicle No. UP20/4473 (Tata Truck) was taken and the police party with the above named persons had left for Delhi in Vehicle No. UP20/4473 (Tata Truck) and red Maruti van. Jaswinder Singh @ Jassa was abducted by the said police personnel from Delhi on 30.10.1992. He was taken to P.S. Baradhpur and, thereafter, killed in Kanshiwala forest at about 5:30 AM in a fake encounter (Extra-judicial killing).

13. The prosecution had examined 46 witnesses in the Court to prove its case of abduction with the intention to kill Jaswinder Singh @ Jassa (deceased) under Section 364/34 IPC and Section 302/120B IPC and also for the offence punishable under Section 218 IPC. Amongst the witnesses of charge of abduction, PW-1 to PW-7 were examined by the prosecution.

PW-1 Shyam Singh, posted as Jaththedar in Gurudwara Rakabganj, New

Delhi had submitted in his examination-in-chief that he was an employee in Delhi Sikh Gurudwara Management Committee, New Delhi since the year 1981. In the year 1990, he was posted as Jaththedar in Gurudwara Rakabganj, New Delhi and was given the charge of assigning duties to Sewadars and to look into their well being. Jaswinder Singh @ Jassa (deceased) was a Sewadar in Gurudwara Rakabganj, New Delhi in the year 1992 and he was residing in quarter no. 9 inside the premises in Gurudwara Rakabganj, New Delhi. The attendance register of the said Gurudwara (material "Exhibit D-38") which pertains to the attendance of Sewadars for the month of October, 1992) was maintained in his handwriting. In the said register, at page '5' at serial no. '31', the entries of presence of Jaswinder Singh @ Jassa, Sewadar were in his handwriting. Deceased Jaswinder Singh @ Jassa was present in Gurudwara Rakabganj, New Delhi on 1st, 2nd and 3rd October, 1992 when his attendance was recorded in the register. On 4th October, 1992, he took leave uptill 18.10.1992 and left Gurudwara premises. His leave application which was part of the record was accepted under the signature of this witness (PW-1, Shyam Singh). The reason for applying leave was illness as mentioned in the leave application. The said leave application of Jaswinder Singh @ Jassa was proved by PW-1 Shyam Singh and has been exhibited as Exhibit 'Ka-1'. It was then stated that a telegram sent by Jaswinder Singh @ Jassa was received seeking extension for eight days of leave which was proved and exhibited as Exhibit 'Ka-VI'. PW-1 states that the presence of employees was recorded in the register with the letter 'I' and leave was mentioned with the letter 'L', whereas for the absence of employees letter 'A' was used. The letter 'R' in the Register denotes the entries on the day of 'rest' given to the employee concerned. As regards leave of Sewadar Jaswinder Singh @ Jassa, it was stated that he gave a medical certificate which was proved as Exhibit 'Ka-7'. He states that as per the entries in the attendance register, Sewadar Jaswinder Singh @ Jassa was present in the Gurudwara from 4.10.1992, 27.10.1992 and also on 28.10.1992 and 29.10.1992. The entries of leave of Jaswinder Singh @ Jassa on the relevant pages of the attendance register were proved and exhibited as Exhibit 'Ka-2' in the handwriting of PW-1 Shyam Singh. PW-1 further stated that he was residing in the Gurudwara premises while on duty. On 30.10.1992 at about 08:30 AM, when he was going on duty, Ajayab Singh, another Sewadar of Gurudwara gave him information that the U.P. Police had taken away Jaswinder Singh @ Jassa from outside the Gurudwara near the temple. In cross-examination, PW-1 had reiterated his statement in the examination-in-chief regarding maintenance of attendance register, the leave application and medical certificate submitted by the Jaswinder Singh @ Jassa. On a suggestion that the medical certificate did not bear the signature or thumb impression of the applicant (deceased), PW-1 stated that Jaswinder Singh @ Jassa remained in Gurudwara for few days while he was ill and then he was asked by PW-1 to bring a medical certificate to apply for leave. PW-1 denied the suggestion that attendance was not being recorded on daily basis. As far as receipt of telegram (Exhibit Ka-VI) for extension of leave is concerned, PW-1 stated that the said telegram was not received by him rather it was received in the office of the Gurudwara and he had received intimation of the same. PW-1 has denied suggestion of the attendance register being a forged or fabricated document and

stated that he did not record attendance of Jaswinder Singh @ Jassa on 30.10.1992 and 31.10.1992 in the Gurudwara as he got information that he was taken away by the U.P. Police. The suggestion that the entries of attendance of Jassa on 28.10.1992 and 29.10.1992 were forged and Jaswinder Singh @ Jassa was not present on duty was emphatically denied. He further denied the suggestion that Sikh militants were being given shelter in the Gurudwara and deceased Jaswinder Singh @ Jassa was a militant. He reiterated that he received information of abduction of Jaswinder Singh @ Jassa; he also got information that the U.P. Police came in a Maruti van and a truck and took away Jaswinder Singh @ Jassa from outside the Gurudwara. The said information was given by Ajayab Singh who was residing in the quarter no. 9 with Jaswinder Singh @ Jassa.

PW-2, Satnam Singh, the Supervisor, Gurudwara Rakabganj, New Delhi stated that Sewadars and Jaththedars of Gurudwara Management Committee, New Delhi were working under his supervision. Jaswinder Singh @ Jassa was employed as Sewadar in the Gurudwara Rakabganj and was residing in the flat located inside the premises of Gurudwara. On 30.10.1992 at about 8:30-9:00 AM, Jaththedar Shyam Singh gave him information that some persons had taken away Jaswinder Singh @ Jassa from outside the Gurudwara. Those persons came in two vehicles, while some amongst them were of the U.P. Police, others were in plain clothes. PW-2 identified Jaswinder Singh @ Jassa from the photographs who was abducted by the U.P. Police on 30.10.1992. He stated that he gave information of abduction of Jaswinder Singh @ Jassa to North Avenue Police Post and Parliament Street Police Station and on 100 Dial Number. He also gave information to the Manager, Gurudwara Management Committee who was sitting in the head office. The said information was initially given orally and later in writing. The written information given by PW-2 Satnam Singh has been proved and exhibited as Exhibit 'Ka-3'. PW-2 reiterated that he gave information of abduction of Jaswinder Singh @ Jassa personally to the Manager, Gurudwara Management Committee. The documents namely personal file of Jassa, photographs and attendance register maintained for October, 1992 to January, 1993 were handed over by him to C.B.I. during the course of investigation and the Seizure Memo (Exhibit 'Ka-4') bears his signature. In cross-examination, he stated that his office and residential quarters were in the same premises. His statement was recorded by the Delhi Police sometime after the incident and by the C.B.I. after about 1 and ¼ year of the incident. The Delhi Police also enquired on the date of the incident. PW-2 was confronted with his statement under Section 161 Cr.P.C. recorded by the Delhi Police, wherein it was averred that he got information of the incident at about 10:00 AM when he reached his office in the Gurudwara. A clarification was given by PW-2 Satnam Singh that he might not have given the correct time of getting the information of the incident of abduction as he was puzzled by the incident. PW-2 was also confronted on his statement in the examination-in-chief that Jaswinder Singh @ Jassa was abducted by the U.P. Police while this fact was not revealed by him in the written report given to the Manager, Gurudwara Management Committee nor that he mentioned the same in the report which he gave as an information to the Control Room at 100 Dial Number. PW-2 admitted in the cross-examination that he did not give description of the vehicles used in the

alleged abduction either in the written report ("Exhibit 'Ka-3") or in his statement given to the Investigating Officer. He further proved that cutting and overwriting in date as 1.10.1992 in the attendance register was made and signed by him. He further stated that the said overwriting/cutting occurred on account of the fact that Jaththedars who maintained the attendance register were mostly illiterate. The suggestion that Jaswinder Singh @ Jassa was not present in the Gurudwara on 29.10.1992 and 30.10.1992 has been emphatically denied by PW-2. He proved that in the relevant column of the attendance register as against the name of Jaswinder Singh @ Jassa on 30.10.1992 and 31.10.1992, "(.)(bindi)(dot)" was put by him as he knew that Sewadar Jassa could not perform his duty in the Gurudwara as he was taken away by someone. He categorically denied the suggestion that he did not get information about abduction of Jaswinder Singh @ Jassa on 30.10.1992.

PW-3 is Ajit Singh, the Manager of Delhi Sikh Gurudwara Management Committee who stated that Jaswinder Singh @ Jassa was appointed as Sewadar in the year 1990 and was working in the Gurudwara in the year 1992. On 30.10.1992 at about 9:00 AM, Satnam Singh, the Supervisor gave him information on telephone that some people (six in number) had taken away Jaswinder Singh @ Jassa from outside the Gurudwara, amongst whom three were in police uniform and other three in plain clothes and that they came in two vehicles. This witness had identified deceased Jaswinder Singh @ Jassa from the material exhibits "1 to 5", which are photographs of Jaswinder Singh @ Jassa. He further stated that a written report (Exhibit Ka-3) of the incident was also given to him by Satnam Singh, the Supervisor (PW-2) at about 11:00 AM on 30.10.1992. On the said complaint, an endorsement was made by him to lodge a report in the police station concerned which was proved being in his handwriting and signature by PW-3 and has been exhibited as "Exhibit Ka-3/1". The typed report given to the Police Station Parliament Street, New Delhi was proved bearing his signature as "Exhibit Ka-5". The receipt of the said report in the police station concerned (carbon copy) bearing signature of PW-3 has been exhibited as "Exhibit Ka-5/11". PW-3 then stated that he got intimation of encounter of Jaswinder Singh @ Jassa through a news item published in the Hindi Daily "Shram Meri", a local newspaper circulated in Bijnor District, which was received in his office after 1 and ½ weeks of the incident. In the cross-examination, PW-3 stated that C.I.D. recorded his statement after about 1 and ¼ year of the incident, whereas C.B.I. recorded his statement after two years. No other investigating Agency had recorded his statement. When confronted with the statement of C.B.I., PW-3 stated that he did not disclose the names of Satnam Singh and Shyam Singh who gave first information of the incident of abduction of Jaswinder Singh @ Jassa. In his statement under Section 161 Cr.P.C. recorded by C.B.I., it was written that "he was informed about the fact of taking away of Jaswinder Singh, Sewadar on 31.10.1992 while he was in office". On the discrepancy about the date of incident, PW-3 stated that the said date has wrongly been mentioned by C.B.I. He reiterated that the typed report "Exhibit Ka-5" given by him was received in the Police Station Parliament Street on 30.10.1992 at about 11:00-11:30 AM, receiving of which was also exhibited as "Exhibit Ka-5/1". He further clarified that he had no information about abduction of

Jassa made by the U.P. Police till the written report was lodged. However, when he went to the Gurudwara in the evening after his duties were over in the head office, he came to know that Jassa was taken away by the U.P. Police. PW-3 was confronted for non-disclosing the said fact, either in the first information report lodged by him or in his statement to C.B.I. or C.I.D. In reply, he denied that the said report was lodged on incorrect facts due to "Peshbandi". From the personal record of Jaswinder Singh @ Jassa, his birth certificate was shown to "PW-3" who identified the writing and signature of Satnam Singh and Sardar Ram Singh over the endorsement on the said document.

PW-4 Sardar Manendrajeet Singh, a Sewadar in Gurudwara Rakabganj stated that he was residing in quarter no. 9 in Gurudwara, Rakabganj premises alongwith Ajayab Singh, Jaswinder Singh @ Jassa and 2-3 other Sewadars. On 30.10.1992, he was on duty from 8:00 AM till 12:00 PM in a hall of the Gurudwara. On 29.10.1992, his shift duty was from 8:00 PM till 12:00 midnight. On 29.10.1992, when he came back from duty at around 12:00 midnight, he found two unknown (new) persons in the quarter apart from Ajayab Singh and Jaswinder Singh @ Jassa (two of his roommates); one of them was a Sardar whereas another was 'Mauna' [A Sikh who removed his beard and cut his hair (kesh)]. He came to know that those two new persons came to meet Jaswinder Singh @ Jassa only after Jassa was taken away. On 30.10.1992, when he went to duty in the morning, he came to know that Jaswinder Singh @ Jassa was taken away by the U.P. Police. PW-4 was cross-examined on the identity of those two new (unidentified) persons who allegedly stayed in quarter no. 9. In reply, he averred that when he came back from duty on 29.10.1992 at around 12:00 o'clock (midnight), he saw those two persons sleeping in the quarter. On 30.10.1992, while he was going to duty, he saw them talking to Jaswinder Singh @ Jassa. PW-4 was also confronted with his Section 161 Cr.P.C. statements recorded both by the C.I.D. and C.B.I. on the issue that he did not mention that the U.P. Police had taken away Jaswinder Singh @ Jassa and further with regard to identity of two unknown persons who allegedly stayed in quarter no. 9. On the first issue, PW-4 stated that he mentioned to C.B.I. during investigation that Jaswinder Singh @ Jassa was taken away by the U.P. Police but the reason for non-recording of the said fact in his statement was not known to him. For the second question, he stated that he did not mention to C.B.I. that both the unknown persons were Sardar (having 'kesh' and 'beard') and that if it was so mentioned in his statement, the reason was not known to him. PW-4 emphatically denied that Jaswinder Singh @ Jassa was not present in the quarter No. 9 (in the Gurudwara) on 20.10.1992 and 30.10.1992 and that he was involved in terrorist activities.

PW-6 namely Uday Rai, a shop keeper of Beetal-Beedi shop located on the road across Gurudwara Rakabganj, Delhi near Hanumal Ji Temple recorded his statement on 12.10.1999. He stated that around 7:00 AM before opening his shop, he went to Hanuman Ji Temple located outside the Gurudwara. At around 8:00-8:45 AM, when he was coming out of the temple he saw one Sardar aged about 20-25 years coming out from the Gurudwara on a cycle. At that time, a red Maruti van came and three persons in plain clothes caught hold of that Sardar. They brought him to a Circle near Dogra Taxi stand and made him sit in a truck. In that truck, 2-3 persons were sitting in 'Khaki' uniform. The said

truck went away on the Rakabganj Road. PW-6 stated that he could not notice the movement of red Maruti van and that the truck was of blue colour. When he reached his shop, he saw crowd collected in front of the Gurudwara and people present there were talking that a Sardar was taken away by the police and that he was a Sewadar in Gurudwara Rakabganj, New Delhi. After the said incident, Police of Parliament Street Police Station came on the spot and directed him to close the shop. His statement was also recorded by the police of the said Police Station and his narration of the incident was noted. From the statement of PW-6, it appears that though opportunity to cross-examine PW-6 was given to the defence but they did not avail the same.

PW-5 was posted as Sub-Postmaster in Majitha Post Office in the year 1994. Exhibit 'Ka-6', the telegram dated 20.10.1992 was shown to this witness and he stated that the said telegram was sent from Majitha Post Office on 20.10.1992 at about 2:00 PM by Jaswinder Singh to Jaththedar Shyam Singh (PW-1), Gurudwara Rakabganj. The said telegram was noted at serial number 'A-7' in the register of the Post Office concerned. PW-5 gave statement to C.B.I. after looking to the said register that the telegram was sent on 20.10.1992 and that the record of telegram Form was weeded out after two months. In cross-examination, PW-5 clarified that he was not present in the Majitha Post Office on the date when telegram was sent.

PW-9 is Vijay Kumar, a resident of Shalimar Bagh, New Delhi. He stated that he was working as a Cleaner in Dogra Taxi stand situated in front of Hanuman Ji Temple and stayed there in the end of October, 1992. On a date (which he did not remember), when he woke up in the morning he saw a mini truck of blue colour parked in front of the Temple. On the bumper of the said truck "Police" was written. In the said truck, 5-6 police personnel were present in uniform carrying badge of the U.P. Police. Thereafter, a red Maruti van came. At around 8:00-8:30 AM, a young boy (aged about 22-23 years) who was a Sardar wearing a yellow turban came out of Gurudwara Rakabganj, New Delhi on the cycle. Immediately, 3-4 persons in plain clothes came out from the said Maruti van and caught hold of Sardar, they put him in the said mini truck. The said Sardar shouted to inform in the Gurudwara that he was being taken away by the police. The truck and Maruti van left in the opposite directions. He stated that he could not note the registration number of the vehicles. A lot of crowd was collected on the spot and some people who came out of the Gurudwara took away the cycle of the young boy and then he came to know that the said boy was a Sewadar in the Gurudwara. This witness was cross-examined on his statement recorded by Delhi Police with regard to identity of the mini truck. He stated that his statement was recorded by Delhi Police after about 17-18 days of the incident and he did not mention the colour of the truck being 'yellow' and that if it was so written, it was wrong. The statement of PW-7 recorded by C.B.I. was also put to him to confront that he mentioned that truck was of 'yellow' colour in his statement under Section 161 Cr.P.C. This witness categorically replied that the truck was of blue colour and he had seen the same from his own eyes. The colour of the truck 'yellow' was wrongly mentioned in his statement recorded by C.B.I. He denied that he went to the Gurudwara to give information of the incident and stated that Gurudwara people themselves came out and asked him, it was then informed that the persons who took away Sardar boy

were from the U.P. Police as they were wearing badge of U.P. Police. P.W.-7 denied that he was giving wrong statement under the pressure of Gurudwara people.

PW-10, Ajayab Singh is a Sewadar in Gurudwara Rakabganj who was residing in quarter 9 in Gurudwara premises. He stated that Balveer Singh, Jogendra Singh, Manjeet Singh (PW-4) and Jaswinder Singh @ Jassa (deceased) were residing alongwith him in quarter no. 9. His duty shift in the Gurudwara in October, 1992 was from 4:00 AM till 8:00 AM and from 4:00 PM till 8:00 PM. On a day prior to the incident of abduction, he came back to the quarter at around 8:00 PM and when he woke up at around 3:30 AM to go on duty, he saw two new people sleeping on the cot of Jaswinder Singh @ Jassa. Jaswinder Singh @ Jassa was also sleeping in a separate cot near him. He further states that when he came back in the night to the quarter after having dinner, though Jassa was sleeping but those two new persons were not there. In the morning at around 8:00 AM after finishing his duty when he was standing near the 'piyao' (drinking water kiosk) on the gates of Gurudwara, he heard a "shore" that someone was abducted from outside the Gurudwara. When he came out of the gate alongwith other Gurudwara people, they were informed by the Dogra Taxi stand persons that a boy was taken away by the U.P. Police and his cycle was standing there. When they looked on the blue mark on the cycle, they came to know that it belonged to a Sewadar of the Gurudwara. They took the cycle inside the Gurudwara and then on identification of the same, it was found that it belonged to Jaswinder Singh @ Jassa. PW-10 stated that when he came inside the Gurudwara after the incident, he did not find those two unknown persons in the Gurudwara who were sleeping on the cot of Jaswinder Singh @ Jassa in his quarter. On enquiry, it was transpired that Jassa went out of the Gurudwara to get milk on the cycle when he was taken away by the U.P. Police and this fact was told to him by Jaththedar Shyam Singh.

PW-10 further stated that Jaswinder Singh @ Jassa was ill prior to the incident. He was confronted with his statement under Section 161 Cr.P.C. recorded by C.I.D. on the identity of those two unknown persons and the time when Jaswinder Singh @ Jassa had left the quarter no. 9 to get milk. He denied giving contradictory statements to the investigating agency. PW-10 was also confronted with his statement given to C.B.I. about the identity of those two unknown persons. He categorically denied that he did not see anything and that Jaswinder Singh @ Jassa was not taken away from outside the Gurudwara and that he was giving false statement on the asking of Gurudwara people.

14. As noted above, PW-1 to PW-4, PW-6, PW-9 and PW-10 are the first set of witnesses who were examined on the charges of abduction of Jaswinder Singh @ Jassa.

Placing their statements as noted above and the documentary evidences, i.e. material exhibits namely photographs, personal records (leave application, medical, leave application form telegram) of deceased and duty/attendance register i.e. 'Ka-2', it was vehemently argued by Sri Dileep Kumar learned Senior Counsel for the appellants that the duty/attendance register is a forged document which had been prepared for the purpose of the case. In fact, no register was being maintained in the Gurudwara and for this reason, the register "Exhibit Ka-2" starts with the

attendance for the month of October, 1992 itself. No other attendance register being maintained in the Gurudwara prior to October, 1992 was seized by C.B.I. The entries in the attendance register seized by C.B.I., therefore, cannot be taken as true to prove the presence of deceased Jaswinder Singh @ Jassa in Gurudwara Rakabganj on 29.10.1992 and 30.10.1992. Moreover, there are cutting and overwriting in the said register and the prosecution witnesses could not prove the genuineness/authenticity of the said document.

15. As far as personal records of deceased are concerned, it is contended on behalf of the appellants that the leave application does not bear a date. The date of giving medical certificate in the office of the Gurudwara is not known. Medical certificate does not contain the thumb impression or signature of the applicant. It could not be ascertained as to when telegram for extension of leave was received in the office of the Gurudwara. The date of sending the said telegram as per the prosecution witnesses was 20.10.1992, whereas leave was allegedly applied by deceased only upto 18.10.1992. As per the entries in the attendance register, Jaswinder Singh @ Jassa was continuously shown on leave from 4.10.1992 till 27.10.1992, whereas in the leave application he mentioned the period of leave from 4.10.1992 to 18.10.1992. The telegram for extension of leave as per the oral and documentary evidences dated 20.10.1992 was received in the office of Gurudwara on 23.10.1992. It is, thus, not known as to how leave of Jaswinder Singh @ Jassa was recorded, thus, from 19.10.1992 and 22.10.1992, before the date when telegram was received in the office of the Gurudwara.

16. It is, thus, vehemently contended that the entries in the duty/attendance register were made on a back date as leave of Jaswinder Singh @ Jassa could not have been recorded without the receipt of telegram seeking extension of leave. It is, thus, contended that the entries of attendance of Jaswinder Singh @ Jassa in the Gurudwara on 28.10.1992 and 29.10.1992 were fabricated entries having been made on a back date in order to establish the presence of Jaswinder Singh @ Jassa in the Gurudwara. It is, thus, vehemently argued that the documentary evidences (seized by C.B.I. on 16.10.1993) could not be relied upon to hold that Jaswinder Singh @ Jassa was present in the Gurudwara and was abducted from outside its gates.

It is then argued that PW-1 has not been able to prove the movement of deceased in the manner in which it was averred by him. The presence of deceased in the Gurudwara on the date of incident is highly doubtful.

17. As per the statement of PW-2, he was the first person to give information of the incident of abduction of Jaswinder Singh @ Jassa to Delhi Police on 100 Dial Number. There are serious contradictions about the time when PW-2 came to know about the fact of abduction of Jaswinder Singh @ Jassa from the Gurudwara and intimation was given by him on 100 Dial Number. He admits that before he gave intimation on 100 Dial Number (Control Room) he was told that the police had already been intimated but he insisted to have given information on 100 Dial Number again but he did not mention the said fact to Delhi Police. Learned Senior Counsel further urged that the entries in the attendance register were supposed to be

checked by PW-2 who was a Supervisor posted in the Gurudwara. PW-2 also could not explain as to how leave from 19.10.1992 till 22.10.1992 was granted to deceased Jaswinder Singh @ Jassa when there was no information in the Gurudwara office about extension of leave upto 22.10.1992 as the telegram was received only on 23.10.1992.

18. With the above, it is vehemently urged that all documentary evidences, the material exhibits including the duty/attendance register Exhibit 'Ka-2' could not be proved by the prosecution. Once the presence of Jaswinder @ Jassa in the Gurudwara on 30.10.1992 is not proved, the entire case of abduction set up by the prosecution becomes false resulting in frustration of its case about illegal/extra-judicial killing of Jaswinder Singh @ Jassa by the police personnel of the U.P. Police (P.S. Baradhpur, Bijnor). The alternative theory set up by the defence about terrorist activities of deceased and his killing in a police encounter being Sikh militant stands itself proved from the said facts and circumstances of the case.

19. Further it is argued that there are improvements on vital points in the statement of PW-4 with regard to identity of two unknown persons allegedly present in the quarter of Jaswinder Singh @ Jassa in the intervening night of 29-30.10.1992. The written report allegedly given by the Manager, Ajit Singh came into picture only on 17.11.1992 when a report in writing was submitted by Sukhi Ram, the In-charge Police Outpost, North Avenue. None of the documentary evidences or oral testimony of prosecution witnesses could prove the charge of abduction beyond all reasonable doubts.

20. Dealing with the above arguments, it is pertinent to note that to prove the charge of abduction, the prosecution had produced two witnesses of fact namely PW-6 and PW-9 who stated to have seen the police personnel parking their vehicles at the Dogra Taxi stand (near Gurudwara Rakabganj) and taking away Jaswinder Singh @ Jassa (deceased) in those vehicles from the road outside the Gurudwara. To prove the report of abduction lodged by the Manager, Gurudwara Management Committee, three witnesses namely PW-11, the Assistant Sub-Inspector, Police Station Parliament Street; PW-12, the Officer in the Police Post North Avenue on duty on the date of incident; and PW-13, Sukhi Ram, Chauki In-charge, Picket Police Post, North Avenue, Parliament Street had entered in the witness-box. Their testimonies would be appraised at the appropriate place in the judgment.

21. We may further note that PW-29 Dalveer Singh, a retired police officer, then posted in the Police Lines, Bijnor had entered in the witness box to prove that two vehicles were hired by the Station House Officer, Police Station Baradhpur, Bijnor on 29.10.1992 from the Police Lines, Bijnor. He proved that running register regarding movement of the vehicle, "material Exhibit 58(D-40)" bears signature of the officer concerned. It was further proved that demand of vehicles (a hooter vehicle and a light vehicle) was made through a wireless message endorsed and exhibited as Exhibits "Ka-31", "Ka-31/1" and "Ka-31/2". On the said demand, a Tata Truck No. UP20/4473 (Tata 407 Detain) was released from the Police Lines, Bijnor, endorsement of which was made by the officer concerned. The said vehicle was driven by Driver Kailash.

22. Much emphasis has been laid on the statement of PW-29 by the learned

Senior Advocate for the appellants to assert that Tata Truck (blue colour) had covered only 208 kms. that too on 29.10.1992 which shows that the said vehicle though hired by accused Dhirendra Singh Yadav, S.H.O. Baradhpur, Bijnor but it did not ply to Delhi.

PW-30, a resident of Baradhpur, Bijnor had also been examined who stated that he went with Avtar Singh (PW-36) and some police personnel from Bijnor to New Delhi on 29.10.1992 in a red Maruti van and Tata Truck (blue colour). They reached Gurudwara Rakabganj, New Delhi at around 12:00-1:00 AM; 2-3 police personnel and his uncle went inside the Gurudwara and the remaining persons stayed in the vehicles. PW-30 also stated that he later went inside the Gurudwara. His uncle Avtar Singh talked to Jaswinder Singh @ Jassa and he alongwith his uncle slept in the quarter of Jassa. In the morning, his uncle woke him up and told that Jassa had gone somewhere and they started searching for him in the Gurudwara and later he was told by his uncle that U.P. Police had taken away Jassa. When they came outside the Gurudwara, those vehicles were not there and they came to their cousin's place in a bus.

23. We may note at this juncture that the examination-in-chief of this witness (PW-30) was recorded on 12.6.2003. On the said date, all accused persons were not present in the Court and this witness being an eye-witness, the Court was of the view that he could identify the accused persons so his statement-in-chief was withheld on that day. On the next date fixed for continuation of his examination-in-chief, i.e. on 15.12.2003, this witness was brought to the Court on being arrested which fact is evident from his statement in the cross-examination recorded on 12.4.2004. On 15.12.2003 when PW-30 entered in the witness-box, he refused to identify the accused persons saying that the accused persons present in the court were not the same persons who went with him to Delhi to bring Jaswinder Singh @ Jassa. This witness, however, reiterated that the police personnel who went to Delhi alongwith him were from the U.P. Police. At this stage, PW-30 was cross-examined by the Public Prosecutor for the C.B.I.; in the cross-examination, he stated that he was investigated by C.B.I. and that he went to Delhi on 29.10.1992 alongwith his uncle and some police personnel from Bijnor in a private vehicle. With regard to identity of the accused, relevant part of statement of PW-30 reads as under:-

"हाजिर अदालत अभियुक्तगण को देखकर कहा कि इनमें से कोई भी व्यक्ति वह लोग नही है जो मुझे लेकर दिल्ली गुरूद्वारा आये थे जो पुलिस वाले मुझे लेकर आये थे वो यू.पी. पुलिस के थे किस एरिया के थे मुझे नही पता। यह मै जानता हूँ जो हमारी मारूती वैन चला रहा था वो कुम्हारो का लड़का पप्पू? था।

सुना गया पी.पी. सी.बी.आई. को इस स्टेज पर उनके गवाह से जिरह करने की अनुमति दी गयी

X X X X X

जिरह वास्ते पी.पी. सी०बी०आई०

यह सही है कि सी०बी०आई० ने मेरा बयान लिया था और पूछताछ की थी यह बात भी सही है कि मै 29-10-92 को पुलिस वालो के साथ तथा चाचा जी के साथ विजनौर से प्राइवेट वैन में चला था और चाचा जी भी साथ थे। यह भी सही है कि मेरे साथ तीन पुलिस वाले भी बैठकर आये थे गाड़ी में पांच आदमी तथा ड्राइवर था। मैने किसी पुलिस वालो का नाम नही बताया था मैने केवल नाम अपने चाचा से सुना था मै उसे जानता नही था। यह सही है कि मैने सी.बी.आई.

वालो को बताया था कि दो पुलिस वाले और थे जिनमें एक काले रंग का मोटा सा वर्दी पहने था यह कहना गलत है कि मै पुलिस वालो से डर के मारे आज न्यायालय में पहचानने में कतरा रहा हूँ। यह कहना भी गलत है कि मेरे साथ जो वैन में सवार थे उनमें धीरेन्द्र सिंह, दौजी? व कलवा सिपाही नहीं थे। यह कहना गलत है कि ये तीनो व्यक्ति आज न्यायालय में उपस्थित है और मै जानबूझ कर ना पहचान रहा हूँ। मेरी वैन में जो मेरे साथ आये थे उनमें से मै अपने चाचा अवतार व ड्राइवर पप्पू? को जानता हूँ और कौन थे मुझे पता नही। यह कहना गलत है कि मै जानबूझ कर मुल्जिमान से मिल गया हूँ और सही बात ना बता रहा हूँ। यह कहना भी गलत है कि मुल्जिमान के पुलिस में कार्यरत होने के कारण उनके आतंक के कारण मैं उनको पहचानने से इंकार कर रहा हूँ।"

Further, in the cross-examination for the accused recorded on 29.1.2004, PW-30 took a U-turn and resiled from his previous versions in the examination-in-chief. He denied having gone to Delhi on 29th October; stayed with Jassa in the Gurudwara and further stated that he met Jassa in Bijnor who came to his shop at Nagina alongwith one Kamaljeet to threaten him that their identity should not be disclosed to the police.

24. A reading of the cross-examination of PW-30 recorded on 29.1.2004 shows that in narration of the entire story, he reiterated the versions of the accused about the incident. PW-30 was further recalled on 12.4.2004 for re-examination on an application moved by the prosecution after completion of his cross-examination on 29.1.2004 for the accused. His previous statements dated 12.6.2003, 15.12.2003 and 29.1.2004 were put to him by the prosecution to bring to his notice that he made contradictory statements in the Court. On being confronted, PW-30 deposed that his all three previous statements were true. He reiterated that he went to Delhi with the police personnel but did not meet Jassa on 29.10.1992. He emphatically denied that he was making statement about going to Delhi alongwith the police personnel under the pressure of the Investigating Agency namely C.B.I.

25. As noted above, the record indicates that PW-30 was arrested to appear in the Court after 12.6.2003, i.e. before his examination-in-chief could be concluded. It appears that U-turn taken by PW-30 in the cross-examination recorded on 15.12.2003 was not his independent decision. It appears to have been made to support the defence theory under some kind of pressure. His statement of refusal to identify the accused is also found shaky. The statement of this witness (PW-30) made in the Court when read as a whole, proves that he went to Delhi with the police personnel of U.P. Police from Baradhpur Bijnor on 29.10.1992 and that he had also gone to the Gurudwara Rakabganj, New Delhi. The question as to the purpose or reason of going to Delhi alongwith police personnel has not been correctly answered by this witness (PW-30).

26. Taking into consideration the whole testimony of PW-30, we are of the considered view that at least his deposition does not shake the basic version of the prosecution story, as this witness had supported the prosecution case in his first statement-in-chief recorded on 12.6.2003 and for this reason he was not declared hostile, though cross-examined by the prosecution on contradictory versions made in the Court.

27. All other private persons produced by the prosecution namely Chandra Prakash (PW-32)(Driver); Avtar Singh (PW-36)(uncle of PW-30) and Jasveer Singh (PW-37), to prove the movement of

accused (police personnel of P.S. Baradhpur, Bijnor) to Delhi had been declared hostile as they did not support the prosecution story.

28. PW-34 Saran Jeet Singh, a resident of Delhi is related to deceased Jaswinder Singh @ Jassa being his cousin. He was produced to prove the presence of Jassa in Delhi on 28.10.1992. This witness stated that Jaswinder Singh @ Jassa came to his house on 28.10.1992 and had dinner with him. On 30.10.1992, he got information of abduction of Jassa at about 10:30 AM through a telephonic message from the Gurudwara. When he went to the Gurudwara, he was told by Vijay Kumar (PW-9) at the Dogra Taxi stand that Jassa was taken away by the U.P. Police and he also enquired about the said fact from the Gurudwara people.

We may note that the statement of PW-34 is a hearsay evidence and as such cannot be given much credence so as to prove the presence of Jassa (deceased) in the Gurudwara on 29.10.1992 or the fact of his abduction from the road outside the Gurudwara in the morning on 30.10.1992.

29. Now we proceed to analyse the testimonies of PW-11 and PW-12.

PW-11, an Assistant Sub-Inspector posted on duty in Parliament Street Police Station, New Delhi in October, 1992 proved the signature and handwriting of S.H.O. Ashok Hari in the noting on Exhibit 'Ka-5' (the typed report given by the Manager, Gurudwara Management Committee about the abduction of Jaswinder Singh @ Jassa). This witness has also proved the writing and signature of Sukhi Ram on Exhibit 'Ka-5/2'. He further stated that Chik FIR of Case Crime No. 400 of 1992 under Section 365 IPC was registered by him on 17.11.1992 at 8:50 PM on the basis of the written reports exhibited as Exhibits 'Ka-5' and 'Ka-5/2'. The S.H.O. Ashok Hari had died in an accident and as such he entered in the witness-box to prove the writing and signature of the said officer.

Much emphasis has been laid by the learned Senior Advocate for the appellants on the statement of PW-11 in the cross-examination that the U.P. Police was not named as suspected accused in the FIR registered on 17.11.1992. It is further vehemently contended that the written report "Exhibit Ka-5", the endorsement of S.H.O. Ashok Hari (Exhibit 'Ka-5/1') and the report of Sukhi Ram dated 17.11.1992 (Exhibit 'Ka-5/2') are all fabricated documents. It is contended that the Case Crime No. 400 of 1992, i.e. Chik FIR was not registered in the Police Station Parliament Street, New Delhi rather it was an interpolation made by Sukhi Ram (PW-13) at D.D. No. 20A. There is no record of receipt of the typed report (Exhibit 'Ka-5') given by Ajit Singh (PW-3) (the Manager, Gurudwara Management Committee) in the Police Station Parliament Street, New Delhi. The case of the prosecution that typed report was received on 30.10.1992 in the Police Station Parliament Street and was endorsed to Sukhi Ram, Chauki In-charge of Picket Police Post, North Avenue is nothing but a result of fabrication. It is argued that all the documents proved by PW-11, PW-12 and PW-14, were fabricated later on. None of these witnesses mentioned the names of PW-1 and PW-2 as the persons who gave first information to the police about the factum of abduction. The written report dated 30.10.1992 (Exhibit 'Ka-5') and the report of Sukhi Ram (PW-13) Exhibit 'Ka-5/2' were prepared as a result of "Peshbandi". The

C.B.I. or Delhi Police did not investigate into the said aspect of the matter.

30. At this stage, we may further appreciate the testimony of PW-13, the Sub-Inspector Sukhi Ram who was posted as Chauki In-charge in Police Outpost, North Avenue, Police Station Parliament Street. He deposed that Gurudwara Rakabganj, New Delhi lies within the territorial limits of the Police Outpost, North Avenue wherein that he was posted in October, 1992 as Chauki In-charge. He states that on 30.10.1992 at about 10:40 AM, he got a wireless message that a Sewadar of Gurudwara Rakabganj namely Jassa Singh was taken away by the U.P. Police. The said information was entered in the Daily Diary No. '9' of the Police Outpost. After getting the said information, he went to the place of incident and made enquiry from the persons present namely Uday Rai, Raja Ram and other taxi drivers. It was then transpired that Jaswinder Singh @ Jassa (aged about 22-23 years), a resident of Majitha, Amritsar, who was working as Sewadar in Gurudwara Rakabganj, New Delhi was taken away in two vehicles (a red Maruti van and blue colour truck) from outside the Gurudwara at about 8:30 AM on 30.10.1992. The entry of wireless message received on 30.10.1992 at about 10:40 AM in Police Post North Avenue at D.D. No. '9' has been proved by 'PW-12' by bringing the original Daily Diary of the said police post, which was exhibited as "Exhibit 'Ka-12". At this stage, we may note that PW-12, Constable Shyam Lal posted in Police Force, North Avenue, New Delhi proved that the true copy of D.D. No. '9' was handed over by him, in his own handwriting and signature, to the C.B.I. during investigation.

PW-13, S.I. Sukhi Ram further stated that he sent wireless messages to SHO(s) and DCP(s) of Delhi and S.S.P. of the entire country to transmit the lookout notices about Jassa Singh. These wireless messages having been sent by him in his handwriting and signatures have been proved as Exhibit 'Ka-14'. As noted above, D.D. No. '30' dated 30.12.1992 of Police Outpost, North Avenue, New Delhi was proved in original by PW-12, the Constable Shyam Lal and exhibited as "Exhibit Ka-13". It was proved by him that entry in D.D. No. '30' was in the handwriting of Sukhi Ram which he could recognize as he was posted alongwith Sukhi Ram at Police Outpost North Avenue. On the other hand, Sukhi Ram (PW-13) stated that the report with regard to the investigation made by him on 30.10.1992 was entered in D.D. No. 30 in his own handwriting. The original D.D. No. '30' was produced in the Court to prove and exhibit the said entry as "Exhibit 'Ka-13". PW-13 further states that during the course of investigation, it came to his notice that Jassa was taken away by the U.P. Police. As a result of it, a wireless message dated 4.11.1992 was sent to S.S.P.(s) of Uttar Pradesh which was also in his handwriting and signature. The said wireless message was proved from true photocopy as "Exhibit Ka-15". It was stated by PW-13 that he did not get any feedback of the wireless messages sent by him as "Exhibit 'Ka-15". Typed report given by the Manager, Gurudwara Management Committee about the incident dated 30.10.1992 was received by him after it was forwarded for enquiry by SHO, Parliament Street Sri Ashok Hari (Exhibit Ka-5/1). When he did not get any feedback of the whereabouts of Jassa till 17.11.1992, he submitted his report (Exhibit 'Ka-5/2') alongwith the written report (Exhibit 'Ka-5') about missing of Jassa under Section 365 IPC on 17.11.1992. The Case Crime No. 400 of 1992 was registered on the basis of the said report and investigation was handed over to him. During the course of

investigation, he prepared a site plan, "Exhibit Ka-16" and recorded statements of the witnesses. On 18.11.1992, he again sent wireless messages to SSP(s) of the U.P. Police which were proved being in his handwriting and signature as "Exhibit Ka-17". PW-13 stated that investigation could not be completed by him on account of the order of the Apex Court in a writ petition filed in relation to the incident in question. On 14.12.1992, he again sent wireless messages to SSP(s) of the U.P. Police, the copy whereof has been proved being in his handwriting and signature as "Exhibit Ka-18".

Placing the statement of PW-13, it was vehemently argued by the learned Senior Advocate for the appellants that PW-13 had been made a judge of his own cause by handing over the investigation to him on the alleged report given by Ajit Singh (the Manager of Gurudwara Management Committee). As per the statement of PW-13, the Chik report of Case Crime No. 400 of 1992 was registered at Police Station Parliament Street, New Delhi, on the report (Exhibit 'Ka-5/2') given by him only. According to the learned Senior Advocate, the said report, thus, becomes a complaint and PW-13 would fall in the category of the complainant. It is, thus, argued that it is well settled principle of law that a complainant cannot be made Investigator of his own complaint. The act of the SHO, Police Lines in handing over the investigation on the report of abduction of Case Crime No. 400 of 1992 to PW-13 Sukhi Ram was, therefore, in contravention of the principles of natural justice. We are afraid to accept the said submission as there is no substance in the same. The Investigation in Case Crime No. 400 of 1992 admittedly had not been completed by Delhi Police or the Investigating Officer Sukhi Ram who entered in the witness-box as PW-13. The investigation with regard to the charge of abduction and killing of Jassa by the accused persons (policemen of Police Station Baradhpur, Bijnor) has been completed by C.B.I. on the direction issued by the Apex Court in a writ petition filed by a relative of Jaswinder Singh @ Jassa.

31. It is further urged that PW-6 and PW9 are star witnesses of the prosecution. PW-6, however, was not cross-examined so his evidence-in-chief cannot be given credence. PW-6 was projected as eye-witness by the prosecution to establish the charge of abduction of Jassa. This witness was allegedly running a Beetal Shop outside the Gurudwara but in the site plan prepared by the Investigating Officer (PW-46), there is no mention of the Beetal Shop outside the Gurudwara. PW-6 and PW-9, two independent witnesses produced by the prosecution did not identify the victim/deceased from the photographs exhibited as material "Exhibits 4 and 5". There is no substance in their evidence about Jassa being abducted by the U.P. Police form the road outside the Gurudwara on 30.10.1992. It is, thus, vehemently urged that they cannot be placed in the category of eye-witnesses rather their evidence at best can be said to be hearsay evidence.

32. With regard to PW-13, it is further argued that another star witness of the prosecution to prove the charge of abduction is Sukhi Ram (PW-13) who made preliminary enquiry in the Case Crime No. 400/1992. Any enquiry/investigation on the information of commission of a crime by someone starts with the report registered under Section 134 Cr.P.C. which is termed as the first information report. The enquiry conducted by PW-13 before registration of FIR on

17.11.1992 as Case Crime No. 400/1992, therefore, cannot be treated as a proof of charge of abduction by the accused persons. The result is that none of the prosecution witnesses examined by the prosecution could prove the charge of abduction or identify the appellant or the accused persons being preparators of crime. Their statements regarding abduction of Jaswinder Singh @ Jassa by U.P. Police is not direct but only hearsay evidence. Even otherwise, the entire investigation/enquiry conducted by the PW-13 was tainted, illegal and uncreditworthy. The report prepared by PW-13 being outcome of manipulation, manufacturing of documents, the conviction of accused cannot be recorded on the basis of his report.

It is further urged that the Investigating Officer of C.B.I. namely P.W. 46 admitted in his deposition before the Court that he did not make any enquiry about the authenticity of the attendance register allegedly maintained in the Gurudwara; neither he made any enquiry with regard to the genuineness of the medical certificate nor about the entries of leave granted to Jassa from 19.10.1992 till 22.10.1992. The Maruti van allegedly used in abduction of Jassa was not seized to make it a case property.

33. Dealing with the above submissions, we may note that the record indicates that after completion of the examination-in-chief of PW-6, twice opportunity of cross-examination was granted to the accused. They did not avail the said opportunity and during the intervening period, PW-6 Uday Rai died in an accident. His cross-examination was, therefore, not possible in the circumstances of non-availing of opportunity granted to the accused by the Court. The submission of learned Senior Advocate that his evidence in chief cannot be read to prove the case of the prosecution is, thus, found misconceived.

34. As far as the investigation made by Sukhi Ram PW-13, we may note that he was cross-examined on behalf of the accused only on the wireless messages sent by him and the date and time of first information report [typed report given by Ajit Singh (PW-3)] recorded at D.D. No. '9' of Police Outpost, North Avenue, New Delhi and his knowledge about involvement of the U.P. Police. PW-13 was contradicted on the statement of witnesses recorded by him during the course of initial investigation and identity of Tata truck disclosed by the witnesses Uday Rai (PW-6) and Vijay Kumar (PW-9). He was not confronted on the investigation made by him on the first information report forwarded by SHO, Police Station Parliament Street namely Ashok Hari. No question was put up to him to dispute the authenticity of the documents proved by him (Exhibit Ka-5) namely typed report received with the endorsement of SHO Ashok Hari (Exhibit 'Ka-5/1') and the endorsement to PW-13 to make an enquiry (Exhibit 'Ka-5/2') as also the entries in D.D. No.'9' and D.D. No. 30 proved by PW(s)-11, 12, 13.

35. On the issue of authenticity of the attendance register seized by PW-46, Investigating Officer, C.B.I., suffice it to note that the Investigating Officer had admitted that he did not make any enquiry about the attendance register being maintained ordinarily in the office of Gurudwara Rakabganj and apart from the register seized by him with the Seizure Memo dated 16.12.1993 (Exhibit 'Ka-4'), no other attendance register was asked by

him from the office of Gurudwara. This omission on the part of the Investigating Officer, in our opinion, may be considered as a lapse in the investigation but that by itself would not be sufficient to throw away the entire prosecution case being based on manufactured documentary evidences. The oral depositions of prosecution witnesses cannot be brushed aside on the said ground urged vehemently on behalf of the appellants. The entries in the attendance register maintained in Gurudwara Rakabganj were proved by PW-1 being in his handwriting. Apart from few minor contradictions, no major discrepancy could be pointed out from his deposition.

The Investigating Officer, C.B.I. (PW-46) further proved that after registration of the FIR by C.B.I. dated 15.11.1993, he recorded statements of witnesses, seized all documents related to articles of the case. He proved FIR dated 15.11.1993 as "Exhibit Ka-63", seizure memos as "Exhibits Ka-51, Ka-53 and Ka-56, Ka-64"; two site plans of both the places of incident prepared by him as "Exhibit Ka-65 and Ka-66"; the seizure memo dated 16.12.1993 for seizure of documents from the Gurudwara Office as "Exhibit Ka-4". He proved that he recorded statements of Satvendra Singh (PW-30), Avtar Singh (PW-36) and Jasveer Singh (PW-37) during the investigation made by him. He proved that he recorded statement of Satnam Singh (PW-2) in his office at Delhi. He was confronted on the correctness of the site plan of the incident of abduction outside the Gurudwara. PW-46 replied that he might not have indicated the Beetal Shop in the site plan but there is description of the same in the Case diary. PW-46 was mainly confronted with 161 Cr.P.C. statement of witnesses recorded by him. He reiterated what has been transcribed in the Case Diary. Apart from the lapses pointed out in the investigation done by him, nothing could be brought before us which would substantiate the submissions of the learned Senior Counsel for the appellants regarding the investigation being based on the manufactured documents or a result of illegal exercise of power conferred on the Investigating Officer. The evidence collected by the Investigating Officer C.B.I. (PW-46) seized form different sources are part of record of the trial.

36. The relevant questions on the issue of abduction arisen before us are (i) as to whether Jaswinder Singh @ Jassa (deceased) was present in Gurudwara Rakabganj in the intervening night on 29-30.10.1992 and further (ii) whether he was abducted/taken away by the U.P. Police (accused persons) in the morning on 30.10.1992 from the road outside the Gurudwara.

37. On the said questions, on appreciation of oral and documentary evidences produced by the prosecution, the following circumstances can be culled out from the record and have been proved by the prosecution:-

(i) It was proved by the prosecution that Jaswinder Singh @ Jassa aged about 22-23 years was a Sewadar in Gurudwara Rakabganj at the time of the incident, i.e. in the year 1992. He was residing in Quarter No. 9 of Gurudwara Rakabganj alongwith Manendra Jeet Singh (PW-4), Ajayab Singh (PW-10), Jogindar Singh and Balveer Singh (all Sewadars of Gurudwara Rakabganj).

(ii) Deceased Jassa went on leave by moving a leave application on 4th October, 1992 and was on leave upto

18.10.1992. He further gave application for extension of leave till 27.10.1992 which was duly approved by the Gurudwara authority. The prayer for extension of leave for the aforesaid period was made through a telegram sent from Majitha Post Office, proved by PW-5 (an employee of the Postal Department).

(iii) In the intervening night on 29-30.10.1992, two unknown persons came to quarter no. 9 and stayed with Jassa. As those persons were not known to his roommates PW-4 Manendra Jeet Singh and PW-10 Ajayab Singh, they had mentioned them as "unknown" in their statements. There is some dispute about their identity being "Sardar" and "Mauna", but the presence of two unknown persons in quarter no. 9 in the intervening night of 29-30.10.1992 was proved by the flatmates of Jaswinder Singh @ Jassa namely PW-4 and PW-10 and could not be disputed successfully by the defence/appellants.

(iv) PW-1 Shyam Singh, a Jathethedar in Gurudwara Rakabganj, In-charge of Sewadars, deposed that the entries about attendance of Jassa in the attendance register were made by him.

(v) PW-2 Satnam Singh is the witness who gave first information of abduction of Jassa to North Avenue Police Outpost and Parliament Street Police Station on 100 Dial Number. He deposed that he also gave information in the Gurudwara Head office initially oral and later in writing to the Manager, Gurudwara Management Committee. He also proved the written report given by him to the Manager Gurudwara Management Committee as "Exhibit Ka-3". PW-2 was confronted on the time of the intimation/information given by him at 100 Dial Number to the Manager, Gurudwara Management Committee. PW.3, Ajit Singh, the Manager Gurudwara Management Committee, however, proved that typed report dated 30.10.1992 was given by him in Police Station Parliament Street on the information given by Satnam Singh, the Supervisor in writing as "Exhibit Ka-3". The receipt of typed report (Exhibit 'Ka-5') sent by PW-3, the Manager of Gurudwara Management Committee has been proved as "Exhibit Ka-5/1" being the handwriting and signature of Ashok Hari, the then SHO, Parliament Street Police Station by PW-11, the Assistant Sub-Inspector on duty in Parliament Street Police Station, New Delhi in October, 1992. There are two endorsements on the typed report (Exhibit 'Ka-5') which are about the receipt of copy of the same in the Police Station Parliament Street on 30.10.1992 by S.H.O. Ashok Hari; as noted above, his signatures have been identified and proved by PW-11. Another endorsement is on the copy forwarded to In-charge Picket Police Post, North Avenue to enquire. It is also of the same date i.e. 30.10.1992, and has also been proved and exhibited as "Exhibit Ka-5/1". The enquiry report dated 17.11.1992 given by Sukhi Ram (PW-13) received on 17.11.1992 at 8:50 PM in the Police Station Parliament Street, New Delhi has been proved by PW-11 (Exhibit 'Ka-5/2') in the handwriting and signature of S.I. Sukhi Ram. The first information report namely Case Crime No. 400 of 1992 under Section 365 IPC had been registered on the basis of the said report.

(vi) A perusal of the report dated 17.11.1992 submitted by Sukhi Ram (PW-13) further indicates that on receipt of written complaint of Ajit Singh, the Manager Gurudwara Management Committee, wireless messages were sent by Sukhi Ram as "lookout notices". When no feedback was received by him, the report regarding his abduction under Section 365 IPC on the information given by PW-3 Ajit

Singh was submitted. PW-13 had entered in the witness box and proved the entries made by him in D.D. No. '9' with regard to the message received in Picket Police Post, North Avenue on 30.10.1992 at about 10:40 AM. The said entry records that a Sewadar (Jaswinder Singh @ Jassa) of Gurudwara Rakabganj was taken away by U.P. Police. The wireless message sent by 'PW-13' as In-charge Police Outpost, North Avenue to the DCP New Delhi and SSP(s) of the country have been proved as "Exhibit Ka-14". PW-13 also proved the report of the enquiry made and entered by him in D.D. No. '30' dated 30.10.1992 maintained in Chauki North Avenue being in his handwriting. It stands proved from the record that PW-13 went to the place of abduction under the directions issued by SHO, Police Station Parliament Street, under whose jurisdiction he was working as Chauki In-charge Police Outpost, North Avenue. The enquiry made by PW-13 on 30.10.1992 under the direction of his Superior cannot be accepted to be result of fabrication or a manufactured document being presented as a result of "Peshbandi". The said report being submitted by Sukhi Ram (PW-13) in discharge of his official duties cannot be discarded as being tainted on the contention of the learned counsel for the appellants that PW-13 had no jurisdiction to make a preliminary enquiry. The delay in lodging the first information report about missing of Jaswinder Singh @ Jassa cannot be attributed to the first informant namely Ajit Singh, the Manager, Gurudwara Management Committee (PW-3). The argument of learned Senior Advocate that all documents relating to enquiry made by Delhi Police into the charge of abduction of Jassa against the appellants were manufactured for the purpose of the case, cannot be accepted being without any substance. We may reiterate that all the above noted documents have been seized by the Investigating Officer, C.B.I. (PW-46) when the investigation was handed over to C.B.I. under the directions of the Supreme Court.

(vii) It is, thus, proved by the prosecution that a young man aged about 22-23 years named as Jaswinder Singh @ Jassa was taken away by the police personnel of the U.P. Police from the road outside Gurudwara Rakabganj, New Delhi on 30.10.1992 at about 8:00 AM when he came out of the Gurudwara on cycle. PW-6 Uday Rai, a shop keeper of Beetal Shop near the place of incident had proved the fact of abduction. Though he did not identify the abducted person being Jaswinder Singh @ Jassa from the photograph but he categorically stated that the young Sardar aged about 20-25 years was taken away by police personnel in uniform and some persons in plain clothes in two vehicles, which were a red Maruti van and a truck of blue colour and that the said young man was a Sewadar of Gurudwara Rakabganj, New Delhi. He further proved that the police of Parliament Street Police Station came on the spot to make an enquiry and he was interrogated by them.

(viii) PW-9 namely Vijay Kumar, a cleaner working in Dogra Taxi stand near Gurudwara Rakabganj is an independent witness who also substantiated the aforesaid fact in his deposition. The statement of PW-9 is intact apart from minor inconsistency/contradiction from his statement recorded under Section 161 Cr.P.C. by Delhi Police and the C.B.I. which is with regard to the colour of the police truck which was parked at the Dogra Taxi stand and used in the abduction of Jassa. The cross-examination of PW-9 further gives credence to his statement in examination-in-chief that one young Sardar

was lifted by the U.P. Police on the road outside the Gurudwara at about 8:00-8:30 AM on 30.10.1992.

(ix) On the charge of abduction, the prosecution had produced some witnesses namely Satvendra Singh (PW-30), Chandra Prakash (PW-32), Avtar Singh (PW-36) and Jasveer Singh (PW-37) to prove the movement of accused from P.S. Baradhpur, Bijnor to Gurudwara Rakabganj, New Delhi. PW-30 though took U-turn in his cross-examination at a later point of time but from reading of his whole testimony, it is evident that he has proved the movement of police personnel of P.S. Baradhpur, Bijnor to Delhi on 29.10.1992 in two vehicles namely a red Maruti van and a Tata truck. He also deposed that he alongwith PW-36 Avtar Singh went to Gurudwara Rakabganj, New Delhi and met Jaswinder Singh @ Jassa in quarter no. 9. The statement of PW-30 if read alongwith the statements of Manendra Jeet Singh (PW-4) and Ajayab Singh (PW-10) (two flatmates of Jaswinder Singh @ Jassa), it becomes clear that those two "unknown persons" who stayed with Jassa in quarter no. 9 in the intervening night of 29-30.10.1992 were PW-30 Satvendra Singh and PW-36 Avtar Singh and they were those persons who had identified Jassa to the U.P. Police, as PW-30 further stated that two more persons alongwith them went inside the Gurudwara on the said date. PW-30, PW-32, PW-36 and PW-37 though had turned hostile on the identification of accused persons and about their involvement in the incident of abduction but a careful reading of their whole testimony is indicative of the fact that the accused persons, who were posted in P.S. Baradhpur, Bijnor went to Gurudwara Rakabganj, New Delhi and abducted Jassa in the morning on 30.10.1992. PW-30 and PW-36 witnesses when confronted with their statement under Section 161 Cr.P.C. made to the C.B.I., could not dispute their statement that they went to Gurudwara Rakabganj, New Delhi with the accused persons on 29.10.1992.

38. From the above appreciation of the documentary and oral evidences, the offence of abduction of Jaswinder Singh @ Jassa, a Sewadar in Gurudwara Rakabganj, New Delhi from outside the said Gurudwara in furtherance of the common intention of the accused that he would be murdered, punishable under Section 364 IPC readwith Section 34 IPC, stood proved.

39. Both the above questions posed to us are, thus, answered in affirmative. It is proved by the prosecution beyond all reasonable doubts that deceased Jaswinder Singh @ Jassa was a Sewadar in Gurudwara Rakabganj, New Delhi and that he was abducted on 30.10.1992 at about 8:00-8:30 AM. from Talkatora Road-Gurudwara Rakabganj Road in two vehicles namely one red Maruti van and another Tata Truck No. UP20/4473 (Tata 407 Detain) (a blue colour vehicle which was hired on 29.10.1992 from the Police Lines, Bijnor) by a Police party led by S.H.O., P.S. Baradhpur, Bijnor.

40. Moving further, undoubtedly, the accused persons charged with the offences under Section 365 readwith Section 34 IPC including Dhirendra Singh Yadav, S.H.O., Police Station Baradhpur, Bijnor were posted in the Police Station Baradhpur, wherein the second incident of encounter of Jaswinder Singh @ Jassa had occurred. As far as the argument that it was a police encounter made by the accused persons in a combing operation in view of terrorist activities of Jaswinder Singh @ Jassa, we may note at the outset that the defence

theory of encounter is not acceptable as they have not been able to prove the presence of deceased Jaswinder Singh @ Jassa in Kanshiwala Jungle with the territorial limits of Police Station Baradhpur, Bijnor on the fateful day nor there is any record of his criminal antecedents.

41. However, in support of the case of defence that it was a police encounter the statement of PW-39, the Investigating Officer C.B.C.I.D. Inspector S.S. Rathi has been placed before the Court to assert that this prosecution witness had proved the investigation report submitted by him in two criminal cases registered on 31.10.1992 in police station Baradhpur, District Bijnor namely Case Crime No. 192 of 1992 and 193 of 1992. A perusal of the deposition of PW- 39 indicates that investigation of the above noted criminal cases registered by the accused persons was handed over to him on 16.03.1993. He prepared a site plan of the site of the encounter and proved it as 'Exhibit 'Ka-61'. From his cross examination, it transpires that he recorded the statement of Ajit Singh, Manendra Jeet Singh and Ajayab Singh (PW-3, 4 and PW-10) and also recorded statement of inquest witnesses namely Satnam Singh, Amreek Singh, Tulsa Singh and Naseeb Singh. PW-29 admitted in the cross examination that Ajit Singh gave statement that he was informed about the abduction from Gurudwara Rakabgunj, New Delhi. However a dispute with regard to time and abduction has been raised by the defence with the aid of statement of PW-39 wherein he narrated the statement of Ajayab Singh (PW10) recorded under Section 161 Cr.P.C.

42. In our consideration of deposition of PW-39, we may note that the investigation made by CBCID was not brought to its logical end, in as much as, on intervention of the Apex Court, investigation was transferred to CBI and a criminal case under Section 365/35, 302/120-B was registered by CBI. Much credence, therefore, cannot be attached to the testimony of PW-39 the Investigating Officer C.B.C.I.D to hold that deceased Jaswinder @ Jassa was a terrorist and it was a case of his encounter by the U.P. police in due discharge of their official duties.

43. Now we may consider the evidence of defence witnesses. Satnam Singh (DW-1) was Pradhan of village Kanshiwala, Police Station Baraharpur, District Bijnor. He states that on 31.10.1992 he heard the sounds of fire at about 5.00-6.00 AM. After sometime, a police Constable came to him to state that police had an encounter in which a terrorist was killed. DW-1 was called by the police to go on the spot to identify the deceased, who was stated to be a terrorist. DW-1 states that he reached the spot alongwith three persons namely Sardar Tulsa Singh, Sardar Amreek Singh and Sarder Gurudev Singh. He saw a young terrorist (Sikh) died, lying on the ground. On one side of his body a magazine rifle on which saffron color flag was tagged was lying. When asked, police personnel informed him that it was AK-56 rifle. At a distance of approximately 10 paces from the dead body, one double barrel gun was also there. The said gun was identified by one Gurudev Singh as belonging to him. DW-1 further goes on to say that deceased (terrorist) alongwith another terrorist and one Sardar Naseev Singh came to his house around 15-16 days prior to the incident. They had dinner with him and both the terrorists stayed in his house in the night.

Later, both the terrorists were also seen by him in the Jungle on 24/25.10.1992. One of the young terrorists who came to his house was carrying the same rifle which was spotted by him at the site of the encounter. DW-1 is a Panch witness. In cross examination, he admitted that he never made any complaint to the police about any terrorist activities in the village Kanshiwala Jungle or presence of deceased Jaswinder Singh @ Jassa or any other terrorist in the Jungle of the said village. DW-1 also admitted that he did not know the name of deceased terrorist till the date of recording of his statement. He also admitted that being Pradhan of the village he met Dhirendra Singh Yadav S.H.O Barhapur, District Bijnor prior to the incident and one police officer came to him to ask him to give his statement in the Court about the incident.

44. DW-2 Tulsa Singh stated that accused Constable Kalawa Singh came to his house to call him to identify deceased terrorist who was killed in Kanshiwala Jungle on 31.10.1992. DW-2 in his examination-in-chief and also in cross-examination deposed that he had seen deceased terrorist alive in Kanshiwala Jungle on 18.10.1992 and 19.10.1992 as also on 29 & 30.10.1992. The said terrorist was carrying AK-56 rifle when he met him on 18.10.1992 & 19.10.1992. DW-2 also admitted in cross that he did not report to the police about the presence of terrorist (deceased or any other) in the Jungle of village Kanshiwala. He only says that he told Satnam Singh (DW-1) and Naseeb Singh (Gurudwara Head) about the presence of terrorist in the area.

45. On the basis of statement of DW-1 and DW-2, the counsel for the appellants sought to submit that deceased was a terrorist; his presence in Kanshiwala Jungle on 29.10.1992 & 30.10.1992 was proved by defence witnesses who also identified deceased being the same person who was roaming around the jungle in village Kanshiwala, Police Station Barhapur, Bijnor carrying AK-56 rifle. The submission is that the defence brought sufficient evidence on record to prove the identity of deceased and his involvement in terrorist activities and also established that deceased Jaswinder Singh @ Jassa was not present in Gurudwara Rakabgunj, New Delhi as asserted by the prosecution.

46. We do not find any substance in the above submission, in as much as, admittedly the defence witnesses had never given any information or report to the police about the presence of deceased Jaswinder @ Jassa in village Kanshiwala prior to the incident. The defence theory of deceased being a terrorist is unfounded. Even otherwise, if it is accepted for a moment that deceased was a terrorist, the said fact, even if established, does not give license to the accused police personnel to kill him. The case set up by the police officers (accused) of Police Station Barhapur, District Bijnor about deceased being terrorist or that he was killed in an encounter in Kanshiwala Jungle is further belied by the fact, which is established, that deceased was abducted from Gurudwara Rakabgunj, New Delhi in the morning of 30.10.1992.

47. Now we may deal with the next submission of learned Senior Advocate Sri Dilip Kumar appearing for the appellants on the charge framed under Section 120-B. His argument is that conviction under Section 120-B of the conspiracy cannot be sustained, in as much as, there is no evidence of prior meeting of mind of the

accused. Further, no such inference can be drawn from the circumstance of abduction of deceased even if the offence of abduction is found to be proved. To add to his submission, Sri Satish Trivedi another Senior Advocate appearing for the appellants argued that there is nothing on record which would even indicate the place where Jaswinder @ Jassa was kept in Bijnor before his encounter in the wee-hour on 31.10.1992. He submits that SHO, P.S. Baradhpur, District Bijnor namely (Dhirendra Singh Yadav) was investigating a case of theft in a Bank and during the course of said investigation, combing operation was conducted by the police of P.S. Baradhpur District Bijnor. He further urged that there is nothing on record to show as to how Jaswinder Singh @ Jassa was identified by the police when he came out of Gurudwara Rakabganj, New Delhi. There is variance in the statement of PW-10 Ajayab Singh about the time when Jaswinder @ Jassa had left quarter No.9 in Gurudwara Rakabgunj and went on the street to get milk. As per the prosecution story, deceased came out of the Gurudwara at about 08.30 AM on 30.10.1992, whereas PW-10 Ajayab Singh says that deceased went to get milk in the early morning on 30.10.1992 at about 03.30 AM when he was asked to make tea for two unknown guests in their quarter. Submission is that the time when Jaswinder Singh @ Jassa had left quarter No.9 and went out of the Gurudwara is the most crucial circumstance and since the same was not proved by the prosecution by bringing cogent evidence, the entire prosecution story falls. Admittedly, none of the accused knew Jaswinder Singh @ Jassa prior to the incident. It is, thus, not known as to how police personnel of Police Station Barharpur, Bijnor reached the quarter No.9 in the Gurudwara premises. The prosecution story that police officers had abducted Jaswinder Singh @ Jassa who was admittedly not known to them, thus, seems to be a concocted story. There is a great doubt about the identification of two persons who allegedly went to the quarter No.9 to stay with Jaswinder Singh @ Jassa around midnight on 29-30.10.1992.

48. It is vehemently urged that adverse inference has to be drawn against the prosecution for keeping the matter of abduction in loop and not bringing sufficient evidence to prove the said charge. There is no evidence in the trial as to how the police party identified Jaswinder Singh @ Jassa. The prosecution is completely silent about this issue. Two previous investigating agencies namely the Delhi Police and CBCID did not find any documentary proof of presence of Jaswinder Singh @ Jassa in Gurudwara Rakabgunj, New Delhi. The story drawn by CBI for the first time after the alleged seizure of the attendance register from the office of Gurudwara Rakabgunj, New Delhi is concocted one with a view to falsely implicate the accused. The date and place of seizure of the documents as shown in the seizure memo (exhibit Ka-4) dated 16.12.1993 is CBI complex and not the Gurudwara. The attendance register cannot be said to be a cogent evidence or a reliable document being maintained in Gurudwara Rakabgunj, New Delhi in normal course of events.

49. The medical evidence shows that there were 7 or 8 firearm injuries on the body of deceased. No abrasion or contusion was found which could prove the circumstance of alleged planned (conspired) killing of Jaswinder Singh @ Jassa. The prosecution is silent about the use of vehicle Tata Truck belonging to U.P.

Police on 30.10.1992 and 31.10.1992. The prosecution witness (PW-29) who was brought in the witness box to prove the movement of the said vehicle has not substantiated its case that the said vehicle was plied to New Delhi from Bijnor. The driver of U.P. Tata Truck who drove it to Delhi has not been produced.

50. It is, thus, urged that from the circumstance brought on record, it is evident that deceased was killed in a police encounter and official weapons issued from armory to the police authority of Police Station Baradhpur, District Bijnor had been used during the course of combing operation. Onus was on the prosecution to prove that the police personnel had a prior meeting to conspire about the abduction and planned murder of Jaswinder Singh @ Jassa. The charge under Section 302 read with Section 120-B is, thus, not proved. The common intention of the members of the police party who were implicated for the offence of abduction under Section 365 IPC is also not proved by

It is further argued by the counsels appearing for the other appellants (as noted above), that accused Dhirendra Singh Yadav was a SHO of Police Station Baradhpur, District Bijnor. Other police personnel accompanying him in the combing operation were only following his order. It was not proved by the prosecution that the command given by the SHO of Police Station Baradhpur, District Bijnor was illegal. General questions have been put to the accused persons under Sections 313 Cr.P.C. which have caused material prejudice to other. It is lastly argued that there is no eye witness of the charge of abduction and the entire prosecution story is based on hearsay evidence. The first information report of abduction was delayed by 17 days and CBI had substantially changed the whole story in the charge sheet submitted by it to the trial court. There are material improvements in the case of CBI presented during the course of trial. False evidences were introduced, material evidences were withheld. There is no evidence of conspiracy. There is no evidence of any action or participation of other police personnel accompanying S.H.O. Dhirendra Singh Yadav, Police Station- Baradhpur, Bijnor in the crime. There are G.D. entries of the operation conducted by SHO Dhirendra Singh Yadav.

51. In the crux, it was vehemently argued by all the counsels for the appellants that none of the prosecution witnesses could relate the abduction of Jaswinder Singh @ Jassa (deceased) with the U.P. Police.

On a threadbare discussion of evidences lead by the prosecution and elaborate arguments of learned counsels for the appellants, we find that the following circumstances emerge from the record about the theory of police encounter taken by the defence:-

The defence theory of police encounter (extra-judicial killing) began with the lodging of the first information report namely Case Crime No.192 of 1992 and 193 of 1992. The first information reports of the said criminal cases though have not been brought on record and exhibited, but 'PW-39', the Inspector, CBCID, Sector Bareilly who was assigned investigation of the said criminal cases entered in the witness box to state that the investigation was handed over to him on 16.03.1993. G.D. No.21 dated 17.10.1992 at 14.30 hours of Police station Baradhpur, Bijnor seized by CBI with the seizure memo "Exhibit Ka-55" records registration

of a first information report dated 15-16.10.1992 with regard to the loot of licencee DBBL gun on the oral information given by one Gurudev Singh, the alleged licencee of DBBL gun at Police Station Baradhpur, District Bijnor. Gurudev Singh, the complainant of the report of loot of licencee of DBBL gun has not been produced by the defence to substantiate its theory of police encounter/extra-judicial killing of Jaswinder Singh @ Jassa on the tip-off to the accused SHO, Police Station Baradhpur, District Bijnor. Gurudev Singh appears to have been interrogated by CBCID and CBI but nothing in this regard can be transpired from the record. The first information report of loot of licencee DBBL gun namely Case Crime No.187 of 1992 under Section 392 IPC was placed before us by the counsels for the appellants to assert that police party lead by S.H.O. Police Station-Baradhpur proceeded to Harwanshwala, Kanshiwala Jungle for combing operation and their movement was recorded in G.D. No.20 dated 28.10.1992 at 10.45 hours of Police Station Baradhpur, Bijnor. The police party returned to the police station P.S. Baradhpur, Bijnor on 28.10.1992 at about 19.05 hours and entry to this effect had been made at G.D. No.28. It was asserted by the defence/appellants that on 29.10.1992, on getting information of terrorist movement in village Kanshiwala, Bijnor, the police party led by SHO Baradhpur proceeded at G.D. No.12 time 08.30 AM and returned at G.D. No.22 time 13.30 PM of the same date. It is sought to be submitted that the loot of licencee DBBL gun was made by terrorist Jaswinder Singh @ Jassa. The offence under Section ¾ Terrorist and Disrupted Activities Act (TADA) was added to Section 392 IPC after return of the police party at G.D. No.22 dated 29.10.1992. At G.D. No.29 dated 29.10.1992 at about 17.10 hours, police party led by SHO Baradhpur, Bijnor (comprising of 13 police personnel) proceeded to terrorist area for combing. At G.D. No.30 at about 17.15 hours dated 29.10.1992, request for requisition of vehicle from the police line Bijnor was made by SHO Baradhpur, Bijnor. The request of Tata truck U.P. 20-4473 and UP T No.9078 at G.D. No.35 dated 29.10.1992 made at about 18.30 hours was recorded in the relevant register. The return of police party after combing operation had been recorded at G.D No.19 (17.05 hours) dated 30.10.1992. The entries at G.D. No.4 dated 31.10.1992 time 3.15 AM with regard to movement of police party; request for extra force entered at G.D. No.11 dated 31.10.1992 time 07.15 A.M. and also return of police party at G.D. No.19 time 12.15 hours have been proved and exhibited as "Exhibit Ka-25". All recovered articles and the Arms used in the encounter by the police party had been deposited in the Police Armory in the same column of the G.D. The entry of registration of the first information report No.192/1992 under Section 307 read with Section ¾ TADA and the first information report 193/1992 under Section 25 Arms Act of recovery of AK-56 rifle and DBBL gun No.3122/1360 (with two live cartridges and four empties) had also been made in the same column.

52. The defence case is that AK-56 rifle found besides the dead body of the Jaswinder Singh @ Jassa was fully loaded and a magazine was tied to the waist of deceased having 24 live cartridges. However, ballistic expert (P.W.-19) deposed that four packets '"F', 'F(2)', 'F(3)' & 'F(4)'" were received for ballistic examination which contained "AK-56 rifle No.17036926", "two empty magazines of AK-56 assault rifle", and "one 12 bore

DBBL gun". The statement of 'PW-19' indicates that packet 'F' containing one 7.62 MM AK-56 assault rifle No.17036926 without magazine was received in sealed condition which was marked by him as 'W-1' and when sealed bundles was opened in the Court they were marked as Exhibit 'Ka-29'.

53. Packet 'F(2)' contained two empty magazines of AK-56 assault rifle which were marked by the ballistic expert as 'M-1 and M-2'. They were proved and exhibited as "Exhibit '30' and Exhibit '30/1". Packet 'F(3)' contained one 12 bore DBBL gun No.3122 and 1360/72. On the same, a tag containing signature of PW-19 was found which was proved and exhibited as Exhibit-'31'. In packet 'F(4)', four empties of 7.62 MM assault rifle were found which were marked as "C-69 to C-72". The packets and entries were identified and proved by PW-19 as "Exhibit '32', '32/1', '32/4"'.

54. The above deposition of PW-19 clearly proves that AK-56 assault rifle which alleged to have been used by deceased in the encounter was found with empty magazine as against the police record maintained by the accused at Police Station Baradhpur, District Bijnor and, thus, runs contrary to the case of the defence that deceased used AK-56 rifle in the encounter and the same was recovered besides the dead body. The recovery of AK-56 assault rifle assigned to deceased is, thus, found to be planted and farce.

Further, the G.D. of police station Baradhpur, District Bijnor at G.D. No.26 dated 31.10.1992 records return of police party from the site of encounter with the recovered blood stained and plain earth. The dead body was sent for postmortem on 01.11.1992 entered at G.D. No.7 (06.30 A.M.) dated 01.11.1992 and returned to the police station on the same day at about 23.35 hours entered at G.D. No.29. The dead body was immediately sent for cremation and the same G.D. records disposal of the dead body by cremating it. At G.D. No.19 time 12.16 hours dated 31.10.1992, it was recorded that intimation was sent to all police stations and Incharge DSRB about the deceased terrorist being unknown. The special report of registration of Case Crime No.192/1992 under Section 307 IPC and ¾ TADA as also case Crime No.193 of 1992 under Section 25 Arms Act was sent at G.D. No.20 14.00 hours through Constable 207 Suraj Pal Singh.

55. The above noted entries of G.D. have been exhibited by the prosecution witnesses and on the basis thereof, it was argued on behalf of the appellants that the action of police party led by SHO of Police Station Baradhpur, District Bijnor was legal and justified. The encounter was made during the combing operation conducted by SHO Dhirendra Singh Yadav and special report of the incident was immediately sent.

56. Dealing with the above, we find it relevant to note that apart from the G.D. entry which were made by the accused themselves and the report of SHO Dhirendra Singh Yadav (one of the main accused), there is nothing on record which could connect deceased Jaswinder Singh @ Jassa with Case Crime No.187 of 1992 under Section 372 IPC registered on the oral information given by one Gurudev Singh, who said to have identified the licencee DBBL gun found beside the dead body of Jaswinder Singh @ Jassa being his licencee gun. The said first information report had been registered on the oral information given by Gurudev Singh who was resident of village Harwanshwala

within the jurisdiction of P.S. Baradhpur, District Bijnor. The prosecution has brought sufficient evidence on record to prove the charge of abduction of Jaswinder Singh @ Jassa by the police party led by SHO Dhirendra Singh Yadav, Police Station Baradhpur, District Bijnor. Once the offence of abduction is proved, the prosecution case that it was a fake encounter and that the recovery of AK-56 rifle and DBBL gun 3122/1360 (looted by deceased) was planted by the accused has to be accepted.

It does not stand to reason as to why cremation of dead body was done on 01.11.1992 without making any effort to determine the identity of deceased and information to his family or relative about his death. Two defence witnesses (DW-1 and DW-2) stated that they saw the dead body at the site of encounter when they reached there on calling of the police officers. Both the defence witnesses also stated that they saw deceased earlier in village Kanshiwala and DW-1 even said that deceased had stayed in his house for one night. DW-2, on the other hand, stated that he saw deceased in Gurudwara of Village Kanshiwala and Gurudwara Head Naseeb Singh also reached the site of encounter.

57. From the above deposition of defence witnesses, it cannot be accepted that it was not possible for SHO Baradhpur, Bijnor namely accused Dhirendra Singh Yadav to determine the identity of deceased Jaswinder @ Jassa after his encounter.

58. We may further note that the wireless messages sent by DW-13, Sukhiram, Piket police post, North Avenue, New Delhi had been proved and exhibited as "Exhibit 'Ka-14' to 'Ka-18'". G.D. No.9 dated 30.10.1992 of police outpost North Avenue, New Delhi proved as "Exhibit 'Ka-12/1'" records that a wireless message was received at the said police station that Sewadar Jaswinder Singh @ Jassa was taken away by the U.P. Police. The wireless messages dated 30.10.1992 sent to all SHO's, DSP in New Delhi and all SSP's in India by PW-13 have been proved. The said wireless messages (Exhibit Ka-14) indicated that it was intimated to every concerned officer in the country that one Sewadar boy of Gurudwara Rakabgunj, New Delhi named as Jaswinder Singh @ Jassa aged about 20-22 years resident of Majitha of Amritsar, Punjab had been reported to have been taken away in police vehicle by some unknown police personnel on 30.10.1992 at about 8.30 AM from near the Mandir located outside Gurudwara Rakabgunj, and if he was "wanted" in any criminal case registered in any district or State of the country, DCP, New Delhi District was to be informed. This message also records that the incident was reported at G.D. No.9 dated 30.10.1992 police Outpost North Avenue of Police station Parliament Street, New Delhi. The content of the wireless message sent by PW-13 about the incident occurred on 30.10.1992 was clear and categorical about the report being lodged with regard to the incident of abduction.

59. In continuance of the said message, again it was reported in wireless message on 04.11.1992 addressed to all SSP's in the State of U.P. that it came to be reported that Jaswinder Singh @ Jassa was taken away in a police vehicle by the U.P. Police. Same messages was circulated to all SSPs in U.P. again on 18.11.1992 and 14.12.1992. PW-13 had proved that in the initial investigation made by him it was clearly transpired that the police vehicle in

which Jaswinder @ Jassa was taken away from Talkatora road outside the Gurudwara Rakabgunj, New Delhi belonged to U.P. Police and one Maruti Van was also used in the incident having registration number of the State of U.P. For this reason only, the report/wireless messages were sent by PW-13, circulating lookout notice to all SSPs in the State of U.P. When no feed back was received, report of lodging of the first information was sent at Police station Parliament Street, New Delhi dated 17.11.1992. All actions taken by the officer (PW-13) (in due discharge of his official duties) have been found to be justified in the nature of complaint received by him. By no stretch of imagination, it can be accepted that the records of police Out post North Avenue, New Delhi of Police station Parliament Street, New Delhi were manufactured by the prosecution. We reiterate our conclusion not to accept the said submission of learned Senior Counsel with regard to the authenticity of the documents relating to lodging of the report of abduction at the police station, Parliament Street, New Delhi of Jaswinder Singh @ Jassa from the road outside the Gurudwara.

Further, it is also substantiated from the report sought by S.P. Bijnor dated 19.12.1992 from Police Station- Baradhpur, Bijnor the document which has been proved and exhibited as "Exhibit 'Ka-37", that information of abduction of Jassa was received by the SHO Dhirendra Singh Yadav, P.S. Baradhpur, Bijnor. In reply to the said message the accused SHO only intimated that the name of deceased killed in encounter was Jaswinder Singh @ Jassa and another person who accompanied him was Kamaljeet Singh but their addresses were not known to him. It is, thus, evident even from the record of Police station Baradhpur, Bijnor seized by CBI that accused Dhirendra Singh Yadav, SHO Baradhpur came to know about the identity of deceased at-least on 19.12.1992. We may further note that no investigation or enquiry was done by the U.P. police (SP, Bijnor) or any other senior officer to ascertain the genuineness of killing of a young Sikh in alleged police encounter. The investigation made by CBCID had commenced only on 16.03.1993 that too for investigation of the cases registered by the accused against deceased in Police Station Baradhpur, District Bijnor (Case No.192/1992 and 193/1992).

60. We may also record that the present is the case of circumstantial evidence as there cannot be any independent witness of the factum of abduction and obviously of fake encounter. In the above circumstance of the case, the chain which started with the prosecution story of abduction is found to complete with the killing of Jaswinder Singh @ Jassa. The police party led by SHO Dhirendra Singh Yadav, Police Station Baradhpur, District Bijnor had been proved to be directly involved in the abduction of Jaswinder Singh @ Jassa from the road outside the Gurudwara where he was normally residing being working as Sewadar. There is no missing link in the chain of a circumstances on the issue of abduction. The claim of the defence that deceased was a terrorist and was rightly booked by accused Dhirendra Singh Yadav under TADA on account of loot of DBBL gun in view of his terrorist activities is not proved from any of the circumstances brought on record. The defence witnesses are proved to be liars. The claim of self defence in making encounter during the alleged combing operation by the police party (accused) has not been established by

bringing any cogent evidence on record by the defence.

61. The Apex Court has taken a serious view about the incident in the writ petition filed by relative of Jaswinder Singh @ Jassa namely S. Saranjeet Singh (PW-34). An affidavit of the Deputy Commissioner of police, New Delhi was filed therein to depose that on 30.10.1992 at 10.40 AM an information was received in PCR picket police North Avenue dated 30.10.1992 that one Sewadar Jaswinder Singh @ Jassa had been taken away by U.P. Police in a Jypsy. On receipt of the said information under the directions of S.H.O Police Station Parliament Street, S.I. Sukhiram In-charge Picket police North Avenue rushed to the spot and inquired the matter. In the enquiry, it was ascertained that one Sewadar of Gurudwara Rakabgunj, New Delhi named as Jaswinder Singh @ Jassa aged about 22-23, resident of Majhita, District Amritsar was reported to have been taken away in a police vehicle by the U.P. State Police at about 08.30 AM from the road near Hanuman Mandir outside Gurudwara Rakabgunj, New Delhi. The witness examined by the Sub Inspector Tulsi Ram confirmed that Jaswinder Singh @ Jassa was taken away by the U.P. Police in a government vehicle. Wireless messages to all SSPs of the State of U.P. were sent making a request that in case Jaswinder Singh @ Jassa was 'wanted' in any criminal case, information be sent to DCP, New Delhi but no information had been given till the date of filing of the aforesaid affidavit in the Apex Court. The investigation of the case was stated to be in progress and search of Jaswinder Singh @ Jassa was on. In light of the said affidavit, it cannot be believed that the Delhi Police had manufactured the records with regard to the first information report lodged by Ajit Singh (PW-3) Manager, Gurudwara Prabandh Samiti reporting the incident occurred on 30.10.1992.

62. The cumulative effect of the above evidence reveals that the offences of abduction with common intention to cause murder of Jaswinder Singh @ Jassa (deceased) and his killing in a conspiracy hatched by the police party led by SHO Dhirendra Singh Yadav of Police Station Baradhpur, District Bijnor are proved beyond doubt from the evidence led by the prosecution. The defence theory as projected of killing of Jasiwnder Singh @ Jassa in a police encounter in self defence by the accused is palpably false and completely belied from the facts and circumstances of the present case.

63. Encounter was staged to ingeniously justify the police action against alleged criminal (Jassa) in this matter. Encounter killing of Jaswinder @ Jassa was nothing but a pre-planned murder. International Human Rights Law prohibits the arbitrary deprivation of life of any person under any circumstances. India being member of the United Nations Human Rights Council (UNHRC) has pledged to continue to uphold the highest standards in the promotion and protection of Human rights. Everyone has the right to life and it shall be protected by law. Deprivation of life in any form is a violation of human rights. Article 21 of the Constitution of India guarantees "right to live with human dignity". Any violation of human rights is viewed seriously by the Courts as right to life is the most precious right guaranteed by Article 21 of the Constitution. The guarantee by Article 21 is available to every person and even the State has no authority to violate that right.

64. In **People's Union for Civil Liberties & Anr Vs. State of**

Maharashtra1, right to life guaranteed in Article 21 of the Constitution of India was considered by the Apex Court to say that guarantee that no person shall be deprived of his life or personal liberty except according to the procedure established by law is applicable to everyone and even the government does not have power to violate this. In **R.S. Sodhi Advocate Vs. State of U.P.2**, it was said that whether the loss of live was on account of genuine or a fake encounter is a matter which has to be inquired into or investigated closely. It would be desirable to entrust investigation to an independent agency like Central Bureau of Investigation so that all concerned including the relatives of deceased may feel assured that an independent agency looked into the matter. In **Satyavir Singh Rathi, Assistant Commissioner of Police and Ors. v. State through Central Bureau of Investigation3** it was observed that the police men would not be excused for committing the murder in the name that they were carrying out the order of their superior officers and that the 'encounter' philosophy is a criminal philosophy.

In **Rohtash Kumar vs State Of Haryana4** it was observed that the killings in police encounters affect the credibility of the rule of law and the administration of the criminal justice system. Merely because a person is a dreaded criminal or a proclaimed offender he cannot be killed in a cold blooded manner. The police shall make an effort to arrest such accused. However, in a given case, if a dreaded criminal launches a murderous attack on the police personnel to prevent them from continuing their duties, the police may have to retaliate and in that retaliation, such a criminal may get killed. That could be a case of genuine encounter.

In **Om Prakash Vs. State of Jharkhand & others5**, it is said that:- "It is not the duty of the police officers to kill the accused merely because he is a dreaded criminal. Undoubtedly, the police have to arrest the accused and put them up for trial.

The Supreme Court has repeatedly admonished trigger-happy police personnel who liquidate criminals and project the incident as an encounter. Such kills must be deprecated. They are not recognized as legal by our criminal justice administration system. They amount to State-sponsored terrorism."

65. Having considered the observations made by the Apex Court in challenging the action of police personnel in killing of criminals in an encounter, guidelines issued by National Human Right Commission (NHRC) and the affidavit filed by the Union of India; State Government and the Union Territory, the Apex Court in **People's Union for Civil Liberties (supra)** has issued directions laying down the procedure to be followed in the matter of investigation of police encounter in the cases of death as a standard procedure for thorough, effective and independent investigation. The said directions are relevant to be noted herein:-

"(1) Whenever the police is in receipt of any intelligence or tip-off regarding criminal movements or activities pertaining to the commission of grave criminal offence, it shall be reduced into writing in some form (preferably into case diary) or in some electronic form.

Such recording need not reveal details of the suspect or the location to which the party is headed. If such intelligence or tip-off is received by a higher authority, the same may be noted in some form without revealing details of the suspect or the location.

(2) If pursuant to the tip-off or receipt of any intelligence, as above, encounter takes place and firearm is used by the police party and as a result of that, death occurs, an FIR to that effect shall be registered and the same shall be forwarded to the court under Section 157 of the Code without any delay. While forwarding the report under Section 157 of the Code, the procedure prescribed under Section 158 of the Code shall be followed.

(3) An independent investigation into the incident/encounter shall be conducted by the CID or police team of another police station under the supervision of a senior officer (at least a level above the head of the police party engaged in the encounter). The team conducting inquiry/investigation shall, at a minimum, seek:

(a) To identify the victim; colour photographs of the victim should be taken;

(b) To recover and preserve evidentiary material, including blood-stained earth, hair, fibers and threads, etc., related to the death;

(c) To identify scene witnesses with complete names, addresses and telephone numbers and obtain their statements (including the statements of police personnel involved) concerning the death;

(d) To determine the cause, manner, location (including preparation of rough sketch of topography of the scene and, if possible, photo/video of the scene and any physical evidence) and Page 27 time of death as well as any pattern or practice that may have brought about the death;

(e) It must be ensured that intact fingerprints of deceased are sent for chemical analysis. Any other fingerprints should be located, developed, lifted and sent for chemical analysis;

(f) Post-mortem must be conducted by two doctors in the District Hospital, one of them, as far as possible, should be In-

charge/Head of the District Hospital. Post-mortem shall be video-

graphed and preserved;

(g) Any evidence of weapons, such as guns, projectiles, bullets and cartridge cases, should be taken and preserved.

Wherever applicable, tests for gunshot residue and trace metal detection should be performed.

(h) The cause of death should be found out, whether it was natural death, accidental death, suicide or homicide.

(4) A Magisterial inquiry under Section 176 of the Code must invariably be held in all cases of death which occur in the course of police firing and a report thereof must be sent to Judicial Magistrate having jurisdiction under Section 190 of the Code.

(5) The involvement of NHRC is not necessary unless there is serious doubt about independent and impartial investigation.

However, the information of the incident without any delay must be sent to NHRC or the State Human Rights Commission, as the case may be.

(6) The injured criminal/victim should be provided medical aid and his/her statement recorded by the Magistrate or Medical Officer with certificate of fitness.

(7) It should be ensured that there is no delay in sending FIR, diary entries, panchnamas, sketch, etc., to the concerned Court.

(8) After full investigation into the incident, the report should be sent to the competent court under Section 173 of the Code. The trial, pursuant to the chargesheet submitted by the Investigating Officer, must be concluded expeditiously.

(9) In the event of death, the next of kin of the alleged criminal/victim must be informed at the earliest.

(10) Six monthly statements of all cases where deaths have occurred in police firing must be sent to NHRC by DGPs. It must be ensured that the six monthly statements reach to NHRC by 15 th day of January and July, respectively. The statements may be sent in the following format along with post mortem, inquest and, wherever available, the inquiry reports:

(i) Date and place of occurrence.

(ii) Police Station, District.

(iii) Circumstances leading to deaths:

(a) Self defence in encounter.

(b) In the course of dispersal of unlawful assembly.

(c) In the course of affecting arrest.

(iv) Brief facts of the incident.

(v) Criminal Case No.

(vi) Investigating Agency.

(vii) Findings of the Magisterial Inquiry/Inquiry by

Senior Officers:

(a) disclosing, in particular, names and designation of police officials, if found responsible for the death; and

(b) whether use of force was justified and action taken was lawful.

(11) If on the conclusion of investigation the materials/evidence having come on record show that death had occurred by use of firearm amounting to offence under the IPC, disciplinary action against such officer must be promptly initiated and he be placed under suspension.

(12) As regards compensation to be granted to the dependants of the victim who suffered death in a police encounter, the scheme provided under Section 357-A of the Code must be applied.

(13) The police officer(s) concerned must surrender his/her weapons for forensic and ballistic analysis, including any other material, as required by the investigating team, subject to the rights under Article 20 of the Constitution.

(14) An intimation about the incident must also be sent to the police officer's family and should the family need services of a lawyer / counselling, same must be offered.

(15) No out-of-turn promotion or instant gallantry rewards shall be bestowed on the concerned officers soon after the occurrence. It must be ensured at all costs that such rewards are given/recommended only when the gallantry of the concerned officers is established beyond doubt.

(16) If the family of the victim finds that the above procedure has not been followed or there exists a pattern of abuse or lack of independent investigation or impartiality by any of the functionaries as above mentioned, it may make a complaint to the Sessions Judge having territorial jurisdiction over the place of incident. Upon such complaint being made, the concerned Sessions Judge shall look into the merits of the complaint and address the grievances raised therein."

It was held by the Apex Court therein that the above requirements/norms must be strictly observed in all cases of death and grievous injuries in police encounter by treating them as law declared under Article 141 of the Constitution of India.

66. In the instant case, having carefully analyzed the evidence on record we find that:- (i) there is nothing on record which would reveal that police was in receipt of intelligence or tip-off with regard to the terrorist activities of deceased Jaswinder Singh @ Jassa. It may be noted further that:-

(ii) On his death, no first information report had been lodged with regard to the incident of encounter and as such there was no occasion of forwarding the report to the Court under Section 157 Cr.P.C. The intimation sent to the senior officials about encounter entered in the G.D. and special report of the incident allegedly sent by the accused Dhirendra Singh Yadav (SHO, Police Station Baradhpur, District Bijnor) were merely an eye-wash.

(iii) No independent investigation into the incident was directed to be conducted by the competent officer till the direction was issued by the Apex Court vide judgement and order dated 08.10.1993 after almost for a period of 1 year from the date of the incident that too on the issue raised by a relative of deceased.

(iv) No magisterial enquiry under Section 176 Cr.P.C. was held and as such there was no occasion of sending a judicial report to the concerned Magistrate having jurisdiction under Section 190 of the Code of Criminal Procedure to make further inquiry. No information was given to the National Human Right Commission or State Human Right Commission.

(v) Most importantly even identity of deceased was not determined before cremation of his dead body.

(vi) Relatives of the alleged criminal/victim/deceased had not been informed by the police.

67. Having noted the above and in light of threadbare discussion on all issues arising in the instant case, no infirmity could be found in the decision of the trial court for conviction of accused-appellants for the offences under Section 364 IPC read with Section 34 IPC, Section 218 IPC, Section 302 read with Section 120-B IPC. The charges framed against them have been proved beyond all reasonable doubts. As the sentence awarded to the appellants is minimum, the same requires no interference.

The appeals are, accordingly, **dismissed.**

The appellant namely Jaipal Singh in the connected Appeal No.1345 of 2012 is on bail. His bail bonds are cancelled and sureties are discharged. The Court concerned is directed to take him in custody and send him to jail forthwith for serving out the remaining part of his sentence.

The other surviving accused appellants in all the connected appeals are in jail. They shall serve the remaining sentence.

Certify this judgment to the court below immediately for compliance.

The compliance report be submitted through the Registrar General, High Court, Allahabad.

(2020)12ILR A79
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.11.2020

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

First Appeal From Order No. 23 of 2001

Smt. Sudesna & Ors. ...Appellants
Versus
Hari Singh & Anr. ...Respondents

Counsel for the Appellants:
Sri Nigamendra Shukla

Counsel for the Respondents:
Sri Amresh Sinha

A. Motor Accident Claim–Amount of award – Failure to deposit – More than one and a half year has elapsed –Held, If the amount is not deposited, the same is liable to be deposited on or before 31.1.2021. (Para 3 and 6)

Review Application disposed of (E-1)

Cases relied on :-

1. New India Assurance Company Ltd. Vs Hussain Babulal Shaikh & ors., 2017 (1) TAC 400 (Bom.)

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.)

(In Re: Civil Misc. Review Application No.1 of 2020)

1. Heard Sri Nigamendra Shukla for the appellant on the review petition.

2. It is stated by the learned Counsel that the review is meant for a very limited purpose. It does not challenge the award or the judgment but the challenge is to the approach of the Insurance company.

3. In the judgment as the Insurance company has not been directed to deposit the amount within a particular time though one and a half year has elapsed, the amount has not been deposited.

4. Learned Advocate for the appellant has placed reliance on the decision in New India Assurance Co. Ltd. Vs. Hussain Babulal Shaikh and others, 2017 (1) TAC 400 (Bom.).

5. It is further orally conveyed that even if the amounts will be deposited, the Insurance company normally deducts TDS. The judgement is reviewed and at the end.

"I. On depositing the amount in the Registry of the Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any.

II. Considering the ratio laid down by the Hon'ble Apex Court in the case of A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442, the order of investment is not passed because applicants/claimants are neither not illiterate and in New India Assurance Co. Ltd. Vs. Hussain Babulal Shaikh and others, 2017 (1) TAC 400 (Bom.).

III. View of the ratio laid down by Hon'ble Gujarat High Court, in the case of Smt. Hansaguti P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291, total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount (as directed in para No. II) without producing the certificate from the concerned Income-Tax Authority."

6. If the amount is not deposited, the same shall be deposited on or before 31.1.2021 as more than one and a half year has elapsed.

7. It goes without saying that if the amount is deposited and TDS is deducted, the Insurance company shall see to it that in future this mistake is not committed and will help the appellant in recovering the said amount from the income-tax department.

8. The registry is directed to send a copy of this order to the Tribunals so that the Tribunals may pass necessary orders while disposed of the claim petitions.

9. The review application is disposed of.

(2020)12ILR A81
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.12.2020

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

First Appeal From Order No. 598 of 2020

Smt. Rekha Mishra & Ors. ...Appellants
Versus
Ram Kumar & Ors. ...Respondents

Counsel for the Appellants:
Sri Hanuman Prasad Dube, Sri Vipul Dube

Counsel for the Respondents:
Sri Radheyshyam, Sri Pradeep Kumar Sinha

A. Motor Accident Claim – Deduction of income tax on the compensation – Power of Tribunal – Held, Tribunal cannot deduct tax on the compensation – The amount awarded by the Tribunal cannot be subjected to tax on the flat rate as decided by the Tribunal. (Para 11 and 13)

B. Interpretation of Statute – Motor Vehicle legislation and Tax legislation – Conflict – Which amongst it prevail – Motor Vehicle legislation is a social welfare legislation and there is no conflict between the social welfare legislation and tax legislation – Even if there is conflict, the social welfare legislation would prevail as it would subserve larger public interest. (Para 13)

Appeal partly allowed (E-1)

Cases relied on :-

1. Hansaguri Parafulchandra Ladhani & ors. Vs The Oriental Insurance Company Ltd. and others, 2007 ACJ 1897

2. New India Assurance Company Ltd. Vs Hussain Babulal Shaikh & ors., 2017 (1) TAC 400 (Bom.)

3. F.A.F.O. No. 2935 of 2005, Smt. Balesh Kumari & ors. Vs Sahbat Khan & anr., decided on 25.11.2020

4. Sarla Verma & ors. Vs Delhi Transport Corporation & ors., (2009) 5 SCC 121

5. National Insurance Co. Ltd. Vs Mannat Johal & ors., 2019 (2) T.A.C. 705 (S.C.)

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri Dube, learned counsel for the appellants and Sri P.K. Sinha, Advocate, assisted by Sri Ojha, learned counsel for the respondent-Insurance Company.

2. This appeal is preferred by the original claimants against the award and decree dated 23.11.2019 passed by Motor Accident Claim Tribunal/Additional District Judge, Court No.3, Jhansi in Motor Accident Claims Petition No. 29 of 2018.

3. Brief facts giving rise to this appeal are that on 6.11.2017 Jai Prakash Mishra on motorcycle bearing Registration No. U.P. 93 AE 9142 was going to Mijhauna via Daboha. Said motorcyle was being driven by his elder brother Virendra Kumar Mishra carefully and slowly at left side. When the motorcycle reached in front of village Gora at Daboha Bhander Road at about 1.35 pm, a Scorpio bearing Registration No. MP 09 V 6431 was coming rashly and negligently from front looking to which Virendra Kumar Mishra stopped motorcycle on kachcha pavement of his left hand despite that said Scorpio dashed hardly motorcycle on account of which Virendra Kumar Mishra and Jai Prakash Mishra succumbed to injuries on the spot.

4. There is no dispute as far as assessment of quantum, compensation and liability, the accident having taken place, the deceased having succumbed to the injuries received in the accident. That the deceased was a salaried person is also not in dispute. The only issue that arises for consideration is whether the Tribunal itself could have assumed and deducted income tax from the compensation awardable to the heirs of the deceased.

5. On 17.3.2020, I had passed the detailed order as follows:-

"Admit.

A copy of memo of appeal be given to Sri Radhey Shyam, Advocate who normally appears for National Insurance Company Limited to seek instructions from it and assist the Court as the matter can be disposed of at the first hearing.

The matter is covered by the judgment of the Gujarat High Court as well as Section 194A(3)(IX) of Income Tax Act. The amount of income tax slab can be deducted from the income of the deceased who was a salaried person, but adhoc Rs.10,00,000/- and more amount by way of calculation of income tax could not have been deducted from the compensation to be awarded. The said is without any sanctity of law.

Normally in the claimant's appeal, I do not pass any interim order but in this case the deduction of Rs.1064543/- as proposed income tax could not have been ordered to be deducted. The order of deduction of Rs.1108165/- as proposed income tax is against the mandate of law. The reason being income tax liability of concerned claimant to pay tax on interest or the compensation awarded to them shall arise if such interest or income is accrued in concerned financial year together with other income of the respective claimants in that financial year. The judgment of the Apex Court in Ramabai Versus Commissioner of Income Tax, (1990) 181 ITR page 400 will come to the aid of the appellants. Similar is the decision of Gujarat High Court in Civil Application (For Order) No.10031 of 2006: First Appeal No.1392 of 2006 (Hansaguri Prafulchandra Ladhani and others Versus Oriental Insurance Company Limited) decided on 4.10.2006 reported in 2007 (2) GLR 1484 which will also be applicable to the facts of this case.

The Insurance Company if has not yet deposited the amount shall deposit the decretal amount with interest along with the deducted amount of Rs.1108165/-. The second aspect which will have to be looked into would be whether the Tribunal should add prospective income after deduction of the personal expenses or it should be before in the light of the judgment of Supreme Court in Civil Appeal No. 1999 of 2020 (Nirmala Kothari Versus United India Insurance Company Limited) decided on 4.3.2020.

List on 31.3.2020 for final disposal.

Meanwhile, the learned Judge be apprised by the Registrar General of this order through the District Judge, Jhansi so that such mistake is not committed in other matters as this would be his opinion in matter which involve high stake.

Notice to the owner is not necessary as the liability is fastened on the insurance company."

6. The matter has been listed today thereafter on urgency note filed by Sri Dube. The matter can be disposed off on short point.

7. The presence of the owner is not necessary.

8. The appellants' only prayer is that the Insurance Company could not also have deducted the amount of income tax which has been deducted by the Tribunal on its own.

9. Sri Dube, learned counsel for the appellants submitted that in the case of **Hansaguri Parafulchandra Ladhani and others Vs. The Oriental Insurance Company Ltd. and others, 2007 ACJ 1897,** which has been again reiterated and followed by the Bombay High Court in **New India Assurance Company Ltd Vs. Hussain Babulal Shaikh and others, 2017 (1) TAC 400 (Bom.)** and by this Court in **First Appeal From Order No.2935 of 2005, Smt. Balesh Kumari and others Vs. Sahbat Khan and another,** dated 25.11.2020, practice of the deduction of TDS by Insurance Company was deprecated. In this case, the Tribunal itself has deducted the amount of income tax, i.e., reason for this appeal which could not have been done.

10. Sri Dube further submits that education cess could not have been deducted, which is vehemently objected by Sri P.K. Sinha, assisted by Sri Ojha making submission that amount has accrued in the year 2019 immediately after the claim petition was filed and, therefore, the deduction by the Tribunal cannot be found fault with and has requested the Court to dismiss the appeal.

11. The Tribunal, after assessing the compensation, did not assign any reason as to under what provision, it had assumed itself to be an Authority which could deduct what can be said to be tax on the entire compensation. Calculation of income tax could not have been done for the reason that income tax is on the income which accrues ever year. If the Tribunal was of the view that income of the deceased was without deduction of any tax then it could have done it from the gross salary of Rs.27187/- rather the Tribunal deducted Rs.2200/- which was amount of Provident Fund which he would have received on his retirement. Amount of Rs.2000/- was further deducted on the loan which he had taken and had the Tribunal gone by the basics also as the salary of the deceased was Rs.27,187/- per year, annual salary after deductions under the Income Tax Act would not beyond the slab of Rs.2,50,000/- per year had he been survived. Income tax is to be chargeable in the year in which it is received. Thus, there is a mistake which is apparent on the face of the record. The assessee claimant cannot be now forced to claim refund.

12. Provision of Section 194A read with sub section 3 (ix) of the Income Tax Act lays down several guidelines for deduction of tax and source in payment of amount, which is awarded. Amount could not be subjected to deduction of income tax. The reason being that Section 194A (3) (ix) will not permit even the Insurance Company to deduct the same at par. The procedure has already been laid down wayback in the year 2007 by the High Court of Gujrat in the case of Hansaguri (supra), which has been followed by High Court of Bombay in a recent Judgment rendered in the case of New India Assurance Company Ltd Vs. Hussain Babulal Shaikh and others (supra), which has been followed by the undersigned in the case of Smt. Balesh Kumari **(supra)**.

13. When the Income Tax Act and the decisions referred hereinabove do not permit the Insurance Company to deduct TDS, could the Tribunal deduct what is

known as tax on the compensation. With utmost respect, the answer is same cannot be. Tax has to be levied each yer. Compensation is awarded in lump sum which has to be spread over as it was an aggregate amount. Income even if we consider apart from the interest, it has to be spread over relevant financial year from the period when the amount would accrue. The claimants normally are not given the entire amount and are subjected to deposit the amount. The amount awarded by the Tribunal cannot be subjected to tax on the flat rate as decided by the Tribunal. The legislation being a social welfare legislation and in fact there is no conflict between the social welfare legislation and tax legislation even if there is conflict the social welfare legislation would prevail as it would subserve larger public interest. A reference to a Division Bench Judgement of Himachal Pradesh which quashed the circular issued by the Income Tax Department has been considered by the Bombay High Court in the Judgment referred hereinabove (supra) on which also this Court places reliance.

14. Further the learned Judge has lost sight of the fact that the deceased left behind him five legal representatives when he passed away. The amount has to be distributed amongst all the five of them and it cannot be that the income tax would be payable on the total sum amount awarded. Even if we look at the order, amounts are bifurcated which goes to show that the amounts are again kept in fixed deposits. In that view of the matter, the amount of compensation will have to be divided between the persons who got money and this amount has to be spread over to the coming years. It is not one time income to them. It is compensation spread over as per the system prevailing. The amount cannot, therefore, be held to be income in one particular year, namely, 2019 when the award came to be passed even if we consider that the period during which the matter remained pending before the Tribunal, the amount has to be bifurcated amongst the legal heirs. Thereafter, the Income Tax Department will have to consider the slabs as they are applicable. As per decision of the Apex Court in **Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121,** the contribution to the family known as multiplicand multiplied by the multiplier which is for the several imponderables in life and economic factors and is based on the application of multiplier with reference to the age of the deceased which has been identified by the Apex Court. It is not the year that the income has to be considered. Hence, the exercise undertaken by the learned Tribunal is prima facie not tenable and is deprecated. Award passed by the Tribunal in its operative portion would read as follows:-

15. Rs.41,45,000/-+70,000/-+30,000/- each to the minor children Prachi and Sparsh, who were 14 and 17 years of age at the time of accident, hence, the award would be Rs.42,75,000/- with 7.5% rate of interest in view of the latest decision of the Apex Court in **National Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.)**, wherein the Apex Court has held as under:-

"13. The aforesaid features equally apply to the contentions urged on behalf of the claimants as regards the rate of interest. The Tribunal had awarded interest at the rate of 12% p.a. but the same had been too high a rate in comparison to what is ordinarily envisaged in these matters. The High Court, after making a substantial enhancement in the award

amount, modified the interest component at a reasonable rate of 7.5% p.a. and we find no reason to allow the interest in this matter at any rate higher than that allowed by High Court."

16. As far as the other part is concerned, the Judgment is maintained. Fresh decree will be drawn by the Tribunal on receipt of the order of this Court. The Insurance Company, if has not deposited the amount as of yet despite the order dated 23.11.2019, shall immediately deposit the entire amount. It goes without saying that no TDS shall be deducted in view of **New India Assurance Co. Ltd. Vs. Hussain Babulal Shaikh and others, 2017 (1) TAC 400 (Bom.).**

17. As far as other aspects are concerned, lis is settled between the parties.

18. A copy of this order be placed before the Registrar General so that it may be circulated to the concerned Tribunal and other Tribunals in the State so that such mistake which is apparent on the face of the record be not committed in future.

19. Appeal is partly allowed.

(2020)12ILR A85
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.12.2020

BEFORE

THE HONTBLE DR. KAUSHAL JAYENDRA THAKER, J.

First Appeal From Order No. 667 of 2017

Uma Shankar Mishra ...Appellant
Versus
The Oriental Insurance Co. Ltd., Alld. & Anr. ...Respondents

Counsel for the Appellant:
Sri Arvind Srivastava

Counsel for the Respondents:
Sri Amit Kumar Sinha, Sri Deepal Srivastava Sinha, Sri Mohan Srivastava

A. Motor Accident Claim – Production of insurance policy–Liability of Insurance Company Exoneration of the Company–Legality–It is bounden duty of the Insurance Company to have produced the insurance policy–Held, the owner and Insurance Company shall be jointly and severely liable for the amount. (Para 4, 5 and 6)

Appeal and Cross Objection partly allowed (E-1)

Cases relied on :-

1. National Insurance Company Ltd. Vs Jugal Kishore & ors., AIR 1988 SC 719

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard learned counsel for the parties.

2. This appeal at the behest of the appellant challenges the judgment and award dated 6.12.2016 passed by the Motor Accident Claims Tribunal, Allahabad in M.A.C. Case No. 62 of 2013.

3. A very interesting issue has arisen before this Court namely what should be the fate of an owner who has not been permitted to file the copy of the insurance policy belatedly but before pronouncement of judgment. Though the owner did not file the driving license and/or policy along with written statement, the policy number was mentioned in the written statement. The Insurance company also did not lead any evidence to show that the vehicle was not insured with it. The owner gave application to produce the driving license and the policy. Very strangely the Tribunal rejected the same on one ground that the matter was listed for final argument. Could this has been done? The empathic answer is, no.

4. May that as it may be, the practical solution in this matter now is that the driving license and the policy would be checked and evaluated by the law officer of the Insurance Company as it was a nano car and prima facie license shown before this Court. Copy appended at Page No.81 is the driving license of Ghanshyam Mishra, whose date of birth mentioned in the driving license is 10.9.1977 and it was in vogue at the time of accident. It appears that hyper technical stand taken by the Tribunal has led to preferring of this appeal as it exonerated the Insurance Company on the ground that policy was not in vogue and that the driving license was not filed. This stand of the learned Tribunal has caused both the Insurance Company as well as the owner loss of interest which they may have to pay as the appellant herein has challenged the award.

5. The learned Tribunal should not have taken stand of an adversary at the behest of learned counsel for the Insurance Company just because he has objected to production of document. Rather, as per the decision of the Apex Court in **National Insurance Company Ltd. Vs. Jugal Kishore and others, AIR 1988 SC 719,** it was bounden duty of the Insurance Company to have produced the insurance policy.

6. May that as it may be, this Court would give quietus to this lis. The amount awarded is maintained and the Tribunal in its over zeal though mentioned, has not granted the amount of medical bills which has not been added for which cross objection has been filed by the claimants before this Court.

The judgment of the Tribunal is hereby modified as follows:

(i) The owner and the Insurance Company shall be jointly and severely liable for the amount.

(ii) The interest as granted by the Tribunal up to the date of judgment is maintained. However, there shall be an addition of Rs.90,000/- (rounded figure) of the bills which Tribunal has mentioned and accepted but in its decree and award has not calculated the same which is the submission of Sri Amit Kumar Sinha, learned counsel for respondent-claimant. A rider is made that the officer of the Insurance Company would be shown all the bills and if he is satisfied, this additional amount be deposited. However, liberty is granted to both the parties to prefer review for this additional amount if they do not come to a consensus.

7. The Insurance Company will deposit the sum of Rs.4,97,465/- plus additional sum of Rs.90,000/-with 7% interest from the date of filing of the claim petition till the date of award and 4% thereafter till the amount is deposited by February, 2021 and meanwhile, look into other grievances of the appellant as this Court has treated this matter in a conciliatory manner at this stage as the policy is accepted now, but as far as driving license is concerned, there are some reservations, hence, the owner shall provide the original copy of the driving license to the Insurance Company.

8. Sri Amit Kumar Sinha, learned Advocate states that Rs.25,000/- which the owner has already deposited may be considered to be the interest for these three years and he has satisfied with the said interest, hence, the owner may not deposit any further interest.

9. In view of the above, this appeal and the cross objections are partly allowed.

10. This Court is thankful to all the learned Advocates and Sri Rastogi, the Law Officer of the Insurance Company. The record and proceedings which according to the knowledge of learned Advocate is kept in PRR Section be sent to the Tribunal forthwith.

(2020)12ILR A87
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.11.2020

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

First Appeal From Order No. 1194 of 2012

Dharam Veer & Ors. ...Appellants
Versus
Kamal Singh & Ors. ...Respondents

Counsel for the Appellants:
Sri Mohan Srivastava

Counsel for the Respondents:
Sri Rahul Sahai, Sri K.K. Dwivedi, Sri Parihar

A. Civil Law-Motor Accident Claim–'Negligence'–Principle of *'Res Ipsa Loquitur'*–Meaning – The term negligence means failure to exercise care towards others which a reasonable and prudent person would in a circumstance or taking action which such a reasonable person would not –It can be both intentional or accidental which is normally accidental–More particularly, it connotes reckless driving and the injured must always prove that the either side is negligent–If the injury rather death is caused by something owned or controlled by the negligent party then he is directly liable otherwise the principle of 'res ipsa loquitur' meaning thereby 'the things speak for itself' would apply. (Para 18)

B. Motor Accident Claim – Contributory Negligence and Composite Negligence – Difference – In the case of contributory negligence, a person who has himself contributed to the extent cannot claim compensation for the injuries sustained by him in the accident to the extent of his own negligence, whereas in the case of composite negligence, a person who has suffered has not contributed to the accident but the outcome of combination of negligence of two or more other persons – In case of composite negligence, injured need not establish the extent of responsibility of each wrong doer separately, nor is it necessary for the court to determine the extent of liability of each wrong doer separately. (Para 22 and 23)

C. Motor Accident Claim – Civil Procedure Code – Section 11 – Res Judicata – Finding on negligence by Tribunal having coordinate jurisdiction – If ingredients of Section 11 of Code are satisfied the later tribunal should not venture to substitute its view without new and cogent evidence produced before it – Tribunal committed an error in giving its fresh finding on negligence for the same accident – Held, the earlier judgment would be binding on the subsequent Tribunal deciding between the same parties. (Para 29 and 33)

D. Motor Vehicle Act, 1988–Civil Procedure Code – Section 2(11) – Legal Representative–Meaning–Entitlement of husband of deceased to receive compensation–Legal representative means any person who in law represents the estate of a deceased person, and includes any person who inter meddles with the estate of the deceased–For fatal accident of wife, earning husband is liable to be treated as legal representative of the deceased wife–Held, deduction of compensation of claimant by the tribunal cannot be sustained. (Para 40 and 43)

E. Evidence Act, 1872 – Proof of age – Relevance of Oral Testimony – Absence of School Certificate – Principle to be applied – If the School certificate is not proved otherwise corroborated, other evidence like oral testimony of PW-1 proving the age of deceased

38 years at the time of accident, should be accepted – Finding of Tribunal on the age reverted – Compensation re-calculated and fresh award drawn. (Para 44, 46 and 53)

F. Motor Accident Claim – Multiple Claim – Procedure–Where there are multiple claims arising out of same accident, the Tribunal should place all the matters before the same Tribunal and the same tribunal should consolidate the matter and decide the same–Necessary direction issued to all the Tribunal. (Para 54)

Appeal disposed of (E-1)

Cases relied on :-

1. F.A.F.O. No. 1818 of 2012; Bajaj Allianz General Insurance Co. Ltd. Vs Smt. Renu Singh & ors. decided on 19.7.2016

2. Archit Saini & anr. Vs Oriental Insurance Company Ltd.; AIR 2018 SC 1143

3. Khenyei Vs New India Assurance Company Limited & ors. ; 2015 LawSuit (SC) 469

4. T.O. Anthony Vs Karvarnan & ors. , (2008) 3 SCC 748

5. Bijoy Kumar Dugar Vs Vidhyadhar Datta & ors. , 2006 (1) TAC 969 SC

6. Gurmeet Kaur & ors. Vs Mohinder Singh & ors., 2006 (3) TAC 958 SC

7. First Appeal From Order No. 2443 of 2013; Jai Devi alias Jaleba Vs Vidup Agrahari & ors. decided on 9.10.2016

8. United India Insurance Co. Ltd. vs Laljibhia Hamirbhai & ors.; 2007 (1) G.L.R. 633

9. New India Assurance Co. Ltd. Vs Vikas Sethi; 2020 SCC OnLine ALL 921

10. Canara Bank Vs N.G. Subbaraya Setty; (2018) 16 SCC 228

11. United India Insurance Co. Ltd. Vs Anarwati; 2017 (2) ADJ 421

12. Ishwardas Vs St. Of M.P. & ors.; AIR 1979 SC 551

13. F.A.F.O. No. 164 of 2005; Oriental Insurance Co Ltd Vs Bhag Singh & ors. decided on 08.07.2019

14. GSRTC v. Ramanbhai Prabhatbhai, AIR 1987 SC 1690

15. Guru Govekar Vs Respondent: Filomena F. Lobo & ors.; AIR 1988 SC 1332

16. Laxmidhar Nayak & ors. Vs Jugal Kishore Behera & ors.; AIR 2018 SC 204

17. National Insurance Co. Ltd. Vs Mannat Johal & ors., 2019 (2) T.A.C. 705 (S.C.)

18. A.V. Padma Vs Venugopal; 2012 (1) GLH (SC), 442

19. Smt. Hansaguti P. Ladhani Vs The Oriental Insurance Company Ltd.; 2007(2) GLH 291

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri Mohan Srivastav, learned counsel for the appellant and Sri Rahul Sahai assisted by Shri Parihar, learned counsel for the respondent- Insurance company Ltd. The owner and the driver have absented themselves though served.

2. This appeal, at the behest of the claimants has been preferred against the award and order dated 21.12.2011 passed by Motor Accident Claims Tribunal, Bulandshahr in M.A.C.P. No.274 of 2009 decided by Sri Vijay Kumar Agarwal, HJS. I normally do not subscribe to theory of the writing name of presiding officer but the facts in which and the manner in which the tribunal deal with the issues before it has prompted me to write his name.

3. The factual scenario relates to an accident having taken place on 26th of February 2009 at about 9.00 pm when the deceased along with her husband and other person namely Harendra Singh and others were travelling from village where they stayed to village Hissail in Maruti Van No.DL 1CC/2521 driven by her husband namely claimant No.1. When this maruti

van reached G.T. Road near village Ranauli, a tanker coming from the opposite direction which was driven very negligently and carelessly in gig gag manner suddenly turned to its right side of the road and rammed into the maruti van caused the accident in which wife of Harendra Singh, wife of claimant No.1 and one another person namely child sustained multiple injuries. Wife of Harendra Singh died in the Government Hospital at Khurja on the very same day. The wife of the present claimant No.1 suffered the pain for almost about three months and was hospitalised. She died out of these injuries only and there is no evidence on record.

4. F.I.R. of the incident was lodged on 26.2.2009 at 11.15 at the police station Arania as Case Crime No. 48 of 2009 was registered against the driver of the tanker. The charge-sheet was laid against the driver of the tanker. The deceased was a household lady and along with it was engaged with animal husbandry and was earning Rs.3000/- per month. The opponent No.1 and 2 filed joint written statements denying the version of the claimants and brought on record that the vehicle was insured with Reliance General Insurance Co. which was valid from 16.12.2008 to 15.12.2009. Reliance General Insurance Co. denied the version of the claim petition. The Tribunal framed several issues and came to the conclusion that the husband of the deceased namely claimant No.1 who was driving the vehicle was equally negligent and written the finding of the contributory negligence thereby halving the compensation awarded to the claimants. No other facts are necessary as the accident has been admitted, the death occurring out of the injuries is admitted, the appellant being legal representative is not accepted.

5. In this background, the matter requires to be considered. The appellants herein examined claimant No.1 and P.W. 2 so as to bring home their claim. The driver and the owner did not appear before the tribunal in any of the matters. Unfortunately, this matter was subsequently conducted.

6. The appellants are the legal representatives rather heirs of the deceased. The appellants have felt aggrieved by the finding of tribunal on the issue of negligence and compensation as far as decision of the tribunal on other issues is concerned they have attained finality.

7. The accident having taken place and the involvement of car in which claimants were travelling and truck owned by respondent no 2 and insured by respondent no 3 herein is not in dispute. It is necessary to mention a fact here that MACP Case no.166 of 2010 concerning this very appellant who had claimed the compensation for death of his son the insurance company settled the dispute in Lok Adalat on 23.10.2011. One more aspect requires to be mentioned here that out of the said accident one other claim petition was preferred being MACP No.104 of 2009 preferred by Harinder Singh and others v. Kamal Singh and others under Section 166 of the Motor Vehicles Act1988. The matter was tried before another tribunal namely Anupam Goyal who decided the lis on 25.2.2011 holding the driver of the truck solely negligent and holding all the three respondents herein responsible to compensate the claimants. . A mention requires to be made here that this award was placed on the records of the tribunal whose award is impugned in this appeal by the claimants which finds a mention even in the award despite that without discussing the findings recorded by the coordinate tribunal and why the tribunal

did not want to follow the same and decide the issue of negligence afresh the tribunal passed the impugned award

8. The issue of negligence was decided in favour of the appellants herein in the earlier claim petition which arose out of the same accident and the Insurance Company has not challenged the liability imposed on them by the Tribunal nor they have challenged the decision holding the driver of the truck solely negligent in the earlier claim petition and they have as narrated hereinabove settled one another claim concerning the appellant no.1 herein.

9. The appellants are the legal representatives rather heirs of the deceased. The appellants have felt aggrieved as the tribunal where the claim for accidental death of wife of appellant number one and mother of other appellants was filed decided the issue of negligence once again without following the decision of the coordinate tribunal, The tribunal decided the lis without appreciating that the appellant number one had not come before it to claim damages for injuries incurred by him in the accident. In the alternative it is submitted that even if the issue of negligence was decided again the tribunal has lost sight of the fact that the driver of the truck did not step in the witness box nor did the owner examine any witness to hold the driver of the car to be partly negligent when admittedly the driver of the truck was charge-sheeted.

10. It is a fact brought on record that and proved by oral testimony that the truck rammed into the car causing 3 casualties of persons travelling in the maruti van and caused injuries to other inmates of the car . The fact that the claimant number one was the driver of the car could not be the ground for halving the compensation as he and other claimants had claimed as legal representative of the deceased and qua the legal heirs it was a case of composite negligence reliance is placed on the decision of Apex Court in Khenyei v. New India Assurance Co. Ltd. & others (infra) and Civil Appeal No.4244 of 2015 decided on 07.5.2015 and decision of this High Court titled UPSRTC Vs Sri Ram Lakhan Singh and 2 others, decided in FAFO No.881 of 2015 dated 8.4.2015 D to bring home his submission that that the tribunal could not have re-evaluated the facts and was bound by principles of res judicata propounded by the High Court and the Apex Court and even if the tribunal wanted to decide the issue of negligence afresh it should have given its reasons for taking a different view which has not been done which makes the judgment vulnerable and requires to be set aside as far as it decide against the appellant no 1 on the issue of negligence. It is further submitted that the compensation awarded is also not in consonance with principles enunciated with this high court and the Apex Court. It is further contended that the rate of interest granted by the tribunal is also not in consonance with the principles laid down by this Court and the Apex Court.

11. Per Contra Shri Rahul Sahai assisted by Shri Parihar ld advocate for the insurance company has submitted that the tribunal has not committed any error in deciding the issue of negligence as the driver of the car was before it, he has relied on two decisions of the Gujarat high court titled in G.S.R.T.C. Vs. Rajeshbhai Shankarlal Patel in First Appeal no. 3068 of 2013 and allied matters decided on 5.2.2014 (Coram Justice Mr. Shah and R.P. Dholaria) and in case of United India Insurance Company Limited v. Kiritikumar

Tulsibhai Patel and 2 others, FA No.1450 of 2016, dated 1.9.2016 (Coram justice M R Shah and Jst AS Supehia) and has contended that as the accident occurred in the middle of road the tribunal was justified in not following the decision rendered by coordinate tribunal as before the earlier tribunal it was case of composite negligence whereas in this case the driver was before it .The insurance company was justified in raising this issue before the tribunal. It is further submitted that the compensation has be halved as driver of the car was the owner of the car and even if it was case of composite negligence the tribunal has taken a absolute practical approach as the insurance company would have to recover from the driver and owner of car namely the claimant number one. It is further pleaded that there was contributory negligence of the driver of car namely appellant no 1and the amount does not require to be enhanced.

12. Heard the learned Advocates for the parties.

13. Recently, the Apex Court in Sudarsan Puhan Vs.Jayanta Ku. Mohanty and another etc., AIR 2018 SC4662, and in the case of UPSRTC Vs. Km. Mamta and others, reported in AIR 2016 SCC 948, has held that appeal is continuation of the earlier proceedings, and High Court is under legal obligation to decide all the issues of lis and decide it by giving reasons.

14. In view of the rival contentions raised this court is called upon to decide (a) whether the issue of negligence was rightly decided by the tribunal again on the same set of facts or was it bound by principles of res judicata, (b) whether the court in this appeal will also have to decide whether claimant no1 was negligent in driving the car or otherwise , (c) whether it is a case of composite negligence qua claimant no I/ appellant no 1 though he was the driver and the deduction from his entitlement is just and proper or otherwise, (d) The question is whether claimant no1 is legal representative and hence entitle to sue if yes whether the deduction by tribunal was justified. The claimants have even challenged adequacy of the compensation awarded and interest awarded thereon.

15. Before I proceed to decide this appeal from the facts and law as is all the questions will have to be answered in favour of the appellants herein for the reasons mentioned herein below at the outset it is noticed that the tribunal has committed an error which is apparent on the face of the record and is against the settled principles of law as would be demonstrated hereinafter

16. I would deal with each issue separately under separate heads namely negligence applicability of doctrine of res judicata the compensation to be awarded and entitlement of the claimants. The doctrine of res judicata applies to a case where the suit or an issue has already been heard and finally decided by a Court. In the case of abandonment also this doctrine would apply.

17. In the aforesaid background this Court feels that it would be necessary to show that the thinking of the tribunal is bad but perverse therefore though I am convinced that principles of res judicata apply. I have ventured to discuss the finding of negligence which is supported by learned counsel for insurance company so as to contend that drivers of both the vehicles were negligent.

ISSUE OF NEGLIGENCE EVEN IN ABSENCE OF

APPLICABILITY OF DOCTRINE OF RES JUDICATA AND WHETHER THE SAME IS RIGHTLY DECIDED BY THE TRIBUNAL:

18. The term negligence means failure to exercise care towards others which a reasonable and prudent person would in a circumstance or taking action which such a reasonable person would not. Negligence can be both intentional or accidental which is normally accidental. More particularly, it connotes reckless driving and the injured must always prove that the either side is negligent. If the injury rather death is caused by something owned or controlled by the negligent party then he is directly liable otherwise the principle of "res ipsa loquitur" meaning thereby "the things speak for itself" would apply. The term contributory negligence has been discussed time and again. A person who either contributes or is co author of the accident would be liable for his contribution to the accident having taken place.

19. The Division Bench of this Court in First Appeal From Order No. 1818 of 2012 (Bajaj Allianz General Insurance Co.Ltd. Vs. Smt. Renu Singh And Others) decided on 19.7.2016 has held as under :

"16. Negligence means failure to exercise required degree of care and caution expected of a prudent driver. Negligence is the omission to do something which a reasonable man, guided upon the considerations, which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Negligence is not always a question of direct evidence. It is an inference to be drawn from proved facts. Negligence is not an absolute term, but is a relative one. It is rather a comparative term. What may be negligence in one case may not be so in another. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which would be reasonably foreseen likely to caused physical injury to person. The degree of care required, of course, depends upon facts in each case. On these broad principles, the negligence of drivers is required to be assessed.

17. It would be seen that burden of proof for contributory negligence on the part of deceased has to be discharged by the opponents. It is the duty of driver of the offending vehicle to explain the accident. It is well settled law that at intersection where two roads cross each other, it is the duty of a fast moving vehicle to slow down and if driver did not slow down at intersection, but continued to proceed at a high speed without caring to notice that another vehicle was crossing, then the conduct of driver necessarily leads to conclusion that vehicle was being driven by him rashly as well as negligently.

18. 10th Schedule appended to Motor Vehicle Act contain statutory regulations for driving of motor vehicles which also form part of every Driving License. Clause-6 of such Regulation clearly directs that the driver of every motor vehicle to slow down vehicle at every intersection or junction of roads or at a turning of the road. It is also provided that driver of the vehicle should not enter intersection or junction of roads unless he makes sure that he would not thereby endanger any other person. Merely, because driver of the Truck was driving vehicle on the left side of road would not absolve him from his responsibility to slow down vehicle as he approaches intersection

of roads, particularly when he could have easily seen, that the car over which deceased was riding, was approaching intersection.

19. In view of the fast and constantly increasing volume of traffic, motor vehicles upon roads may be regarded to some extent as coming within the principle of liability defined in Rylands V/s. Fletcher, (1868) 3 HL (LR) 330. From the point of view of pedestrian, the roads of this country have been rendered by the use of motor vehicles, highly dangerous. 'Hit and run' cases where drivers of motor vehicles who have caused accidents, are unknown. In fact such cases are increasing in number. Where a pedestrian without negligence on his part is injured or killed by a motorist, whether negligently or not, he or his legal representatives, as the case may be, should be entitled to recover damages if principle of social justice should have any meaning at all.

20. These provisions (sec.110A and sec.110B of Motor Act, 1988) are not merely procedural provisions. They substantively affect the rights of the parties. The right of action created by Fatal Accidents Act, 1855 was 'new in its species, new in its quality, new in its principles. In every way it was new. The right given to legal representatives under Act, 1988 to file an application for compensation for death due to a motor vehicle accident is an enlarged one. This right cannot be hedged in by limitations of an action under Fatal Accidents Act, 1855. New situations and new dangers require new strategies and new remedies.

21. In the light of the above discussion, we are of the view that even if courts may not by interpretation displace the principles of law which are considered to be well settled and, therefore, court cannot dispense with proof of negligence altogether in all cases of motor vehicle accidents, it is possible to develop the law further on the following lines; when a motor vehicle is being driven with reasonable care, it would ordinarily not meet with an accident and, therefore, rule of res-ipsa loquitor as a rule of evidence may be invoked in motor accident cases with greater frequency than in ordinary civil suits (per three-Judge Bench in Jacob Mathew V/s. State of Punjab, 2005 0 ACJ(SC) 1840).

22. By the above process, the burden of proof may ordinarily be cast on the defendants in a motor accident claim petition to prove that motor vehicle was being driven with reasonable care or that there is equal negligence on the part the other side."

20. The negligent act must contribute to the accident having taken place. The Apex Court recently has considered the principles of negligence in case of Archit Saini and Antother Vs. Oriental Insurance Company Limited, AIR 2018 SC 1143.

21. The Apex Court in Khenyei Vs. New India Assurance Company Limited & Others, 2015 LawSuit (SC) 469 wherein the Apex Court while considering the question of joint and several liability held as under:

"It is a case of composite negligence where injuries have been caused to the claimants by combined wrongful act of joint tort feasors. In a case of accident caused by negligence of joint tort feasors, all the persons who aid or counsel or direct or join in committal of a wrongful act, are liable. In such case, the liability is always joint and several. The extent of negligence of joint tort feasors in such a case is immaterial for satisfaction of the claim of

the plaintiff/claimant and need not be determined by the by the court. However, in case all the joint tort feasors are before the court, it may determine the extent of their liability for the purpose of adjusting inter-se equities between them at appropriate stage. The liability of each and every joint tort feasor vis a vis to plaintiff/claimant cannot be bifurcated as it is joint and several liability. In the case of composite negligence, apportionment of compensation between tort feasors for making payment to the plaintiff is not permissible as the plaintiff/claimant has the right to recover the entire amount from the easiest targets/solvent defendant."

22. Thus, it can be seen that there is a difference between contributory and composite negligence. In the case of contributory negligence, a person who has himself contributed to the extent cannot claim compensation for the injuries sustained by him in the accident to the extent of his own negligence; whereas in the case of composite negligence, a person who has suffered has not contributed to the accident but the outcome of combination of negligence of two or more other persons.

23. The Apex Court in T.O. Anthony v. Karvarnan & Ors. 2008 (3) SCC 748 has held that in case of composite negligence, injured need not establish the extent of responsibility of each wrong doer separately, nor is it necessary for the court to determine the extent of liability of each wrong doer separately. It is only in the case of contributory negligence that the injured himself has contributed by his negligence in the accident. Extent of his negligence is required to be determined as damages recoverable by him in respect of the injuries have to be reduced in proportion to his contributory negligence. The relevant portion is extracted hereunder :

"6. 'Composite negligence' refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrong doers, it is said that the person was injured on account of the composite negligence of those wrong-doers. In such a case, each wrong doer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrong-doer separately, nor is it necessary for the court to determine the extent of liability of each wrong-doer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence of the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence."

Emphasis added.

24. In this case it is seen that the driver and the owner of truck have though appeared before the tribunal have not examined themselves on oath. The claimant no. 1 examined himself and was at length cross examined by the advocate of the insurance company. The claimants examined Hari Om sharma as p,w.2. The respondents have not examined any witness on oath. The insurance company having not proved fact of negligence on the part of the driver of the car, the insurance company cannot be benefitted. Considering the

submission of Sri Sahai that the tribunal has rightly decided the issue of negligence while examining the facts no doubt there is head on collision between the car and tanker No.UP 18 AD 9820 at 9 pm at night which caused the death of three people, the reply filed by the driver and the owner was one of denial and had contended that it was the fault of Dharamveeer, driver of the maruti car no. DL 01 CC2521, Tribunal first narrates its feeling that as there was no mention of Dharveer nor he had filed any claim petition for claiming compensation for his injury he may or may not have been travelling in the vehicle however, the tribunal believes his oral testimony he has in his ocular version stated that the driver of the truck came on the wrong side and dashed with the maruti car causing severe injuries to his son Narendra and his wife Raj Kumari, the FIR was lodged by brother in law of Harendra ,basis of the charge-sheet the tribunal notes that one another claim petition was already decided and the judgment was placed before him as exb 52 C2. The tribunal goes on the assumption on whether Dharamveer was traveling in the vehicle or not. The tribunal thereafter discusses that FirR is not a encyclopaedia of the incident accepts that chargesheet was laid against the driver of the tanker/truck . It was argued before the tribunal by insurance company that it was case of equal negligence of drivers of the both the vehicles. The tribunal goes on to take different view on two counts it relied on the site plan and the fact that there was decision in Bijoy Kumar Dugar v. Vidhyadhar Datta and others, 2006 (1) TAC 969 SC and Gurmeet Kaur and others v. Mohinder Singh and others, 2006 (3) TAC 958 SC and came to the conclusion that the driver of the vehicle namely car was equally negligent unfortunately the tribunal missed out the following aspects (i) the claimants/ appellants were the heirs of the deceased and they were not claiming for injuries caused to them this aspect has been missed by the tribunal the second aspect of holding the driver of the car negligent also is against the principles of deciding contributory negligence recently the principles for holding drivers negligent or rather holding a driver of one vehicle to have contributed was considered contributory negligence has to be proved and to be shown and demonstrated that the person who has to be held to have contributed to the accident having taken place was co-author of the accident in this case just because the tribunal has come to the conclusion that the driver of the car was negligence only on the basis of the site plan which was not even proved before it. In this case the tribunal was having the evidence of eye witnesses recently the Apex Court in the case of Archit Saini (supra) has laid down the guidelines as far as what would amount to contributory negligence.

25. No witnesses has been examined who have deposed in favour of the driver of the truck as can be seen the driver of the truck was driving a heavier vehicle and was under a duty to slow down it is not brought on record whether he had slowed down the vehicle it is not always that vehicles which have had head on collision both the drivers would be or rather co authors of the accident the tribunal had the choice of referring to the findings of fact based on oral testimony of one another witnesses who was in the car but there is no discussion whatsoever by the tribunal. In that view of the matter the judgment of Gujarat High Court cited by the counsel for respondent will be of no aid as in the case on hand no other evidence was brought on record for differing as was the fact in the facts proved before the tribunal the decision of Gujarat High Court.

26. A reference to the decision of this High Court in FAFO No.2443 of 2013, Jai Devi alias Jaleba v. Vidup Agrahari and others decided on 9.10.2016 would be relevant for our purpose as the findings of fact in the holding the driver of motorcycle to be negligent had been upturned by the high court .Facts of Jai Devi (supra) were identical and the impact in this case also was such that there were three people who subsequently succumbed to the injures in that view of the matter and in absence of any proof to the contrary, the tribunal has fallen in great error in relying on the decisions f the Apex Court without considering facts of the case ratio of a decision cannot be applied without factual discussion the facts in the case relied by the tribunal were different there accident was between vehicles of equal magnitude namely trucks the finding based on para 5 of the decision of Gurmeet Kaur (Supra) cannot be sustained as the ld tribunal has not applied the ratio properly the Apex court was concerned with two fast moving heavy vehicles hence the finding of tribunal cannot be sustained. The decision in Vijaykumar also could not have been followed . There is no finding returned by the tribunal as to the facts the cryptic finding that in view of decision of Apex court both are held negligent this has gone to the root of the matter in causing miscarriage of justice.

27. **Qua applicability Of Doctrine Of Res Judicata where Decision On Negligence Was Decided By competant Tribunal in Claim Arising Out Of The Same Accident :**

28. Issue of applicability of Res Judicata falls in the category of mixed question of law and facts, and applicability depends on evidence led by parties. The doctrine applies even if the decision by earlier court is right or wrong but if it has attainted finality between parties the doctrine shall apply and the issues decided.

29. A vex question baffles tribunals so far the issue of negligence is concerned, where the claimant has produced a copy of decision of a tribunal where issue of negligence is decided earlier by the Motor Accident Claim Tribunal for the same accident wherein, the issue of negligence has been decided on merits and the Tribunal comes to the conclusion that, "...considering documentary evidence and also considering cited cases in respect of composite negligence, I come to the conclusion that impugned accident took place because of composite negligence on the part of the drivers of both the offending vehicle trucks, because on scrutiny of the documentary evidence produced on record, there is not found any negligence on the part of the injured person, and hence, I answer issue no.1 in the affirmative". Then in such situation what should it do? In such situation the issue of negligence decided by the tribunal having coordinate jurisdiction will operate as res judicta or rather collateral estoppel where the parties in two Petitions are same except the claimant or the claimants as the case may be and it is proved that, the accident arose out of same accident and all the ingredients of section 11 of the Code Of Civil Procedure 1908 are fulfilled and except the claimant, or claimants the decision by the Tribunal in Petition decided earlier, on merits where all the parties are before it would operate as 'res-judicata' as far as issue which has been decided for example negligence in subsequent petition. In light of the decision of the High Court of Gujarat in " United India Insurance Co. Ltd. v/s. Laljibhia Hamirbhai & Ors.,(INFRA) the issue of

negligence will operate as resjudicta. It is held in the said case that where the parties in two Petitions are same, except the claimant, the decision by the Tribunal in Petition decided earlier, would operate as 'res-judicata' as fas as issue of negligence is concerned in subsequent petition. It can be seen that High Court of Gujarat in United India Insurance Co. Ltd. v/s. Laljibhia Hamirbhai & Ors2007 (1) G.L.R. 633 has elaborately discussed the applicability as well as non applicability of the said doctrine to claims arising out of same accident but being tried by different tribunals. Recently, similar question arose before this High Court in the litigation titled New India Assurance Co. Ltd. Vs. Vikas Sethi 2020SCC OnLine ALL 921 has delved again on the principles applicable for applying the doctrine where a particular issue being already dealt with and decided on merits could be revisited by subsequent tribunal or whether principle of res judicata in a subsequent claim would apply on an issue of fact which in the former proceedings was decided by a forum of competent jurisdiction between same parties. The Court referred to Section 169 of Motor Vehicle Act, 1988 and Rules 209, 215, 220 of U.P. Motor Vehicle Rules, 1998 while deliberating over the matter and observed that that the MACT is obligated to frame the issues on which the right decision of the claim appears to depend. The Court relied on the judgment titled *Canara Bank v. N.G. Subbaraya Setty,* (2018) 16 SCC 228 and held that the findings of MACT Lucknow were not justifiable as it should have considered the objections of the appellant and weighed the same in accordance with law. The principle of res judicata was applicable between the parties and the same should have been applied on the aspect of proportional liability of both the parties, accordant with the earlier judgment/award. The Court modified the award rendered by MACT Lucknow by fixing the liability to pay compensation equally to both the appellant and respondent. The consistent view is that if ingredients of section 11 of Code are satisfied the later tribunal should not venture to substitute its view without new and cogent evidence produced before it.

30. Reference to the decision of this high court in United India Insurance Co. Ltd. Vs. Anarwati, 2017 (2) ADJ 421 where the undersigned was signatory and where the counsel for the insurance company did not disclose that similar matter was decided by claims tribunal and issue of negligence was decided. The Appellate Court decided the issue of contributory negligence and later when it was found that the insurance company had not challenge the decision wherein the issue of negligence qua the driver of the tractor being held to be solely negligent was already decided and the contention before the appellate court that the vehicle was not involved could not have been permitted to be agitated, .(Similar is the case before us)

31. In the case titled Ishwardas V/S State Of Madhya Pradesh & Ors. reported in 1979 SC 551, the Apex Court has held that in order to sustain the plea of res-judicata, it is not necessary that all the parties to the litigations must be common. All that is necessary is that the issue should be between the same parties or between the parties under whom they or any of them claimed.

32. A similar issue arose before this High court in case titled Oriental Insurance Co Ltd vs Bhag Singh and Others, First Appeal From Order No. - 164 of 2005, wherein the court held

"2. This appeal at the behest of Insurance Company is covered by a Division Bench judgment of this Court reiterated and followed in First Appeal From Order No.896 of 2005 (United India Insurance Company Limited Versus Smt.Anarwati & Others) decided on 20.10.2016 wherein it has been held that as far as issue of negligence is concerned, the judgment in one matter has to be followed by the subsequent Tribunal. Paragraph 19 of the Division BenchJudgment passed in First Appeal From Order No.896 of 2008 and Paragraph 14 of the judgment passed in First Appeal From Order No. 3096 of 2004 reads as follows :

"19. The driver of motorcycle cannot be said to have contributed to the accident having taken place. We have decided the matter of contributory negligence as learned Advocate for appellant did not disclose that in the case of Baladeen and others Vs. Tofan Singh andanother, M.A.C.P. No.501 of 2002, involving same vehicles being Tractor No.UP 75-A/1732,the driver of Tractor was held responsible for alleged accident. Had this been brought to our notice in the beginning and had it been conveyed whether said decision was challenged or not, we would not have re-decided said issue as decision on issue of negligence has already been decided by Tribunal and in the said decision, driver of Tractor has been held solely negligent. In light of decision of High Court of Gujarat in United India Insurance CompanyLtd. Vs. Hamirbhai and others, GLH 2007 (1) 633, we do not say anything about suppression of said material by learned Counsel while contending that vehicle was not involved in accident and it was a case of contributory negligence. We decided the same as it was not pointed out that Insurance company has challenged said decision or not. The decision in another matter arising out of same accident will act as res judicata and, therefore, this ground is no longer available to Insurance company as they had not challenged earlier judgment which found that driver of Tractor was responsible. Thus, we hold that driver of Tractor was negligent"

"14. It is rightly submitted by the counsel for insurance company that the finding of the earlier Bench was binding on the Tribunal as far as issue of negligence is considered. He has heavily relied on Division Bench judgment of this High Court in First Appeal From OrderNo.896 of 2005 (United India Insurance Company Limited Versus Smt. Anarwati & others)decided on 20.10.2016 and has submitted that the finding given to the contrary requires to be up turned. The said submission has to be accepted till it is upturned by Higher Court in appeal. In the earlier matter, the Tribunal held both the drivers negligent. In the subsequent matter the said finding has to operate as res judicata.

33. Thus, it is clear that the Tribunal committed an error in giving its fresh finding on negligence for the accident which took place in the year 1994 and did not follow the earlier judgment. The deceased driver Gurudas Singh was not considered to be negligent earlier also holding that the bigger vehicle contributed 66% is also bad. The earlier judgment as far as negligence is concerned would be binding on the subsequent Tribunal deciding between the same parties.

34. The Claim Petition No.148 of 1994 was decided much before this decision. Thus, the said judgment is upturned":

35. This court is of the opinion that where there are multiple claim petitions

which are filed in different claims tribunals involving different vehicles, the principle of res judicata rather constructive res judicata should be made applicable if all the parties are the same, it is a case of composite negligence, the decision rendered by one Tribunal even if inviolability of res judicata, the decision of the tribunal would be an important piece of evidence which has to be taken not of along with other evidentiary value and material and, therefore, the apportionment would be as per the principles of composite negligence and cannot be judge centric and the decision rendered first would govern the later matters. This opinion of the undersigned gets support from the decision of the Karnataka High Court in the case of Managing Director, Karantaka State Road Transport Corporation Vs. P. Nandini.AIR 2019 (1) Kar. 235.

36. The reliance by the counsel for respondent-insurance company ltd on the recent decision of the High Court of Gujarat in G.S.R.T.C. Vs. Rajeshbhai Shankarlal Patel, (Refer : https://indiankanoon.org/doc/14396269/) where the division bench was considering whether a decision rendered by a coordinate tribunal at a different place would apply as res judicata as far as issue of negligence is concerned. The interesting part is that before the earlier Tribunal all the parties were not arrayed and it was a matter where the Tribunal had not even bifurcated what would be the contributory negligence. All that the Tribunal had done was had decided on the composite negligence. The learned subsequent tribunal in bunch of matters held that as far as the heirs of the deceased who was driving the other vehicle the matter would have to be re-agitated and thereby re-decided the issue of negligence and came to the conclusion that the factual matrix will not permit the Tribunal to apply the doctrine of res judicata. The reasoning given is that the heirs of the driver of the jeep had filed the claim petition which came up for subsequent hearings. The appreciation of evidence before the Tribunal and the High Court revealed that the earlier Tribunal had decided the matter as the same was filed by the heirs of persons travelling in the marshal jeep namely a non tort-feasor and qua those claimants it was a case of composite negligence. Thus, it can be seen that where it is case of composite negligence, a subsequent tribunal if finds that on factual matrix the matter is not covered by the principles down by the Courts can differ and may not apply the doctrine of res judicata.

37. In our case the matter was not against the father by the children as the case before the Gujarat High Court. In our case the claimants were being heirs of the deceased who had succumbed to the injures and qua them even if the tribunal was of the opinion that the driver of the car was negligent it was a case of composite negligence. The petition was filed only against the driver owner and the insurance company tanker and not against the father by the children as was in the case before the Gujarat High Court. Thus the tribunal was even bound by the principles of res judicata which the tribunal has not discussed why the tribunal would not follow the decision of the coordinate tribunal the judgment of Gujarat High Court in F,A. Referred by the insurance company will be of no help as on facts as they emerge in the case on hand. The facts in the decisions of Gujarat high court are different there the tribunal in case of GSRTC (supra) distinguished the decision

of the earlier tribunal and the high Court had confirmed the same in our case unfortunately the learned tribunal does not even discuss as to why the well reasoned judgment of the earlier coordinate tribunal was not applicable and came to its own finding without there being any further or contradictory evidence to support the finding of fact. Thus on both counts the judgment requires to be upturned as far as issue of negligence is concerned, this court comes to conclusion that there was no rebuttable evidence before the tribunal to hold the driver of the car also negligent the tribunal misdirected itself in venturing to decide the issue afresh without discussing why he would not follow the earlier decision on both these counts the judgment requires modification.

QUESTION OF LEGAL REPRESENTATIVE

38. The provisions of Chapter XI partakes within it laudable object to ensure that third party, who suffered because of accident will be compensated, even if financial condition of the driver or the owner, who caused the accident, was not sound. The provisions have to be construed in a manner so that the laudable object of Chapter XI and XII is fulfilled .The term "legal representative' is discussed as this court feels that despite several decisions interpreting the term legal representative under the Motor Vehicles Act, 1939 and1988., the tribunal has misconstrued the term.

39. The term legal representative has not been defined in the Motor Vehicles Act 1939 or 1988 Act. The 2019 Amendment also does not define the term legal representative. Certain provisions of the Code of Civil Procedure are made applicable to the Motor Vehicles Act 1988 and Tribunals and higher Courts have interpreted the term legal representative so as to give purposive interpretation to the said definition. In view of this position we will have to take recourse to umbrella legislation namely Code of Civil Procedure 1908.Section 2 (11) of the Code of Civil Procedure defines the term "legal representative' which reads as under:

40. "Section 2 (11) "legal representative" means any person who in law represents the estate of a deceased person, and includes any person who inter meddles with the estate of the deceased and where a party sues or issued in a representative character the person on whom the estate devolves on the death of the party suing or sued;"

41. In the case of GSRTC Vs Ramanbhai Prabhatbhai, AIR 1987 SC 1690, the Supreme Court has held that for claiming compensation under either of the Acts the term legal representative cannot be given a narrow meaning as ascribed in Fatal Accidents Act 1855. Major, married son & earning son of the deceased can claim compensation. Dependency is not basic criteria for relief in accident cases to the claimants if they are legal heir or legal representative of deceased. (Refer to: https://www.livelaw.in/amp/top-stories/major-sons-of-deceased-can-claim compensation-151579 and https://timesofindia.indiatimes.com/india/Dependency-no-criteria-for-relief-in-accidentcaseSC/articleshow/1839639.cms?from=mdr)

LEGAL REPRESENTATIVE OF OWNER OF VEHICLE

42. In Guru Govekar Vs.Respondent: Filomena F. Lobo and Ors., AIR 1988 SC

1332, the Apex court was faced with the issue of deciding whether under Motor Vehicles 1939,Sections 94, 95, 96 and 125 whether insurer would be liable to pay compensation to third party or to his or her legal representatives as case may be when liability arises when motor vehicle is in custody of repairer The Supreme Court held that insurer is liable to pay compensation found to be due to claimant as consequence of injuries suffered by respondent if any innocent third parties goes without compensation when they suffer injury on account of motor accidents the purpose of the Act will be defeated very object of introducing insurance policy under Act.

43. The claimants before this court and the tribunal are the legal representatives of the deceased as they are husband and children who fall in Class - I heirship. In a recent decision, it has been held that earning wife succumbed to the injuries claim petition was filed by minor daughter and father insurance company disputed its liability on the count that husband is earning and was not dependent of the deceased and minor was dependent on her father Whether such objection sustainable? No. For fatal accident of wife, earning husband is treated as Legal representative of the deceased wife refere to- 2019 ACJ 855 (Del). Thus the deduction of compensation of claimant no.1 by the tribunal cannot be sustained as he was claiming as an heir and not driver the driver or injured.

COMPESATION

44. The tribunal again confused itself by finding that the death certificate dated 31.5.2009 showed the age of the deceased as 45 the injury certificate dated 26.2.2009 showed his age 45 the post mortem report showed age is 38 years whereas ration card dated 28.3.2006 showed her age as 34 he disbelieves the school living certificate as the claimant no.1 did not say in his oral testimony that the name of father of the Rajkumar Durga Singh, it appears that the learned tribunal has not applied basic principles of law of evidence that the School certificate is not proved otherwise corroborated other evidence should be accepted the oral testimony of PW1which proved that the deceased was 38 years at the time of accident on what basis the tribunal came to the conclusion that the deceased was 42 years of age is not understood. The tribunal takes out a mean of the age and comes to the conclusion that she would be 42years of age this is not permitted even if all contours of Evidence Act are to be followed. The tribunal could not have considered that he would consider the mean between what was narrated in medical certificate and the other evidence it has to be observed that this finding of the tribunal is also bad in eye of law and cannot be sustained. The age of deceased will have to be considered to be 38 years at the time of accident. The tribunal considered the income of the deceased at RS 3000per month deducted 1/3 amount granted multiplier of 14 and awarded a meagre sum of Rs.9500/- as non pecuniary damages and added Rs.86000/- for medical expenses for the period she was hospitalised. The tribunal deducted one third for personal expenses It is submitted by learned advocate that the tribunal again committed a mistake in deducting 50% from the total compensation which it could not have done the medical expenses could not have been added to compensation awarded under other heads taken as total compensation. It is further submitted that the tribunal committed error in not adding

any amount under the head of future loss of income reliance is placed on the decision of the Apex Court in National Insurance Company Ltd Vs Pranay Sethi, 2017 judgment of the Apex Court dated 31.10.2017 or claiming enhancement and KHEYNI (supra) for contending that no amount could have been deducted-from compensation to heirs.

45. The deceased was 38 years of age in the year of accident namely 2009.The evidence on record shows that she was into animal husbandry but no proof was adduced to prove this fact or her earning and the tribunal held that the High Courts and Apex court has held that for a houselady the income would be Rs 3000 per month and as the tribunal had considered her age to be 42 applied multiplier of 14 in view of Even if we consider the ratio laid down by the Apex Court in recent judgment, titled Laxmidhar Nayak and Others Vs. Jugal Kishore Behera and others reported in AIR 2018 SC 204 income of a housewife in the year 2009 would be Rs.4000 per month, the amount would be Rs. 48,000/- per annum, to which as the deceased was 38 years of age, 25% will have to be added as she was self employed.

46. Hence, the compensation payable to the appellants in view of the decision of the Apex Court in Pranay Sethi (Supra) is computed herein below:

i. Annual Income Rs.48000/

ii. Percentage towards future prospects : 25%

iii. Total income : Rs.60,000/-

iv. Income after deduction of 1/3 amount would be Rs.40,000/-

v. Multiplier applicable :15

vi. Loss of dependency: Rs.40,000 x 15 = Rs 6,00,000/Amount(six Lacs)

vii. Under non pecuniary heads: Rs1,00,000/-.

viii. Total Compensation : 6,00,000 + 1,00,000 = Rs.7,00,000/- plus Rs. 86,000/- as awarded by the Tribunal for medical expenses.

47. As far as issue of rate of interest is concerned, the interest should be 7.5% in view of the latest decision of the Apex Court in ***National Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.),*** wherein the Apex Court has held as under :

"13. The aforesaid features equally apply to the contentions urged on behalf of the claimants as regards the rate of interest. The Tribunal had awarded interest at the rate of 12% p.a. but the same had been too high a rate in comparison to what is ordinarily envisaged in these matters. The High Court, after making a substantial enhancement in the award amount, modified the interest component at a reasonable rate of 7.5% p.a. and we find no reason to allow the interest in this matter at any rate higher than that allowed by High Court."

48. In view of the above, the appeal is partly allowed.

49. Judgment and decree passed by the Tribunal shall stand modified to the aforesaid extent.

50. The respondent-Insurance Company shall deposit the amount with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited within a period of 12 weeksfrom

today. The amount already deposited be deducted from the amount to be deposited.

51. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442, the order of investment is not passed because applicants/claimants are neither illiterate or restic villagers.

52. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of Smt. Hansaguti P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291, total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 (Smt. Sudesna and others Vs. Hari Singh and another) while disbursing the amount.

53. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein.

54. This Court feels that a direction requires to be given to all the Tribunals in the State that where there are multiple claims, the learned MACT Tribunal Main should place all the matters before the same Tribunal and the same tribunal should consolidate the matter and decide the same so that the situation as it arose in this matter may not arise.

55. This judgment may be sent down to the concerned Tribunal so that in future he may be more vigilant while deciding matters under this beneficial piece of legislation.

56. The Tribunals in the State shall follow the direction of this Court as herein afore mentioned as far as disbursement is concerned, it should look into the condition of the litigant and the pendency of the matter and not blindly apply the judgment of A.V. Padma (supra). The same is to be applied looking to the facts of each case.

57. This Court is thankful to learned advocates for arguing and getting matter disposed of.

(2020)12ILR A103
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.11.2020

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

First Appeal From Order No. 1524 of 2020

Smt. Munni Devi & Anr. ...Appellants
Versus
Anjani Kumar Omar & Ors. ...Respondents

Counsel for the Appellants:
Sri Vidya Kant Shukla

Counsel for the Respondents:
Sri Arvind Kumar

A. Motor Accident Claim – Application of Multiplier – Age of deceased comes under the age bracket of 51-55 years – Multiplier would be 11 – Held, the reasoning given by the Tribunal for applying multiplier of 5 is against the mandate of Supreme Court. (Para 6)

Appeal partly allowed (E-1)

Cases relied on :-

1. Sarla Verma & ors. Vs Delhi Transport Corporation & ors., (2009) 6 SCC 121

2. National Insurance Company Limited Vs Pranay Sethi & ors., (2017) 16 SCC 680

3. Branch Manager, National Insurance Co. Ltd. Vs M. Arulmozhi (2014) AAC 1046

4. National Insurance Co. Ltd. Vs Mannat Johal & ors., 2019 (2) T.A.C. 705 (S.C.)

5. F.A.F.O. No. 23 of 2001, Smt. Sudesna & ors. Vs Hari Singh & anr., decided on 26.11.2020

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri Vidya Kant Shukla, learned counsel for the appellants, Sri Arvind Kumar, learned counsel for the respondent and perused the judgment and order impugned.

2. Facts giving rise to this appeal are that on 7.12.2015 deceased, namely, Virendra Kumar Pal along with one Mayaram, the brother-in-law of his elder brother, riding on motorcycle bearing Registration No. U.P. 78 BW-6535 was going to Village Tikrauli, District Hamirpur. Mayaram was driving the motorcycle with normal speed on his side. As soon as 7.10 am they reached at Village Amauli, Police Station Sajeti on Kanpur-Hamirpur road, the driver of Truck No. U.P. 78-CN- 5788, driving rashly and negligently dashed motorcycle on account of which both succumbed to their injuries on the spot. Claimants filed claim petition claiming a sum of Rs.48,27,906/- as compensation.

3. The Motor Accident Claims Tribunal, Kanpur Nagar (hereinafter referred to as 'Tribunal') in M.A.C.P. No.194 of 2016 awarded a sum of Rs.19,29,687/- with 7% annual interest.

4. The accident is not in dispute. The issue of negligence decided by the Tribunal is not in dispute. The Insurance Company has not challenged the liability imposed on them. The only contention raised in this petition is that deceased was 52 years and 11 months and the multiplier of 5 applied by the Tribunal is on lower side on the basis that the deceased had only five years service left and hence the multiplier would be 5.

5. I have perused the Judgment and order impugned.

6. Even if we consider the age of the deceased to be above 50 years, he comes under the age bracket of 51-55. As per the Judgments of the Apex Court rendered in **Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121** and **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050,** multiplier would be 11. Thus, the reasoning given in paragraph 31 for applying multiplier of 5 is against the mandate of Supreme Court and Judgment of Madras High court rendered in **Branch Manager, National Insurance Co. Ltd. Vs. M. Arulmozhi (2014) AAC 1046.** It has not to be seen as far as the claim petition is concerned, hence, this mistake is apparent on the face of the record. The multiplier applicable in the present case would be 11. As far as deduction of 1/3 is concerned, I am in agreement that it has been properly deducted. As far as the rest of the awarded decree is concerned, the amount granted to

widow, who was 40 years of age, and accident took place on 2003, 10% has to be added. Therefore, Rs.5000/- is to be added to the amount under non pecuniary loss as per decision in Pranay Sethi **(supra)**. The interest as per Judgment of Apex Court in **National Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.)** would be 7.5 per cent but Insurance Company shall not deduct any amount under the TDS as the cannot be deducted as per the Judgment of this Court in **F.A.F.O. No.23 of 2001, Smt. Sudesna and others vs. Hari Singh and another,** dated 26.11.2020. Relevant part of the said Judgment is as under:-

" It is further orally conveyed that even if the amounts will be deposited, the Insurance company normally deducts TDS. The judgement is reviewed and at the end.

"I. On depositing the amount in the Registry of the Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any.

II. Considering the ratio laid down by the Hon'ble Apex Court in the case of A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442, the order of investment is not passed because applicants/claimants are neither not illiterate and in New India Assurance Co. Ltd. Vs. Hussain Babulal Shaikh and others, 2017 (1) TAC 400 (Bom.).

III. View of the ratio laid down by Hon'ble Gujarat High Court, in the case of Smt. Hansaguti P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291, total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount (as directed in para No. II) without producing the certificate from the concerned Income-Tax Authority.""

7. The amount shall be deposited on or before 31.1.2021.

8. It goes without saying that if the amount is deposited and TDS is deducted, the Insurance company shall see to it that in future this mistake is not committed and will help the appellant in recovering the said amount from the income-tax department.

9. The appeal is partly allowed.

10. This Court is thankful to Sri Arvind Kumar for ably assisting the court so that Insurance Company may not have to pay more interest.

(2020)12ILR A105
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.11.2020

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

First Appeal From Order No. 1538 of 2014

Shambhu Nath Shukla & Anr. ...Appellants
Versus
Raghubir Singh & Anr. ...Respondents

Counsel for the Appellants:
Sri Ram Singh, Sri Amit Kumar Sinha

Counsel for the Respondents:
Sri Abhinav Krishna, Sri Abhindra Krishna, Sri Arun Kumar Shukla, Sri R.N. Singh

A. Civil Law - Motor Vehicle Act, 1988 – Section 140 and 166 – Civil Procedure Code – Section 2(11) – Legal Representative – Meaning – Entitlement of father in absence of mother to receive compensation – The term 'Legal Representative' has been considered to be inclusive and the courts have given it a wider scope of applicability – It would include legal heir – The person who can represent the estate of the deceased would be included in the term legal representative – The term therefore includes earning wife and parents and all legal heirs – Held, in the situation when mother died, the father become legal representative and is entitled to get compensation. (Para 6 and 13)

B. Motor Accident Claim – Computation of Compensation – Future Prospects – Application of Multiplier – Non pecuniary Damages – The multiplier of 16 granted by the tribunal was revisited in view of the decision in Sarla Verma and the multiplier of 18 was applied – Held, the appellant is entitled to an addition of 40% of the income of the deceased towards future prospects – Compensation re-computed. (Para 17)

Appeal partly allowed (E-1)

Cases relied on :-

1. Smt. Sarla Verma & ors. Vs Delhi Transport Corporation & anr.; 2009 ACJ 1298

2. National Insurance Company Limited Vs Pranay Sethi & ors.; 2017 0 Supreme (SC) 1050

3. GSRTC Vs Ramanbhai Prabhatbhai AIR 1987 SC 1690

4. A.V. Padma Vs Venugopal; 2012 (1) GLH (SC) 442

5. Smt. Hansaguti P. Ladhani Vs The Oriental Insurance Company Ltd.; 2007(2) GLH 291

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard learned advocate Shri Amit Kumar Sinha with Ram sing for the appellants original claimants and Sri Arun Kumar Shukla for the respondent insurance company. None appears for owner or driver of the vehicle involved in the accident

2. The parties are referred as appellants and respondent insurance company.

3. This appeal challenges the award and decree / order dated 16 09 2003 passed by Motor Accident Claims Tribunal, Allahabad, in M.A.C.P.No.187of 2001 awarding a sum of Rs 1,72,000/- with conditional interest at the rate of 8% if the compensation was not deposited within 2 months of passing of the award. The insurance company has accepted their liability as the award is challenged by the claimants appellants herein.

4. I am pained to narrate that though this petition was preferred in the year 2004 despite several applications for listing the matter were filed only in the year 2014 the delay came to be condoned. The claimants during this period attained the status of senior citizens and the mother of the deceased passed away in the year 2017. The application declaring this fact was filed as an amendment application with application for early hearing. The amendment application nowhere stated that there were no other heirs of the mother of the deceased except that the appellant no1 was her legal representative and heir. The court had ordered to place amendment on record this shows the pathetic condition of a senior citizen. On 19.11.2020 again a application was filed and the matter was order to be listed on 26.11.2020. The accident having caused the death of the son of the appellants is not in dispute. Liability is that of the insurance company is accepted as there is no challenge the same

.issue of negligence decided by the tribunal is also not in controversy .The twin controversy is compensation is on lower side and interest could not be ordered to be paid only in default. The twin dispute raised by insurance companies' counsel is that no enhancement can be granted as there is proof of income and due e flux of time mother having passed away father cannot be granted compensation leave apart enhancement Both the ld counsels have placed reliance on the below mentioned decisions of the Apex Court to bring home their rival contentions in ***Smt. Sarla Verma and others Vs. Delhi Transport Corporation and another, reported in 2009 ACJ 1298;***and it is submitted that the compensation payable to the appellants be as per the decision of the Apex Court in ***National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050.***

5. This appeal is taken for hearing as it relates to Senior citizens out of two one has left this world in the year 2016.The appellant no1 who is now a senior citizen lost his young son Tez Narayan who was aged about 20 years, he was a student of Inter Science stream and he was survived by Shambhunath Shukla and Urmila Devi both his parents in their youth in the year of accident that is 2000. Urmila Devi was mother of the deceased, unfortunately, in the month of December, 2016, she passed away. Shambhunath appellant no 1 is now litigating in dual capacity as father of Tej and heir of Urmiladevi who is presumed to have died intestate leaving no other heir except appellant no 1.as no other class 1 heir of Urmiladevi has approached this court since Dec 2016 nor is there declaration that there are any other legal heir or representative of Urmiladevi or deceased Tej save and except appellant no 1 who is the father of Tej and husband of Urmiladevi original appellant no 2 The appellant no 1 therefore gets into the heirship of, of Urmila Devi. The term legal representative has not been defined in the Motor Vehicles Act 1939 or 1988 Act. The 2019 Amendment also does not define the term legal representative. Certain provisions of the Code of Civil Procedure are made applicable to the Motor Vehicles Act 1988 and Tribunals and higher Courts have interpreted the term legal representative so as to give purposive interpretation to the said definition. In view of this position we will have to take recourse to umbrella legislation namely Code of Civil Procedure 1908.Section 2 (11) of the Code of Civil Procedure defines the term "legal representative' which reads as under:

"Section 2 (11) "legal representative" means any person who in law represents the estate of a deceased person, and includes any person who inter meddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party suing or sued;"

6. Meaning of legal representative given u/s 2(11) of Code of Civil Procedure has to be interpreted in view of the term mentioned in section 140 and166 of MV Act 1988 which has used the term legal representative and not Dependent legal representative. The term has been considered to be inclusive and the courts have given it a wider scope of applicability. The person may not be a heir so as to file case under section 140 and 166 of the Act. The term would include legal heir. The person who can represent the estate of the deceased would be included in the term

legal representative. The term therefore includes earning wife and parents and all legal heirs.

7. In the case titled **GSRTC Vs Ramanbhai Prabhatbhai A 87 SC 1690,** the Supreme Court has held that for claiming compensation under either of the Acts the term legal representative cannot be given a narrow meaning as ascribed in Fatal Accidents ACT 1855. Dependency is not basic criteria for relief in accident cases to the claimants if they are legal heir or legal representative of deceased. Meaning of legal representative given u/s 2(11) of Code of Civil Procedure which reads as "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who inter-meddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued;

8. The term has to be interpreted in view of the term mentioned in section 140 and166 of MV Act 1988 which has used the term legal representative and not Dependent legal representative. The term has been considered to be inclusive and the courts have given it a wider scope of applicability. The person may not be a heir so as to file case under section 140 and 166 of the Act. The term would include legal heir. The person who can represent the estate of the deceased would be included in the term legal representative. The term therefore includes earning wife and parents and all legal heirs. There is a mis reading of the decision of the Apex court in **Sarla Verma and Manjuri Bera (Supra)** to contend that Father cannot be granted compensation for death of his unmarried child .

9. The observation of the Apex Court in **Sarla Verma (supra)** is reproduced as under :

15. "Where the deceased was a bachelor and the claimants are the parents, the deduction follows a different principle. In regard to bachelors, normally, 50% is deducted as personal and living expenses, because it is assumed that a bachelor would tend to spend more on himself. Even otherwise, there is also the possibility of his getting married in a short time, in which event the contribution to the parent/s and siblings is likely to be cut drastically. Further, subject to evidence to the contrary, the father is likely to have his own income and will not be considered as a dependent and the mother alone will be considered as a dependent. In the absence of evidence to the contrary, brothers and sisters will not be considered as dependents, because they will either be independent and earning, or married, or be dependent on the father. Thus even if the deceased is survived by parents and siblings, only the mother would be considered to be a dependent, and 50% would be treated as the personal and living expenses of the bachelor and 50% as the contribution to the family. However, where family of the bachelor is large and dependent on the income of the deceased, as in a case where he has a widowed mother and large number of younger non-earning sisters or brothers, his personal and living expenses may be restricted to one-third and contribution to the family will be taken as two-third."

10. In Section-166 Of the Act the term used is legal representative. In the present case, the deceased was a person, who was living with the appellants. The M.V.Act is a social piece of legislation and it can be seen that the appellants are parents and can be

said to be legal heirs falling in either schedule of Hindu Succession Act. The term legal as defined by dictionary means pertaining to or according to law and the term representative means one who actually succeeds to the property title on the death of its previous holder, which means a person entitled to succeed when the present possessor dies. The term legal representative and legal heir are differently used. The Hindu Law, more particularly Hindu Succession Act, divides the heirs in Class-I and Class-II as far as present appellants are concerned, the appellants can be said to be falling in Class-I. It is an admitted position of fact that mother is a Class-I heir and father is in Class-II both has the following categories of heirs.

Heirs in Class-I

11. Son; daughter; widow; mother; son of a predeceased son; daughter of a predeceased son; son of a predeceased daughter; daughter of a predeceased daughter; widow of a predecease son; son of a predeceased son of a predeceased son; daughter of a predeceased son of a predeceased son; widow of a predeceased son of a predeceased son [son of a pre-deceased daughter of a predeceased daughter; daughter of a pr-deceased daughter of a predeceased daughter; daughter of a pre-deceased son of a predeceased daughter; daughter of a pre-deceased daughter of a predeceased son].

Heirs in Class-II

I. Father

II. (1) Son's daughter's son; (2) son's daughter's daughter; (3) brother; (4) sister.

III. (1) Daughter's son's son; (2) daughter's son's daughter; (3) daughter's daughters' son; (4) daughter's daughter's daughter.

IV. (1) Brother's son; (2) sister's son; (3) brother's daughter; (4) sister's daughter.

V. Father's father; father's mother.

VI. Father's widow; brother's widow.

VII. Father's brother; father's sister.

VIII. Mother's father; mother's mother.

IX. Mother's brother; mother's sister.

12. Ordinarily, heirs of the deceased persons who represents the estate of the deceased and are his legal representatives a claim can be made by legal heirs and therefore, other relatives of the deceased who are not the heirs of the deceased and not being his legal representatives or dependent on him cannot claim-compensation. In the case on hand now the father is claiming as heir of his deceased wife and as per section 15 of The Hindu Succession Act 1956,which relates to general rules of succession in case of female Hindus the property of intestate female will devolve-firstly on sons and daughters and husband. In light of the discussion made herein above which was necessitated because of the submission of ld counsel for respondent that appellant no1 cannot claim compensation in light of the decisions of Apex Court in **Sarla Verma (supra)** the undersigned is unable to accept the submission of Shri Shukla ld counsel for respondent that the father would have his own income and, therefore, he would not be entitled to any compensation or enhancement.

13. As narrated here-in-above, the claim was by the father and the mother in

normal circumstances in presence of mother as per the judgment of **Sarla Verma**, the father may not be entitled to share the Supreme Court in the Case of **Sarla Verma** has not laid down straight preposition that father cannot be granted compensation such a reading of the decision would be against the very spirit of the legislation and would be reading the judgment in piecemeal which is not the intent of the decision may that as it may be, the situation in this case due to passage of time is now different and therefore appellant no 1 becomes a legal representative rather class one heir of Urmila has envisaged under Section 166 of the Motor Vehicles Act.1988. IN This backdrop the calculation and compensation awarded be assessed.

14. The accident occurred in the year 2000.The tribunal considered the income of the deceased who was 12th standard student at Rs.15,000/- per year and granted multiplier of 16.deducted one third for personal expenses of the minor and Rs.12000towards non pecuniary damages The tribunal placed reliance on the schedule appended to the Act under section 163 A of the Act and directed the insurance company to deposit the compensation within2 months failing which the company would be liable to deposit the same with 8% interest.

15. Learned counsel for the appellant submits that even in the year 2000 the income of the deceased should be considered to be Rs.3000/per month- to which 40% be added towards future loss of income as the deceased was below the age of 40 and was student and the deduction of one third deducted is just and proper however later submitted that 50 % of the average amount has to be deducted. And Rs 70,000/- should be added under the head of non peculiar damages. It is further submitted that multiplier be granted as per **Sarla Verma's** decision and future prospect has not been granted which may be granted as per ***National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050,*** and has further requested to grant 18% interest. It is further submitted that the grant of condition in awarding interest is also bad in law.

16. Sri Shukla ld. Advocate for the Insurance company has vehemently objected to enhance the compensation it is further submitted that the income of deceased has been assessed on higher side by the tribunal and has only deducted one third towards personal expenses it is submitted that he was a student of Inter his income cannot be considered to be 3000/- of course he could not point out that why future income should be added as per **Pranav Sethi.** He has further submitted that the deduction should not have been 1/3 but 50%as the deceased was a bachelor which have accepted by Shri Sinha, counsel for the appellant.

17. The calculation of compensation would have to be revisited. The income of Rs.15,000/-per annum is enhanced to Rs.24,000/- per annum which is added by 40% which would mean Rs2000plus40% which would come to Rs.2800/per month deduction of 1/2 for personal expenses the same amount would be 1400 multiplied by 12. The multiplier of 16 granted by the tribunal will also have to be revisited in view of the decision in **Sarla Verma** and it would be 18. As far as the amount under non pecuniary damages is concerned, the same will have to be fixed at additional amount Rs.50,000/- for the filial consortium which now father would be

entitled as amount of RS 12000 awarded by the tribunal already deposited would have been utilized by the mother. The Compensation is computed herein below:

i. Income Rs.2000/per month

ii. Percentage towards future prospects : 40% namely Rs 800/per month

iii. Total income : Rs. 2000Plus Rs 8000 =Rs2800

iv. Income after deduction of 50%: Rs. 1400/

v. Annual income : Rs.1400 x 12 = Rs 16800/

vi. Multiplier applicable : 18

vii. Loss of dependency: Rs x 18= Rs.302,400/

viii. Amount under non pecuniary heads : additional Rs50000/

ix. Total compensation: Rs 3,52,400/- Plus Rs12,000 already awarded.

18. As far as issue of rate of interest is concerned, the interest at the rate of 8% is disturbed in light of the following facts The matter remained pending for default for 10 yrs the repo rate has come down .the rate of interest would be7.5 % from date of filing of claim petition till the amount was deposited and 4% thereafter till the amount is deposited by the respondents as ordered by the tribunal.

19. No other grounds are urged orally when the matter was heard.

20. In view of the above, the appeal is partly allowed. Judgment and decree passed by the Tribunal shall stand modified to the aforesaid extent.

21. The amount be deposited by the respondent-Insurance Company within a period of 12 weeks from today with interest at the rate of7.5%from the date of filing of the claim petition till the judgment of the Tribunal and 4% thereafter till the amount is deposited.

22. The amount already deposited be deducted from the amount to be deposited.

23. I agree with the submission made by Shri Shukla,that the additional amount be permitted to be deposited on or before 28th of February, 2021.

24. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of **A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442.** The order of investment is not passed because applicants/claimants are neither illiterate nor rustic villagers.

25. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansaguti P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291**, total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review

Application No.1 of 2020 in First Appeal From Order No.23 of 2001 **(Smt. Sudesna and others Vs. Hari Singh and another)** while disbursing the amount.

26. Fresh award be drawn accordingly in the above petition by the tribunal as per the modification made herein. The Tribunals in the State shall follow the direction of this Court as herein aforementioned as far as disbursement is concerned, it should look into the condition of the litigant and the pendency of the matter and not blindly apply the judgment of **A.V. Padma (supra).** The same is to be applied looking to the facts of each case.

27. No amount shall be kept in fix deposit as Shambhu Nath Shukla, appellant has become a senior citizen, no TDS shall be deducted as per direction of this Court by the insurance company.

28. This court is thankful to both the counsels for getting the appeal disposed of as the matter is now pending since more than 20 years.

(2020)12ILR A112
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.11.2020
as well as 21.11.2020

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

First Appeal From Order No. 1563 of 2020

Shailendra Tripathi & Anr. ...Appellants
Versus
Dharmendra Yadav & Ors. ...Respondents

Counsel for the Appellants:
Sri Yogesh Kumar Tripathi, Sri Sanjay Kumar Singh

Counsel for the Respondents:
Sri Rahul Sahai

A. Civil Law- Motor Accident Claim – Motor Vehicle Act, 1988 – Section 163A, 164 and 166 –Limitation– Maintainability of Claim filed beyond six months –Applicability of Section 166(3)–Effect of notification of the Amendment Act, 2019–Since, Sections 50 to 57 of the Amendment Act are not notified, claimant/s can still prefer an application u/s 140 of the Principal Act independently or along with an application for compensation u/s 166 or in alternative claimant/s can prefer an application u/s 163-A of the Principal Act for compensation based on the structured formula–Held, since now, there is no provision which provides for seeking condonation of delay, if an application for compensation is filed beyond the period of six months from the date of the accident, till the time Section 53 of the Amendment Act is notified, the claimant/s are not required to prefer an application for condensation of delay–Impugned order of the Tribunal quashed. (Para 15, 16 and 21)

Appeal allowed (E-1)

(Delivered by Hon'ble Kaushal Jayendra Thaker, J.)

1. Heard learned counsel for the appellants and learned counsel for the Insurance Company and Sri Ojha, learned counsel for the State as Amicus Curiae.

2. Amendment, if any, be carried out during the course of day.

3. This appeal is at the behest of claimants whose claim petition came to be dismissed by the learned Motor Accident Claims Tribunal (hereinafter referred to as "the Tribunal" holding that as the accident took place on 24.12.2019 and the petition was filed on 20.8.2020, hence, the claim petition was filed beyond six months as per the amended provisions of Section 166 (3)

of the Motor Vehicle Act (hereinafter referred to as "the Act") as amended in 2019 and, according to the learned Tribunal, the same provisions were/are in the statute book from 2019.

4. Brief skeletal facts are narrated as necessary to decide the question raised in this appeal. The claim petition was filed on 20th August, 2020 most probably after the courts started functioning and accepted filing in physical form. The reasons for delay were also assigned by the petitioners by annexing several medical documents and death certificate of mother of petitioner no.1. The Tribunal mechanically held that amended Section 166 (3) of the Act subscribes a period of six months for filing claim petition and, therefore, a matter after that period cannot be entertained. Learned Tribunal, therefore, dismissed, the claim petition, which has given rise to this appeal.

5. Counsel for the appellants orally submitted that there is question of law involved in this appeal and, therefore, he has in paragraph 11 contended that the order of the Tribunal is against the settled principle of law.

6. The accident took place on 24.12.2019 as culled out from the order of Virjendra Kumar Singh, Presiding Officer, Motor Accident Claims Tribunal. It appears that learned Tribunal has held that six months' time as contemplated had elapsed and, therefore, rejected the claim petition of the claimants filed for claiming compensation for death of their son.

7. It is submitted by learned counsel for the appellants that the learned Tribunal has taken a hyper-technical stand in rejecting the claim petition. It is submitted that the matter can be viewed from three angles. First aspect is that accident took place in the month of December, 2019, even if we hold that assumption made by the learned Tribunal that Section 166 (3) has been notified and is made applicable, six months' period would be over during the pandemic. The pandemic struck us in the month of March, 2020 and the Apex Court by an omnibus order extended the period of limitation. This aspect should have also been looked into by the learned Judge. Thus, period of limitation, therefore, was not over as per the omnibus direction of this Court as well as Apex Court. Reference can be made to various orders passed in Public Interest Litigation (P.I.L) No.564 of 2020, In re Vs. State of U.P. Suo moto. The Division Bench of Hon'ble the Chief Justice and Hon'ble Justice Siddhartha Varma passed therein several directions pertaining to enhancement of limitation as filing of matters was not permitted during the lock down and the order later on passed by the Division Bench on 10.7.2020 therein would also oblige, the learned Tribunal to consider the period. The orders have already been published on official website of he Court. It appears that in sheer haste, learned Tribunal has dismissed the claim petition.

8. Another aspect which is required to be appreciated is that even if we consider that the provisions of 166 (3) of the Motor Accident Act 2019 have been brought on statute book, learned Judge could have seen the matter from different angle that there is substitution of Section 163A by section164, where no period of limitation has been prescribed. He could have permitted the said alternative also. Thirdly, Section 166 (3) has been has been notified but what is the current position with respect to the provisions contained under Section 166(3) of the Motor Vehicles (Amendment Act,

2019 which was published in the Gazette of India on 28th August, 2019?, will have to be evaluated.

9. The while reading Section, is 1 (2) of the 2019 of the amendment Act, the present situation as emerges is that 2019 notification in Section 1(2) connotes as follows:-

10. On 9th August, 2019 the Motor Vehicles Act (Amendment) Act, 2019 was published in the Gazette of India (hereinafter referred as 'the Amendment Act). By this amendment, the Motor Vehicles Act, 1988 (hereinafter referred as 'the Principal Act) has been drastically amended.

11. Section 1 of the Amendment Act is relevant for the present discussion therefore, same is reproduced hereinunder:-

Section 1(1):- This Act may be called the Motor Vehicles (Amendment) Act, 2019.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint and different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

12. In exercise of the powers conferred by Sub-section (2) of Section 1 of the Amendment Act, the Central Government appointed the 1st day of September, 2019 as the date on which the following Sections of the Amendment Act shall come into force, namely...

Section 2, Section 3, Clauses (i) to (iv) of Section 4, Clauses (i) to (iii) of Section 5, Section 6, Clauses (i) of Section 7, Sections 9 and 10, Section 14, Section 16, Clauses (ii) of Section 17, Section 20, Clauses (ii) of Section 21, Section 22, Section 24, Section 27, Clauses (i) Section 28, Sections 29 to 35, Sections 37 and 38, Sections 41 to 43, Section 46, Sections 48 and 49, Sections 58 to 73, Section 75, Clauses (i) of Clause (B) of Section 77, Sections 78 to 87, Section 89, Sub-clauses (a) of clause (i) and clause (ii) of Section 91 and Section 92 of the Amendment Act. Admittedly Sections 50 to 57 of the Amendment Act are not notified till dated.

13. Since we are discussing an issue as to whether the provisions contained under the proposed Section 166(3) of the Act which was published in the Gazette of India on 28th August, 2019 would be applicable in the present time or not, it would be apt to have the comparative table of the Amendment Act and the Principal Act.

Sr. No.	Provisions contained under the Amendment Act	Provisions contained under the Principal Act.
1	Section 50	Sections 140 to 144 (Chapter X)
2	Section 51	Sections 145 to 164 (Chapter XI)
3	Section 52	Section 165
4	Section 53	Section 166
5	Section 54	Section 168
6	Section 55	Section 169
7	Section 56	Section 170
8	Section 57	Section 173

14. If we arefully peruse the above referred table, it clearly appears that Sections 50 to 57 of the Amendment Act are yet to be notified. These Sections 50 to 57 of the Amendment Act relate to Sections 140 to 144, Sections 145 to 164, Section 165, Section 166, Section 168, Sections 169, Section 170 and Section 173, respectively of the Principal Act. In simple words, Sections 140 to 144 of the Principal Act (Chapter - X) have not been omitted as yet and continue to operate. Similarly Sections 145 to 164 (Chapter - XI) and Section 165, Section 166, Section 168, Sections 169, Section 170 and Section 173 of the Principal Act would continue to operate with full vigor till the time Section 51 to 57 of the Amendment Act are notified in the Official Gazette.

15. Above referred discussion leads us to the conclusion that the provisions contained under Sections 140 of the Principal Act which speaks about liability of the Owner and/or Insurer to pay compensation in certain cases on the principle of no fault, Section 163-A of the Principal Act which provides for the special provisions as to payment of compensation based on structured formula and under Section 166 of the Principal Act, legal representative/s can continue to prefer any of the application mentioned hereinabove for compensation as Sections 140, 163-A and 166 of the Principal Act would continue to operate with full vigor till the time Section 51 to 57 of the Amendment Act are notified in the Official Gazette.

16. Since, Sections 50 to 57 of the Amendment Act are not notified, claimant/s can still prefer an application u/s 140 of the Principal Act independently or along with an application for compensation u/s 166 of the Principal Act or in alternative claimant/s can prefer an application u/s 163-A of the Principal Act for compensation based on the structured formula. It is to be remembered that w.e.f. 14th November, 1994 Section 166(3) of the Principal Act, wherein the provision with respect to condonation of delay was made, has been omitted. Since now, there is no provision which provides for seeking condonation of delay, if an application for compensation is filed beyond the period of six months from the date of the accident (Sub-section 3 of Section 166, as proposed to be inserted by way of the Amendment Act), till the time Section 53 of the Amendment Act is notified, claimant/s are not required to prefer an application for condensation of delay.

17. I have enquired from Sri Ojha, State Law Officer/Standing Counsel who states that the position that 166 (3) has not been brought on the statute book. What is the position is that 166 of 1988 Act would still govern the litigation as of today. The alternative was also available to the learned Tribunal but in sheer haste of disposal of the matter, he lost sight of omnibus order of Apext court of extending the period of limitation. The other aspect was that the family was bereaved of young son and mother of one of the appellants passed away due to covid. All these aspects have not been looked into by the learned Judge.

18. This Court had called for the remarks of the learned Tribunal by passing the following order:-

"I have requested colleague of Sri Rahul Sahai, learned counsel, to assist the Court as he is on the panel of I.C.I.C.I Lombard General Insurance Company involved in the accident.

Learned M.A.C.P. Tribunal has dismissed the claim petition on the ground that it is hit by Section 166 (3).

The matter be listed tomorrow, i.e., 20.11.2020 as according to the information with the undersigned, the provisions of 166 (3) as amended by 2019 Act has not been notified, however, the learned counsel for the appellants would like to ascertain the same, hence, list the matter as fresh.

Meanwhile, office to have clarification from the learned Judge by telephonic message as to notification under Section 166 (3) as amended. Send email to the Tribunal as despite telephonic messages, the learned Tribunal does not respond."

19. Sri Satya Nand Upadhyay, learned Additional District & Sessions Judge/Incharge Presiding Officer, Motor Accident claims Tribunal, Gorakhpur has sent his remarks that the notification appointing the date on which the provisions of the Act shall come into force does not subscribe Section 52 to 57 of the amended Act.

20. This Court is thankful to Sri Satya Nand Upadhyay, learned Judge/Tribunal for reverting back to this Court at a short notice. Sri Virjendra Kumar Singh, Presiding Office, Motor Accident Claims Tribunal shall remain more vigilant in future while deciding the claim petition under beneficial legislation.

21. In view of the above, I have no hesitation in quashing and setting aside the Judgment/order impugned. Claim petition is ordered to be restored to file of Tribunal. The Tribunal shall proceed as per 166 read with Section 168 of the Motor Vehicle Act, 1988 as till date amended section dealing with Chapter X, XI XII of the act have not been brought on statute book substituting the earlier provision. Reference to the authoritative notification as published on SCC online web edition http://www.scconline.com, which also gives glimpse of the amendments made. The provisions of section 166 of the 2019 Act has several implications which can be flagged, namely, limitation, which was not there, has been introduced. It appears that the Central Government with a purpose not decided the date for bringing in, has not brought the provisions of amended Sections 52 to 57 which relates to complete change to Chapter X, XI & XII and, therefore, the amended Act has not been brought on the statute book is very clear. The scheme of the new regime would show that they have not been brought on the statute book by amending or repealing the earlier provisions of Chapter X, XI & XII.

22. Copy of this order be circulated to all the Motor Accident Claims Tribunal so that this fallacy may not creep in the future proceedings.

23. This Court is also thankful to Sri Rahul Sahai for having deputed his colleague Sri Akshat Darbari to this Court.

24. With these observations, this appeal is allowed."

(2020)12ILR A116
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.12.2020

BEFORE

THE HONBLE DR. KAUSHAL JAYENDRA THAKER, J.

First Appeal From Order No. 1596 of 2020

Shri Balak Ram ...Appellant
Versus
N.I.C.L., Bareilly & Anr. ...Respondents

Counsel for the Appellant:

Sri Sanjay Singh, Sri Amrendra Nath Rai

Counsel for the Respondents:
Sri Radhey Shyam, Sri Pankaj Rai

A. Civil Law - Workmen's Compensation Act, 1923 Section 4A – Compensation – Payment of Interest–Statute demands that the claimant becomes entitled to interest within a period of one month from the date the amount accrues to him – Held, Insurance company is liable to deposit the amount with interest from one month to the date of accident. (Para 5 and 6)

Appeal partly allowed (E-1)

Cases relied on :-

1. F.A.F.O. No. 1553 of 2020; Sanju Kushwaha Vs Vimal Kumar Verma & anr. decided on 3.12.2020

2. Oriental Insurance Company Vs Siby George & ors., 2012(4) T.A.C. 4 (SC)

3. Civil Appeal No. 7470 of 2009; North East Karnataka Road Transport Corporation Vs Smt. Sujatha decided on 2.11.2018

4. Civil Appeal No. 10018 of 2017, Smt. Surekha & ors. Vs the Branch Manager, National Insurance Company Ltd. decided on 3.8.2017

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard learned counsel for the parties and perused the judgment and order impugned.

2. This appeal at the behest of the claimant challenges the judgment and order dated 31.8.2020 passed by Employee Compensation Commissioner/Assistant Labour Commissioner, Bareilly (hereinafter referred to as 'Commissioner') in Case No.19/E.C.A./2018 awarding a sum of Rs.8,19,069/- with interest at the rate of 12% from the date of its order.

3. Learned counsel for the appellant challenges the order on a limited question of law namely whether default of employer in paying due compensation under the Workmen's Compensation Act, 1923 (hereinafter referred to as 'Act') within one month from the date it fell due, entitles the claimant to 12% interest over the entire amount assessed as compensation in Claims proceeding under Section 4A of the Act and from what date.

4. It is submitted by Sri Pankaj Rai, learned counsel for the respondent that reason for granting interest from the date of order seems to be delay caused by the claimant. Submission of Sri Pankaj Rai is very attractive but no reasons appear to have been assigned by the learned Commissioner.

5. Recently, this Court in First Appeal From Order No. **(Sanju Kushwah Vs. Vimal Kumar Verma and another)** decided on 3.12.2020, has held as under:

"5. I am pained to pen down that the Workmen's Commissioner in Uttar Pradesh are time and again to be conveyed that they are supposed to follow the statute under which they are functioning. I am supported in my view by the Judgments rendered by Supreme Court in ***Oriental Insurance Company Vs. Siby George and others, 2012(4) T.A.C. 4 (SC); Civil Appeal No. 7470 of 2009 North East Karnataka Road Transport Corporation Vs. Smt. Sujatha decided on 2.11.2018; and Civil Appeal No. 10018 of 2017, Smt. Surekha and others Vs. the Branch Manager, National Insurance Company Ltd.*** *decided on 3.8.2017 which holds that Insurance Company has to be made liable and further the relevant date from when the interest would be payable is decided therein, namely, one month of the date, it accrues.*

6. Learned counsel Sri S.K. Mehrotra tried to point out that the Judgment is just and proper, however, I am not convinced as the statute demands that the claimant becomes entitled to interest within a period of one month from the date the amount accrues to him. In our case, the amount accrued to him one month after the accident took place, i.e., 25.10.2017 and the owner Vimal Kumar Verma, who was insured by the respondent no.2 did not make the payment.

7. In view of the aforesaid, Judgment and award impugned herein is modified. If the Insurance Company has not yet deposited the amount, it shall deposit the amount with interest at the rate of 12% from one month from the date of accident, i.e., 25.11.2017."

6. In view of the above, this appeal is partly allowed. The judgment and award of the learned Commissioner shall stand modified to the extent that the insurance company shall deposit the amount with interest from one month from the date of accident, i.e. 3.12.2017.

7. It goes without saying that once the amount is deposited, the Commissioner shall disburse the same and the Insurance company shall not deduct TDS as against the settled principles of law.

8. Despite directions of this Court, it appears that the learned Commissioner is not following the dictate of the legislation. Hence, explanation of learned Commissioner be called for as to why without assigning reasons, she had granted interest from the date of order.

9. This Court is thankful to both the learned Advocates for ably assisting this Court. A copy of this order be sent to the learned Commissioner below calling for his remarks.

10. The matter be placed before the undersigned on 15.1.2021 perusing the remarks of the undersigned.

(2020)12ILR A118
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.12.2020

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

First Appeal From Order No. 1608 of 2020

Regional Manager U.P.S.R.T.C., Azamgarh ...Appellant

Versus

Subedar & Ors. ...Respondents

Counsel for the Appellant:
Sri Sanjeev Kumar Yadav

Counsel for the Respondents:
Sri Brijesh Chandra Naik, Sri Sanjay Kumar Srivastava

A. Civil Law - Motor Vehicle Act, 1988 – Section 147 – Existence of valid insurance policy and proper driving licence – Liability of Insurance Company – Exoneration of the Company – Legality – Held, the judgment and award of the Tribunal, not holding the Insurance Company liable, is bad. (Para 4, 5 and 7)

Appeal allowed (E-1)

Cases relied on :-

1. U.P. State Road Transport Corporation Vs Rajendri Devi & ors., 2020 (3) T.A.C. 66 SC.

2. F.A.F.O. No.1507 of 2003; U.P.S.R.T.C. Vs Smt. Sukha Devi & ors. decided on 3.11.2016 (DB)

3. U.P. State Road Transport Corporation Vs Kulsum & ors., (2011) 8 S.C.C. 142

4. F.A.F.O. No. 857 of 2000; U.P.S.R.T.C. Vs Jainendra Srivastava & ors. decided on 17.4.2019

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri Sanjeev Kumar Yadav, learned counsel for the appellant and Sri Brijesh Chandra Naik, learned counsel for the respondent.Sri Sanjay Kumar Srivastava, learned counsel for the respondent, has absented himself even in the third round.

2. This appeal, at the behest of U.P.S.R.T.C., challenges the judgment and award dated 10.08.2017 passed by Motor Accident Claims Tribunal/Additional District Judge, Court No.1 (hereinafter referred to as 'Tribunal') in MACP No.552 of 2013.

3. The only grievance raised is that the vehicle which was placed at their command was insured. The U.P.S.R.T.C. does not challenge the quantum, involvement of the vehicle and the judgment on merits.

4. Facts are not necessary. However, the skeletal facts goes to show that the appellant entered into an agreement with the owner of the bus. The bus was placed at the service of the appellant which met with an accident. The bus was insured with New India Assurance Co. Ltd. The Tribunal exonerated the Insurance Company and mulcted the liability on the present appellant. This has aggrieved the appellant.

5. Learned counsel for the appellant submits that after holding issue number 2 and 3 in the favour of the appellant namely driver had proper driving license, the Tribunal has exonerated the Insurance Company. Learned counsel for the appellant has further submitted that the vehicle was insured on the date of accident and that the said issue recently came before the Apex Court in **U.P. State Road Transport Corporation Vs. Rajendri Devi and others, 2020 (3) T.A.C. 66 SC.** which also support his argument.

6. While going through the award, it is clear that issue numbers 2 and 3 are in favour of appellant despite that why the Tribunal did not follow the judgment of this Court in First Appeal From Order No.1507 of 2003 **(U.P.S.R.T.C. Vs. Smt. Sukha Devi and others)** decided on 3.11.2016 (DB) and the Apex Court in **U.P. State Road Transport Corporation Vs. Kulsum and others, 2011(8) S.C.C. 142** which are the judgments much prior in point of time as the judgment of the Tribunal is of 10.8.2017. There is no discussion by the Tribunal as to why the Insurance Company has not been mulcted with the liability despite the fact vehicle was insured, the driver had valid driving license and that there was no breach of policy conditions proved before the Tribunal. The award is silent about the same.

7. Similar mistake has been committed by the Division Bench of this Court which has been corrected by the Apex Court in **U.P. State Road Transport Corporation Vs. Rajendri Devi and others (Supra).** I am even fortified in my view by the decisions of this Court in **U.P.S.R.T.C. Vs. Smt. Sukha Devi and others (Supra)** and in First Appeal From Order No.857 of 2000 **(U.P.S.R.T.C. Vs. Jainendra Srivastava and others)** decided on 17.4.2019. This Court, therefore, holds that the judgment and award of the Tribunal in not holding the Insurance Company liable is bad.

8. In view of the above, the appeal is allowed. The Insurance Company will have

to deposit the amount within 12 weeks from today as per the order of the Tribunal and, if the amount has already been deposited by U.P.S.R.T.C., the same shall be refunded to the U.P.S.R.T.C. by the Insurance Company through owner of the vehicle.

9. The statutory deposit of Rs.25,000/- shall be returned to U.P.S.R.T.C.

10. This Court is thankful to Sri Sanjeev Kumar Yadav, learned counsel for the appellant and Sri Brijesh Chandra Naik, learned counsel for the respondent for ably assisting this court.

11. A copy of this judgment be circulated to all the Tribunals in the State of U.P. so that in future where vehicle of U.P.S.R.T.C. is involved and if there is no breach of policy conditions as per Section 147 of the Motor Vehicles Act, 1988, the Insurance Company may be held liable.

(2020)12ILR A120
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.12.2020

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

First Appeal From Order No. 1673 of 2020

Sri Shiv Lal & Anr. ...Appellants
Versus
Sri Vivek Shanker Gupta & Anr. ...Respondents

Counsel for the Appellants:
Sri Shreesh Srivastava

Counsel for the Respondents:
Sri Radhey Shyam

A. Workmen's Compensation Act, 1923–Section 4A–Compensation–Amount of Interest–Practice of granting interest less than 12% –Held, the amount would carry 12% rate of interest from one month from the date of accident–Once the amount is deposited, the Tribunal shall disburse the same and the Insurance company shall not deduct TDS (Tax Deduction at Source) . (Para 8 and 9)

B. Interpretation of Statute – Word 'Shall' used in Section 4A–It has mandatory effect. (Para 4 and 5)

Appeal allowed (E-1)

Cases relied on :-

1. Oriental Insurance Company Vs Siby George & ors., 2012(4) T.A.C. 4 (SC)

2. Civil Appeal No. 7470 of 2009; North East Karnataka Road Transport Corporation Vs Smt. Sujatha decided on 2.11.2018

3. Civil Appeal No. 10018 of 2017; Smt. Surekha & ors. Vs the Branch Manager, National Insurance Company Ltd. decided on 3.8.2017

4. F.A.F.O. No. 1538 of 2020; Miskina & 5 ors. Vs M/s H.D.F.C. Egro General Insurance Ltd. & anr. decided on 26.11.2020

5. F.A.F.O. No. 1553 of 2020; Sanju Kushwaha Vs Vimal Kumar Verma decided on 3.12.2020

6. Smt. Hansagori P. Ladhani Vs The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri Shreesh Srivastava, learned counsel for the appellant and Sri Radhey Shyam, learned counsel for respondent-Insurance Company. Owner's presence is not required, hence, no notice is issued.

2. This appeal, at the behest of the claimants, challenges the judgment and

order dated 29.10.2020 passed by Commissioner, Workmen's Compensation Act, 1923/Additional Labour Commissioner, (hereinafter referred to as 'Commissioner') in E.C. Case No.42 of 2018 awarding a sum of Rs.8,28,852/- as compensation with interest at the rate of 9%.

3. Fact that the deceased was an employee is not in dispute; death caused due to vehicular accident which can be said to be arising out of his employment is not in dispute and; the Insurance Company having insured the vehicle with the workmen is not in dispute, hence, no facts are mentioned except that the accident occurred on 24.10.2017 and the compensation would fall due on 24.11.2017 and no technical pleas are raised. Compensation awarded is not in challenge.

4. The sole question of law which arises for consideration is whether Assistant Labour Commissioner can award interest less than what the statute has legislated, namely, 12% under provisions 4-A of the Workmen's Compensation Act, 1923(hereinafter referred to as 'the Act')? A similar issue had arisen before this Court where this Court has deprecated the practice of grant of interest less than what is specified under the statute. The reason being the word used by the legislation is 'shall' and not 'may'.

5. I am pained to pen down that the Workmen's Commissioner in Uttar Pradesh are time and again have to be conveyed that they are supposed to follow the statute under which they are functioning. Section 4A of the Act legislates as follows:

"4A. Compensation to be paid when due and penalty for default.?

1.Compensation under section 4 shall be paid as soon as it falls due.

2.In cases where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and, such payment shall be deposited with the Commissioner or made to the workman, as the case may be, without prejudice to the right of the workman to make any further claim.

3.Where any employer is in default in paying the compensation due under this Act within one month from the date it fell due, the Commissioner shall?

(a.)direct that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at the rate of twelve per cent per annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government, by notification in the Official Gazette, on the amount due; and

(b.)if, in his opinion, there is no justification for the delay, direct that the employer shall, in addition to the amount of the arrears, and interest thereon pay a further sum not exceeding fifty per cent of such amount by way of penalty:

Provided that an order for the payment of penalty shall not be passed under clause (b) without giving a reasonable opportunity to the employer to show cause why it should not be passed.

Explanation.?For the purposes of this sub-section, ?scheduled bank? means a bank for the time being included in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934)."

6. I am supported in my view by the judgments rendered by Supreme Court in the case of **Oriental Insurance Company Vs. Siby George and others, 2012(4)**

T.A.C. 4 (SC); Civil Appeal No. 7470 of 2009 North East Karnataka Road Transport Corporation Vs. Smt. Sujatha decided on 2.11.2018. Reliance is being placed by learned counsel for the appellant also on judgment in Civil Appeal No. 10018 of 2017, **Smt. Surekha and others Vs. the Branch Manager, National Insurance Company Ltd.** decided on 3.8.2017, which holds that Insurance Company has to be made liable and further the relevant date from when the interest would be payable is decided therein, namely, one month of the date, when the compensation accrues. Learned counsel for the appellant has also relied on the decision of this Court in First Appeal From Order No.1538 of 2020 **(Miskina and 5 others vs. M/s H.D.F.C. Egro General Insurance Ltd. and another)** decided on 26.11.2020 and First Appeal From Order No. 1553 of 2020 **(Sanju Kushwaha Vs. Vimal Kumar Verma)** decided on 3.12.2020.

7. Learned counsel Sri Radhey Shyam tried to point out that the judgment and order impugned is just and proper.

8. In view of the judgments cited hereinabove, judgment and award impugned herein is modified to the extent that the amount would carry 12% rate of interest from one month from the date of accident, i.e., 24.11.2017. If the Insurance Company has not yet deposited the amount, it shall deposit the amount with interest at the rate of 12% from one month from the date of accident till the amount is deposited.

9. It goes without saying that once the amount is deposited, the Tribunal shall disburse the same and the Insurance company shall not deduct TDS. I am supported in my view by the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansagori P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291,** total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 **(Smt. Sudesna and others Vs. Hari Singh and another)** while disbursing the amount.

10. The appeal is allowed. Question of law is answered in favour of the appellant and against the Insurance Company.

11. This Court is thankful to both the learned Advocates for ably assisting the Court.

12. Despite the orders of the Apex Court and this Court, the Workmen Commissioners are not following the mandate of the legislation in awarding the rate of interest and effective date from when interest would accrue. Hence, the Registrar General shall send this order through the Head of the Department of concerned Commissioners for the knowledge of Workmen Commissioners.

(2020)12ILR A123
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.11.2020

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

First Appeal From Order No. 2213 of 2019

Samarjeet Singh ...Appellant
Versus
Khursheed Khan & Ors. ...Respondents

Counsel for the Appellant:
Sri Vidya Kant Shukla

Counsel for the Respondents:
Sri Pawan Kumar Singh, Sri Pawan Kumar Singh, Sri Vijay Prakash Mishra

A. Civil Law -Motor Vehicles Act (59 of 1988) - Section 168 - Compensation - Injury & disability incurred due to the vehicular accident - Tribunal took over hyper technical stand in not granting any compensation - Tribunal disbelieved the medical certificate produced - medical Board opined that claimant had 50% total disability - *Held* - Medical documents which are public document under the Evidence Act have to be believed - It was no body case that the document of Medical Board was fabricated - insurance company or the owner had not doubted the veracity of the said document - Tribunal wrongly disbelieved the medical certificate issued in favour of the claimant by the competent medical board (Para 18)

B. **Civil Law -Motor Vehicles Act (59 of 1988) – Section 166** - Code Of Civil Procedure (5 of 1908) , O.9 R.13 - Setting aside decree ex parte against defendant - Accident claim - Motor Accident Claims Tribunal awarded compensation holding owner solely liable - Owner of offending vehicle filed application under O. 9 Rule 13 of CPC - application was simply filed to show that the driver of the vehicle had proper driving licence & exoneration of the insurance company was not call for - no fresh evidence even after the application O. 9 Rule 13 of CPC was filed except the xrox copy of the driving licence of driver of the offending truck - owner did not challenged the quantum of compensation awarded to the claimant nor requested for rehearing or deciding all the issues afresh - there was no prayer to set aside the entire award - By the subsequent award, tribunal fastened liability on owner and insurance company & reduced the compensation payable to the claimant - *Held* - Tribunal could not have reviewed the compensation awarded without any further pleadings or contrary evidence led after the order of under 9 Rule 13 of the Code was passed - Tribunal wrongly ventured to review the entire earlier award not even challenged before it nor any averment was made that entire award required to be re-answered (Para 26)

C. **Civil Law -Motor Vehicles Act (59 of 1988) – Section 168** - Compensation - Deduction of TDS from amount of awarded compensation - total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis - if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 - if the amount of interest does not exceeds Rs.50,000/- in any financial year, claimant allowed to withdraw the amount without producing the certificate from the concerned Income- Tax Authority (Para 31)

Appeal allowed. (E-5)

List of Cases cited: -

1. Raj Kumar Vs Ajay Kumar & anr .(2011) 1 SCC 343, 2010 LawSuit(SC) 1081, 2011(1) TAC page 785 (SC)

2. Hari Babu Vs Amrit Lal & ors. 2019(2) TAC 718 (All.)

3. Mahoora Bano Vs National Insurance Company & ors. 2020(1) T.A.C. 688 (S.C.)

4. National Insurance Company Ltd. Vs Mannat Johal & ors. Civil Appeal Nos. 1079-4081 of 2019 dt. 23.4.2019

5. Arun Bajpai Vs Mushir Ahmad & ors. F.A.F.O. No.3183 of 2009 Dt 13.12.2017

6. Oriental Insurance Company Limited Vs Surendra Umrao & anr. 2007(3)TAC 40 (All)

7. Sudhir Bhuiya Vs National Insurance Company Ltd. (2005) ACJ 509

8. Sunita & ors. Vs Raj St. Road Transport Corp & anr. 2019 LawSuit (SC)190,

9. Mangla Ram Vs Oriental Insurance Company Limited & ors. 2018 (5) SCC 656

10. Vimla Devi & ors. Vs National Insurance Company Limited & anr. (2019) 2 SCC 186

11. National Insurance Co. Ltd. Vs Smt.Vidyawati Devi & 2 ors. F.A.F.O. No.2389 of 2016 dt 27.7.2016

12. Smt. Patti Devi @ Suman Tripathi & anr. Vs Sita Ram Gupta & ors. FAFO No.3222 of 2004

13. Chameli Wali Vs Municipal Corporation of Delhi (1986) 4 SCC 503

14. Smt. Hansaguti P. Ladhani Vs The Oriental Insurance Company Ltd. 2007(2) GLH 291

15. A.V. Padma Vs Venugopal2012 (1) GLH (SC), 442

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri Vidya Kant Shukla, learned counsel for the appellant and Sri Vijay Prakash Mishra, learned counsel for Insurance Company. None appears for the owner and driver of the vehicle involved in the accident.

2. his appeal, at the behest of the claimant, challenges the judgment and award dated 28.5.2019 passed by Motor Accident Claims Tribunal, Kanpur Nagar (hereinafter referred to as 'Tribunal') in MACP No.271 of 2013 re-deciding the matter and reducing the compensation fromRs.3,79,220/-toRs1,19606/with interest at 7 %from date of judgment. The tribunal re decided the entire matter on an application by the owner of the vehicle involved in the accident and against whom the earlier Tribunal had passed judgment and decree holding him solely liable to compensate the claimant exonerating the insurance company. By the subsequent award the tribunal fastened the liability on owner and insurance company but reduced the compensation payable to the claimant injured non tortfessor.

3. According to Sri Vidya Kant Shukla, learned Advocate for the appellant, the application was filed under Order 9 Rule 13 of C.P. Code 1908 (herein after referred as The Code) by the owner of the vehicle as the award was passed against the owner alone as it was held that the owner had failed to prove that the driver who was driving the offending vehicle and who was held to be negligent had a valid driving license. The insurance company was exonerated in the decision rendered on 29 4 2017 which was not challenged. The only reason for requesting, setting aside of the award was that maybe review was not maintainable and therefore an application under Order 9 Rule 13of the Code was filed. The application was made only bringing to the notice that the driver had a proper driving licence and there was no prayer to set aside the entire award so that insurance company can be held liable to satisfy the award as all other facts were proved before the Tribunal and no fresh evidence even after the application under Order 9 Rule 13 was placed before the Tribunal except the x-rox copy of the driving licence of the driver of the offending truck. The owner had not challenged the quantum or compensation awarded to the claimant by the award dated 29.4.2017 which was sought to be

reviewed. The owner nor the insurance company requested for rehearing or deciding all the issues afresh. The learned counsel for the appellant has heavily relied on five judgment namely, in Raj Kumar Vs. Ajay Kumar and another, 2010 LawSuit(SC) 1081, Hari Babu Versus Amrit Lal and others, 2019(2) T.A.C. 718 (All.), Mahoora Bano Versus National Insurance Company and others, 2020(1) T.A.C. 688 (S.C.) , Civil Appeal Nos. 1079-4081 of 2019 (National Insurance Company Limited Vs. Mannat Johal & others decided by Supreme Court on 23.4.2019 and also of Allahabad High Court in First Appeal From Order No.3183 of 2009 (Arun Bajpai Vs. Mushir Ahmad and others, decided on 13.12.2017.

4. Per contra, learned counsel for the insurance company while supporting the judgment of the Tribunal whose judgment is impugned herein relied on decision of Supreme Court in Vijay Singh Vs. Shanti Devi and others, AIR 2017 SC 5672. and hs contended that once an ex-parte decree has been set aside, the matter had to bed decided afresh. The said decision will not apply at the out set as it was in execution petition and both the appeals against the ex-parte decree was filed . The execution petition was filed meanwhile the appellant took the possession. The application of the defendant for setting aside ex-parte decree was allowed throughout which is not the case in our case . We are in the whelm beneficial peace of legislation where the Tribunal was not even asked to reconsider the question of quantum and interest.

5. Brief facts and the list of dates and events and the manner in which the learned Tribunal has passed the award dated 28 5 2019 whereby the owner and the Insurance Company without pleading any positive evidence have been successful in seeing that the compensation awarded to the appellant by award dated 29 4 2017 who by profession was a driver and had suffered huge disability, was practically left without any compensation because of the fault of the owner and the subsequent change in the presiding officer of the Tribunal.

6. The facts would demonstrate that for no fault of the appellant herein, the Tribunal who could not have refused to grant compensation practically non suited, the appellant qua his injuries and disability incurred due to the vehicular accident The subsequent award shows that the Tribunal took over hyper technical stand in not granting any compensation as it was of the view that the claimant had failed to prove his disability as the treating doctor was not examined on oath and disbelieved the medical certificate produced and not objected to be read in evidence by any of the parties.

7. The claim petition was preferred by the claimant contending that on the date of accident, he was serving as driver on vehicle bearing number U.P. -70 BT 4174 Tata AC which the claimant appellant herein was driving. On 17.6.2011 from Bareilly to Kanpur at about 3:00 O'clock at the place of known as Baba Thaba. The driver of the truck bearing truck U.P. 25 T-5823 drove his truck rashly and negligently and the driver rammed into the truck driven by the appellant herein. The appellant had multiple fractures of his lower limbs. He was admitted in the hospital of Dr. Kamlesh Dwivedi. The report of the said accident was reduced to writing on 20.6.2011 in Police Station at Katra, Bareilly. Later on he shifted and was hospitalized at Siddh Vinayak Hospital, Bareilly thereafter he was shifted to Navyug Nursing Home, Kanpur. Later on

he remained as aa indoor patient in Navyug Nursing Home, Kanpur from 29.6.2011 to 15.7.2011, thereafter also his treatment continued and he was unable to drive any vehicle as a paid driver. The owner of the truck, namely, Khursheed Khan filed a joint reply on his behalf and the driver contending that it was claimant who was driving the vehicle in a rash and negligent manner. It was contended in written statement that the driver of the truck owned by opponent no 1 had a valid driving license and the vehicle was insured with Shree Ram General Insurance Company Limited and the insurance cover note was filed at Exhibit-106 G. The insurance company also filed its reply of denial.

8. The Tribunal framed three issues. The first issue related to negligence of the driver of U.P. 25 T-5823 namely opponent The issue no. 2 was whether the accident occurred due to the negligence of the claimant himself and Issue no. 3 related to from whom and how much compensation the claimant was entitled.

9. The claimant produced several documents namely 9G was discharge card of Navyug Nursing Home, Kanpur, 10 G was his driving licence, 11G was his medical certificate issued the by Medical Board. He had submitted several bills of his medicines. There was certificate of his disability at Exhibit 86 and 87. His salary certificate was at 101G and 102 G. He had also filed the charge sheet which was laid against Sukh Pal. The FIR, X-ray and photographs showing the injuries caused to him were at Exhibit- 125G and 126G.

10. The owner produced documents being permit and the policy of insurance. The respondent no. 3 did not produce any document nor was any witness examined.

11. Issue nos. 1 and 2 are not in dispute before this Court but it is necessary to jot down the same that the Tribunal considered the driver of the other vehicle to be solely responsible for the accident. The issue no.3, the Tribunal considered his income on the basis of his evidence, basis of x-ray plates, basis of medical certificate that he was entitled to a sum of Rs.84,220/- towards medical expenses. As far as permanent disability is concerned, he has testified on oath that the medical board had examined him and he was declared to be disabled to the effect of 50%. The arguments of Insurance Company were that he had got his license renewed, therefore, it cannot be said that he had been rendered without any work. The said submission did not find favour with the Tribunal . The Tribunal considered his income to be Rs.4,000/- per month and held that his yearly income would be Rs.48,000/. The Tribunal considered his loss of income to be 40% and relied on authoritative decisions squarely covering the issue of admissibility of documents namely, decision titled Oriental Insurance Company Limited Versus **Surendra Umrao and another, 2007(3)TAC 40 (Allahabad) and Raj Kumar Versus Ajai Kumar and another, 2011(1) TAC page 785 (SC)**. as the age of the claimant was in the age group of 40-45, multiplier of 15 was granted. He was awarded as sum of Rs.2,000/- for diet and Rs.5,000/- to be considered for mental shock suffering bringing the amount of Rs.3,79,220/-with 9% interest from date of filing of the claim petition till deposit of amount this was as per first award dated 29 4 2017 The Tribunal at the end instead of giving recovery rights held the owner responsible exonerating the Insurance company. It is this exoneration of the insurance company which has caused all the problems for the

claimant the reason being immediately after the judgment and decree was drawn, the claimant through his Advocate gave a notice to the owner to pay him the amount. The owner did not file review application for limited purpose or an application under section 151 of the Code but an application under Order 9 Rule 13 of the Code was filed may be because he was advised that review may not be maintainable,due to old decision of this high court, his application under Order 9 Rule 13of Code wherein he had contended that he had given all documents to his advocate who had not produced the same. The owner produced the xerox copy of driving license of his driver.

12. The application depicted that it was a dispute between insurance company and the owner and the claimant consented for decree to be sent aside. The decree came to be set aside on 29.11.2018 it had proceeded ex-parte against the original defendant no. 2 and 3 namely the driver and the insurance company on that date the advocate for claimant and owner were present..

13. On 28.11.2018 the application under Order -9 Rule 13 of the Code which could not have been granted was allowed, however, as that has not been challenged, the same is not delved into its correctness or otherwise,.

14. On 28.11.2018 the decree was set aside under Order 9 Rule 13 of the Code and framing fresh issue being issue no.4 about license. The reason for filing the application was to show that the the driver of the vehicle had proper driving licence and that exoneration of the insurance company was not call for. The Tribunal after passing the said order allowing the application as the order sheet goes to shows order was passed on 30.11.2018 and the matter was kept on 3.12.2018 for hearing or evidence of of the defendants.

15. On 20.12.2018 the matter was further fixed on 7.3.2019 again it was listed on 7.3.2019, 16.3.2019, 3.4.2019 and 16.5.2019. The record does not show that after the matter was restored to file by the Tribunal, the Tribunal ever listed the matter for further evidence of the claimant. The new presiding officer heard the matter on 21.5.2019 and on 25.5.2019 and the Tribunal listed the mater for pronouncement of judgment. The impugned judgment whereby the Tribunal very strangely accepted the finding on issue no.2 of the earlier award and answered newly framed issue no 4 but though it was called upon only to decide newly framed issue no 4 decided all issues without any new recording of evidence or calling upon the claimant to adduce evidence and practically as narrated herein above reviewed the award of predecessor and did not take into consideration the decision of this High Court in Oriental Insurance Company (supra) instead though no one had cited the decision of the Calcutta High Court in Sudhir Bhuiya Vs. National Insurance Company Limited reported in (2005) ACJ 509. The said decision does not lay down straight jacket formula that the genuineness of documents must be fabricated. It was no body case that the document of Medical Board was fabricated. It is given by the head of the Kanpur Medical Board. The insurance company or the owner had also not doubted the veracity of the said document. Even in the proceeding which were concluded the said document was believed and there was a tacit acceptance of the same despite that the Tribunal of its own misread the said

decision . The fact had to be proved by following principles of natural justice which unfortunately the Tribunal itself did not follow. The Tribunal very strangely accepted the X-rox copy of driving license produced by the owner subsequently without adducing any fresh evidence as is borne out from the record, the Tribunal decided issue no. 4 accepting the x-rox copy of the driving licence. The opponent namely the owner took adjournment on 7.3.2019 and he did not examine anybody. The x-rox copy of the document produced along with application Order 9 Rule 13 of the Code has been accepted by the Tribunal . The photo copy of driving licence of Sukh Lal and x-rox copy of Form 54 was produced by the owner on 3.12.2018 . From 3.12.2018 till the judgment the record does not show that any evidence whatsoever was laid by the opponent owner herein save and accept producing the x-rox copy of the driving licence of the driver even without examining who had issued the same accepted the xerox copy of the driving license of the driver of the truck who was held negligent and very strangely disbelieved the medical certificate issued in favour of the claimant by the competent medical board and not by private doctor and the claimant was taken totally unaware and was not even aware that the Tribunal had ever called upon to produce any fresh evidence in support of his claim.

16. Very strangely, the learned Tribunal brushed aside the government document produced and which was earlier not challenged and accepted by the earlier presiding officer and the insurance company. The Tribunal accepted the xerox copy of the driving license and held the insurance company liable the question is should it hold the adverse against the claimant whose claim was already accepted by the earlier Tribunal and could the Tribunal review not relying on the decision of jurisdictional high court the answer is the Tribunal could not have reviewed the compensation awarded without any further pleadings or contrary evidence led after the order of under 9 Rule 13 of the Code was passed.

17. While going through several commentaries on powers under order 9 rule 13 0f the Code the undersigned could not find any authoritative pronouncement on this issue as it appears that the owner was advised to file application under Order 9 Rule 13 as may be. He was advised that the review may not be tenable. The earlier tribunal has cited and relied and has even discussed decision cited by the appellant herein of jurisdictional High Court that the Allahabad High Court but the later tribunal in her zeal to decide against the claimant very conveniently relied on the decision of Calcutta High Court (supra) and and of the Apex in Raj Kumar Versus Ajay Kumar (infra) which should not have been done.

18. However as this is appeal filed under Section 173 of Motor Vehicle Act, 1988 this Court will even assume that the powers vested in the Tribunal reconsidered the issue of compensation. It should be noted here that the Tribunal again made an error in erroneously interpreting the decision of Calcutta High Court and misreading the judgment of Apex Court in **Raj Kumar Vs. Ajay Kumar and another, reported in (2011) 1 SCC 343.** The High Court of Allahabad which is a jurisdictional High Court has in its judgment referred by the earlier Tribunal held that medical documents which are produced and it which are public document under the Evidence Act have to be believed. It was nobody case that the

compensation could not be granted. The error which is error on the face on record has to be corrected. Recently the Apex Court has deprecated the decision where the Tribunals have taken hyper technical stand and have applied strictly the trappings of Civil Procedure and or criminal procedure. It can also be seen from the different angle that if the insurance company was not impleaded but if it is shown that it was liable in that case also under Section 170 of the Motor Vehicle Act, 1988 could have been impleaded later on also under Section 166, it is not always compulsory to array insurance company. IN this case also thue Tribunal could have exercised its powers under Section 168 read with Section 169 of the Act. The Tribunal ought to have considered that the fresh lis was between the owner and the insurance company and not between the claimant and the owner or the insurance company whereby the Tribunal granted interest under Section 171 of Act from the date of the judgment. The judgment was delayed not be cause of the appellant but because of the application filed by the owner. Hence, the said order is also bad.

19. It has been time and again held that trappings of civil and criminal proceedings cannot be applied in a very strict manner. I am fortified in my view by the decisions in Sunita and others Vs. Rajasthan State Road Transport Corporation and Another, 2019 LawSuit (SC)190, Mangla Ram Vs. Oriental Insurance Company Limited and Others, 2018 (5) SCC 656 and Vimla Devi and others Vs. National Insurance Company Limited and another, (2019) 2 SCC 186.

20. The compensation is ordered to be reassessed in view of the submission made by learned counsel for the appellant and in view of and in view of the decision in F.A.F.O. No.2389 of 2016 (National Insurance Co. Ltd. Vs. Smt.Vidyawati Devi And 2 Others) decided on 27.7.2016. The Allahabad High Court in a recent decision dated 31.7.2019 in FIRST APPEAL FROM ORDER No.3222 of 2004 (Smt. Patti Devi Alias Suman Tripathi And another Versus Sita Ram Gupta And Others) and also in First Appeal From Order No. 113 of 2020 decided on 8.12.2017 wherein in this Court has held as under which is reproduced herein:-

"1. Heard Sri Nagendra Kumar Singh for the appellant and Sri N.K. Srivastava for the respondents.

2. This appeal challenges the order dated 31.10.2001 passed by Motor Accident Claims Tribunal, Deoria, in M.A.C.P. No.599 of 1996.

3. I am pained that a girl of 16 years of age, who was before the Tribunal, was awarded a sum of Rs.1 Lac but on an application being made that Insurance company joined should have been New India and not United India. The Tribunal reduced the compensation to Rs.2,000/-. The new incumbent Judge undertook the entire exercise of writing afresh new judgment and reduced the claim to a sum of Rs.2,000/- holding that it was not proved that she had suffered partial disablement and holding that the Insurance company would be liable to pay compensation only from the date it was impleaded.

4. This appeal is filed at the behest of the claimant, who has sued through her legal heir as she was minor at the time of accident.

5. Learned counsel for the claimant has submitted that the claimant had sustained fracture and the amount of Rs.2,000/- could not have been awarded

reviewing earlier judgment. The Tribunal could not have reviewed its earlier decision awarding Rs.1,00,000/- with interest. The review was not permissible. Even it is submitted that out of the said accident, one person has died which shows the gravamen and impact of the accident, this Court has perused the paper-book and the record of the lower court and though it is not submitted in this case, earlier the matter was decided in absence of the owner wherein United India Insurance Company was impleaded as party - respondent but with whom there was no brevity of contract of the owner.

6. In view of the decision of ***UPSRTC Vs. Km. Mamta and others, reported in AIR 2016 SCC 948,*** *the accident having taken place is not in dispute. The claimant not being negligent is not in dispute. The claimant was awarded a sum of Rs.1 Lac is the very same claim vide judgment dated 27.4.2000 is also not in dispute but the said award was against the owner as the claimant could not prove that the vehicle was insured. The owner/ claimant thereafter came in review to show that the vehicle was insured but was insured with New India Insurance Company Limited. The Tribunal of its own decided all the issues afresh. The mute question is could the Tribunal review its own judgment Suo Motu on all issues and alter the amount awarded in favour of a destitute poor minor injured claimant, who had suffered the injuries.*

7. It is admitted position of fact that the injuries sustained by the minor would cause permanent partial disability, is what is held earlier, and that is why a learned Judge of the Tribunal held in favour of the appellant vide judgment dated 27.4.2000 and awarded a sum of Rs.1 Lac as he had become permanent disabled being a young girl. Her left leg was damaged even after filing of the appeal and the claim petition even in the year 2016 and 2008, the position still continues when she filed application for expeditious hearing.

8. The judgment dated 27.4.2000 was never objected by the claimant or owner or insurance company. An application was given to correct the name of the insurer immediately after the owner was held liable.

9. Section 170 of the Motor Vehicles Act read with Section 166 reads as follows:-

"170. Impleading insurer in certain cases.-- *Where in the course of any inquiry, the Claims Tribunal is satisfied that ---*

(a) there is collusion between the person making the claim and the person against whom the claim is made, or

(b) the person against whom the claim is made has failed to contest the claim,

it may, for reasons to be recorded in writing, direct that the insurer who may be liable in respect of such claim, shall be impleaded as a party to the proceedings and the insurer so impleaded shall thereupon have, without prejudice to the provisions contained in sub-section (2) of Section 149, the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made.

166. Application for compensation.-- *(1) An application for compensation arising out of an accident of the nature specified in sub-section (1) of section 165 may be made--*

(a) by the person who has sustained the injury; or

(b) by the owner of the property; or

(c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or

(d) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be:

Provided that where all the legal representatives of the deceased have not joined in any such application for compensation, the application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined, shall be impleaded as respondents to the application.

(2) Every application under sub-section (1) shall be made, at the option of the claimant, either to the Claims Tribunal having jurisdiction over the area in which the accident occurred, or to the Claims Tribunal within the local limits of whose jurisdiction the claimant resides or carries on business or within the local limits of whose jurisdiction the defendant resides, and shall be in such form and contain such particulars as may be prescribed:

Provided that where no claim for compensation under section 140 is made in such application, the application shall contain a separate statement to that effect immediately before the signature of the applicant.

*(3) *****

(4) The Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of Section 158 as an application for compensation under this Act."

and, therefore, the impleadment of an Insurance company is not a must but under Section 168 (3), which reads as follows:-

"168. Award of the Claims Tribunal.--

(1)

.....

(2)

.....

(3) When an award is made under this section, the person who is required to pay any amount in terms of such award shall, within thirty days of the date of announcing the award by the Claims Tribunal, deposit the entire amount awarded in such manner as the Claims Tribunal may direct."

10. In this case, it was the owner, who was the person saddled with the liability to make payment in the Ist judgment. However, he came before the Tribunal showing that his vehicle was insured with New India Insurance Company Limited. The said amount of compensation could not have been altered by the Tribunal. Therefore, the Tribunal has erred in holding that the claimant was entitled to only Rs.2,000/- which is farce-able amount. The Tribunal held that the rate of interest would be from the date of award which is also not permissible. The concept granting interest is as per Section 171 of the Motor Vehicles Act, which reads as follows:-

"171. Award of interest where any claim is allowed.-- *Where any Claims Tribunal allows a claim for compensation made under this Act, such Tribunal may direct that in addition to the amount of compensation simple interest shall also be paid at such rate and from such date not earlier than the date of making the claim as it may specify in this behalf."*

and, therefore, the Tribunal has committed an error in granting interest only from the date the Insurance company was impleaded. The interest was already ordered to be paid from the date of claim petition by order dated 27.4.2000, therefore, non-grant of interest is perverse. The Insurance company has to be saddled with entire liability to indemnify the claimant if it feels that there is some dispute between the Insurance company and the owner. Non-joining of Insurance company is not fatal for grant of interest.

11. The Tribunal in this case has not exercised its judicial discretion. In this case, there was no delay on the part of the appellant as it was informed that United India was the Insurance company and this information was given by the owner of the vehicle. If it was wrongly given, the claimant cannot be made to suffer. The first point of time when they came to know that it was New India Insurance Company Limited, an application was immediately moved so as to implead it as a party - respondent.

12. The owner of the Truck never appeared before the Tribunal and as the motorcyclist was not held to be at all negligent, the burden shifted on the owner of the Truck. The said decision was rendered on 27.4.2000 by Sri N.B. Singh, IInd Addl. District Judge, Deoria, who in paragraph no.13 held as follows:-

"Km. Rinku was 17 years of age at the time of accident. She had received grievous injuries whose descriptions have already been mentioned in the body of this judgment earlier and it has also been stated that she should obtain quite a handsome amount of compensation as her leg and hand both were fractured. The amount of compensation has been claimed which is excessive. According to the provisions mentioned in Schedule-II of the M.V. Act, she is entitled for Rs.15,000/- towards medical expenses, Rs.5,000/- for injuries sustained by her but for loss of her future life she is awarded Rs.80,000/- (eighty thousand) so that she may spend her life easily in future. Thus, the total amount of compensation which she can claim shall be Rs.1,00,000/- (one lakh) payable by Opp.party no.1. Over this amount she can claim interest at the rate of 12% per annum with effect from the date of presentation of claim petition i.e. 20.12.1996 till the entire sum is paid."

13. The applicant and also owner gave an application immediately after she came to know the name of New India Insurance Company. All that the Tribunal had to do was mulcted the liability on the Insurance company instead it started denovo proceeding. The respondent herein - Satnam Singh, owner of the Truck also appeared and gave this factual data and, therefore, there was no point for re-deciding other issues except issue no.2, which reads as under:-

"Issue No.2: Insurance company has alleged in this issue that the driver of the truck had no valid driving licence at the time of accident. The case has proceeded ex-parte against opposite party no.1 who is owner of the Truck. Neither owner of the Truck nor its driver had appeared before this court to say that the driver had valid licence at the time of driving of the truck. Therefore, I decide this issue in favour of Insurance company."

There is no need to rely on Madhya Pradesh High Court (Gwalior Bench) judgment in ICICI Lumbard General Insurance Company Vs. Shanti; Babli; Chunni; Ramwati; Madho Singh and others, 2015 LawSuit (MP) 208, even without considering these decisions as cited by counsel for appellant, this appeal on the factual matrix is to be allowed.

14. The appeal is allowed. The order dated 27.4.2000 awarding compensation will enure for the benefit of the appellant - claimant. She is awarded a sum of Rs.1 Lac with 9% rate of interest from the date of filing of claim petition till the amount is deposited."

21. The Motor Vehicles Act is a beneficial piece of legislation. Had the Tribunal in our case glanced at the x-ray and the photographs produced it would not have made insensitive award. The claimant

- appellant is a driver by profession. Looking to the photographs which are before this Court as the record was summoned goes to show that he was his both lower limb were plated there was rods in do the medical Board opined that he had 50% total disability. Even if we believe that there was such excretion rather the functional disability on the judgment which the Tribunal relied would have permitted the Tribunal to at least hold that the injured was 50% disabled.

22. The award will have to be disturbed even on merits .

23. The Insurance Company having not challenged the subsequent finding that it is liable and must have deposited the amount awarded by the Tribunal. In that view of the matter the calculation also requires to be recalculated as even the earlier Tribunal did not consider adding future loss of income . I am supported in my view by the decision in Mushir Ahmad) supra) and Hari Babu (supra).

24. It is submitted by Sri Vidya Kant Shukla, Advocate that the earlier Tribunal had considered the income of the claimant to be Rs4,000/- and as .his age was 43 years and was in the age group of 40-45. The multiplier of 15 was given. It is submitted that the income should be considered to be Rs.7,000/- per month and the Tribunal should not have deducted other amount looking to the certificate of salary and that he was driver by profession when the accident occurred. It is further submitted that in view of the decision of Apex Court in the case of Raj Kumar (supra) the disability should be considered to be 100% as he now cannot drive as a skilled driver. Per contra, the learned counsel for the insurance company now contends that even if this Court feels that the subsequent judgment is bad, the award of the compensation granted by the First Tribunal should be considered and that the subsequent Tribunal has also appreciated the matter on facts as it was hearing matter after the decree was set aside.

25. Looking to the totality of the facts and as they emerge the income should be considered as Rs.5000/-- per month to which 25% will be added under the head of future prospect which would come to Rs.5,000/- + Rs.1250/- which is euqal to Rs. 6250/- per month. Even if we do not consider that the injury has caused, 100% disablement but we may fall back on the certificate as given by the Medical Board which would be 50% disablement for body as a whole, Hence, the claimant would be entitled to Rs.3125/-per month as loss of income, which will be further multiplied by 15. The same is also to be multiplied by 12 and the figure would be Rs. 5,62,500/- to which Rs.50,000/- be added under the non-pecuniary head of pain shock and suffering and Rs.84224/- for medical expenses. The claimant over and above would be entitled Rs.25,000/- under the head of good diet, attended charges and transportation. I am supported in my view by the latest decision of Apex Court in the case of Kajal Versus Jagdish Chand and others, 2020 ACJ 1042 (SC) /- . The Apex Court in **Chameli Wali Vs. Municipal Corporation of Delhi, (1986) 4 SCC 503** has held that compensation should normally be granted by the High Court exercising powers under Section 173 from the date of filing of the claim petition till realization. In this case the earlier Tribunal granted the amount from the date of the claim petition as there was no delay caused by the claimant herein. The finding is not recorded by the subsequent Tribunal as to how the appellant

protected the proceedings. He appeared before the Tribunal even after the application under Orde 9 Rule 13 was filed as is clear from the order passed in the year 2018 allowing the application under Order 9 Rule 13 of the Code. Thereafter the lis was between the owner and the insurance company and, therefore, finding fault with the claimant was perverse finding which is set aside. The total amount Rs.5,62,000/- + Rs.75,000 + Rs.84,224/- would carry interest at the rate of 7.5%. The insurance company to deposit the difference of the said amount within 12 weeks from today.

26. This is claimant's appeal who has felt aggrieved because of the total insensitivity shown by the Tribunal. While allowing the application under Order 9 Rule 13 of C.P. Code. The application was filed by the owner as during the trial he remained absented after filing his written statement and did not file the license of his driver. On issuance of notice, he appeared before the Tribunal, the Tribunal instead of passing order holding the insurance company liable to pay it ventured to review the entire earlier award not even challenged before it nor any averment was made that entire award required to be re-answered. The Tribunal on premise that the appellant herein claimant did not produce or did not examine the doctor and as the Calcutta High Court had cautioned the Tribunal as reiterated by the Supreme Court in **Raj Kumar (supra)** case totally disbelieved the medical certificate issued by the Medical Board what pains to this Court is that the Tribunal disbelieved the certificate which was believed by the earlier Tribunal which had already granted compensation which was not the lis between the parties now only granted medical allowance, the question is could this have been done, the answer as given above is an emphatic no shows the total insensitivity of the learned Judge rather the Tribunal makes this Court to Penn all this. The factual matrix of the accident having taking place, the involvement of the vehicle and that the claimant had suffered and he was hospitalized and he was already awarded compensation were admitted questions of facts and already decided. The dates and events go to show that after the order of recall the order has been under Order 9 Rule 13, the Tribunal did not call the witness allowed the defendant owner to file copy of x-ray report of the driving licence of his driver and allowed prayer made by him directing the Insurance Company to make the payment. Strangely while passing the award the Tribunal granted interest only from the date of award by returning a finding that the trial was protracted by the claimant. All this perversity are sought to be answered as this appeal filed under Section 173 of Motor Vehicle Act.

27. The aforesaid facts go to show that the Tribunal committed error apparent on the fact of record and only show that the learned Tribunal does not commit such error in future . A copy of ths judgment be sent to learned Tribunal Smt. Mahulika Chaudhary wherever she is posted by the Registry of this Court so that she may be more cautious in future. Because of the error committed by the her the insurance company will now have to pay more amount to the claimants which is recalcuated on the basis of law as its stands today.

28. This appeal is partly allowed.

Further directions

29. A copy of this judgment be placed before the Registrar General for circulating

it to the Tribunals so that in future such mistakes do not occur and the pendency of this High Court does not get increased.

30. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442, the order of investment is not passed because applicants/claimants are neither illiterate or restic villagers.

31. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansaguti P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291,** total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 (Smt. Sudesna and others Vs. Hari Singh and another) while disbursing the amount.

32. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein. The Tribunals in the State shall follow the direction of this Court as herein aforementioned as far as disbursement is concerned, it should look into the condition of the litigant and the pendency of the matter and not blindly apply the judgment of A.V. Padma (supra). The same is to be applied looking to the facts of each case.

33. The record be sent back to Tribunal.

34. This Court is thankful to learned advocates for arguing and getting matter disposed of.

(2020)12ILR A135
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.11.2020

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

First Appeal From Order No. 3989 of 2017

Shrimati Saroj & Ors. ...Appellants
Versus
Raman Malhotra & Ors. ...Respondents

Counsel for the Appellants:
Sri Vishnu Prakash Srivastava

Counsel for the Respondents:
Sri Mohan Srivastava, Sri A.K. Upadhyay, Sri Mohan Srivastava, Sri Vijay Prakash Awasthi, Sri Vijay Kumar Rathi

Civil Law -Motor Vehicles Act (59 of 1988) – Section 168 - Claim for compensation - Non mention of vehicle number in the F.I.R. - *Held* - in a case relating to motor accident claims, claimants are not required to prove the case as it is required to be done in a criminal trial - when a person see his brother, being knocked down by vehicle & see him suffering in pain & in need of immediate medical attention - that person is obviously under a traumatic condition - his first attempt

will be to take injured to a hospital or to a doctor - It is but natural for such a person not to be conscious of the presence of any person in the vicinity - Under such mental strain, it is not unnatural, if the brother of the victim forgot to take down the number of the offending vehicle (Para 9)

Tribunal dismissed claim petition holding that the vehicle was not involved in the accident as F.I.R. was silent qua the number of the vehicle - F.I.R. was lodged promptly - though the number of the vehicle was not mentioned - during the investigation it was found that the vehicle was involved in the accident - charge-sheet was laid - Written statement has been filed by owner - there was no denial of accident - Held - finding of fact of the Tribunal upturned, decree quashed & set aside - record sent back to the Tribunal for deciding on the other issues.

Appeal allowed. (E-5)

List of Cases cited: -

1. Kusum Lata & ors. Vs Satbir & ors. 2011 (1) AICC 651

2. Smt. Santosh & ors. Vs United India Insurance Company & ors. First Appeal From Order No.866 of 2003 Dt. 4.3.2020

3.Mangla Ram Vs Oriental Insurance Company Limited & ors. Laws(SC) (2018) 49

4.Sunita & ors. Vs Rajasthan State Road Corporation & anr. 2019(1) TAC 710 (SC)

5. Vimla Devi & ors. Vs National Insurance Company Limited & anr. (2019) 2 SCC 18

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard learned counsel Shri Vishnu Pratap Srivastava for the appellants and learned counsel Shri Mohan Srivastava for the respondents-Insurance Company. Other respondents have absented themselves and are not represented though served.

2. This appeal, at the behest of Claimants challenges the judgment and award dated 13 09 2017 passed by Motor Accident Claims Tribunal Bulandsaher (hereinafter referred to as 'Tribunal') in M.A.C.P No.1 of 2010, whereby the claim petition filed by the claimants was dismissed by the tribunal.

3. The parties are referred to as claimants/appellants(original applicants). and insurance company/ /respondents.

4. The brief facts as they emerge are on the fateful day namely 30th of October, 2008, the deceased Satyendra Pal and his brother Krishna Kumar were easing near Ram Lila Ground when Krishna Kumar in the early morning at about 4.00 a.m. was going to drop Gulabati who was serving at a distant place. A Maruti Zen came and dashed with the deceased. The deceased breathed last on the spot. A First Information Report was given by Krishna Kumar in the early morning on the same day at 8.30. The post mortem report was carried out and the report was furnished at 3.00 p.m. on the very same day. The deceased Satyapal Singh was 46 years of age, he was serving in the Telephone Department as Senior T.O. at Meghrajpur and he was earning Rs.18,877/- per month. He had also his agricultural land. Respondent No.1 Raman Malhotra was the owner of the vehicle and the vehicle was being driven by whom was not known. The Insurance Company of the Vehicle was arrayed as Respondent No.3. The owner Raman Malhotra filed his replies contending that he had already sold the vehicle to one Marketing Automobiles Pvt. Ltd., Arvind Marg, New Delhi, and the same was sold on 28.12.2006 and, therefore, he was not the owner of the vehicle. He has no reason to be impleaded as respondent in the said petition and the vehicle if was got released, it was by

person who was not he himself. The respondent No.2 also remained absent. Respondent No.3 has filed reply of negation.

5. During the course of the hearing, several applications were given to call for the S.S.P. and to implead respondent Nos. 4 and 5 who are deemed to be the owner of the vehicle. The Tribunal framed five issues but did not decide any of them except issue No.1 holding that the vehicle was not involved in the accident and the claim petition was dismissed.

6. The Tribunal dismissed the claim petition on two counts. It did not believe the presence of the eye-witness who deposed before it and that if the brother of the deceased had seen the vehicle and given the number to P.W.2, he should have been examined on oath and why the F.I.R. was silent qua the number of the vehicle ?

7. Appellants herein had examined P.W.1 i.e. the widow of the deceased, P.W.2 an unknown person who was an eye witness but unfortunately his name was nowhere shown in the charge-sheet. P.W. 3 was the scribe of F.I.R. and also the brother-in-law of the deceased who has been examined on oath. The F.I.R. and the charge-sheet and the site plan were on record of the Tribunal.

8. Learned counsel for appellants has submitted that Tribunal has misdirected itself as the number though was not mentioned, the charge-sheet shows that the vehicle was involved in the accident, the evidence of P.W.3 and 4 was disbelieved on the ground that their presence at the spot was very doubtful. It is further submitted that the Tribunal even in absence of any rebuttal evidence led by the respondents, relied on the decisions of this High Court so as to reject the claim petition of the claimants. The decision in National Insurance Co. Ltd. Vs. Smt. Saheen Parveen and other reported in 2017 (1) ACCD 161 ALD could not have been relied by the Tribunal instead the Tribunal ought to have relied on earlier decisions of this High Court wherein it has been held that trappings of Civil Courts should not be strictly adhered to by the Tribunal. It is further submitted that the owner No.1 had seen that the vehicle from the custody of CJM was released by owner during the pendency of the criminal proceedings lodged against him.

9. Learned counsel for the appellant has relied on the decision of the decision of the Apex Court in **Kusum Lata and Others Vs. Satbir and others, 2011 (1) AICC 651,** more particularly on para Nos. 8 and 9 which are as under:

"8. Both the Tribunal and the High Court have refused to accept the presence of Dheeraj Kumar as his name was not disclosed in the FIR by the brother of the victim. This Court is unable to appreciate the aforesaid approach of the Tribunal and the High Court. This Court is of the opinion that when a person is seeing that his brother, being knocked down by a speeding vehicle, was suffering in pain and was in need of immediate medical attention, that person is obviously under a traumatic condition. His first attempt will be to take his brother to a hospital or to a doctor. It is but natural for such a person not to be conscious of the presence of any person in the vicinity especially when Dheeraj did not stop at the spot after the accident and gave a chase to the offending vehicle. Under such mental strain if the brother of the victim forgot to take down

the number of the offending vehicle it was also not unnatural.

9. There is no reason why the Tribunal and the High Court would ignore the otherwise reliable evidence of Dheeraj Kumar. In fact, no cogent reason has been assigned either by the Tribunal or by the High Court for discarding the evidence of Dheeraj Kumar. The so-called reason that as the name of Dheeraj Kumar was not mentioned in the FIR, so it was not possible for Dheeraj Kumar to see the incident, is not a proper assessment of the fact-situation in this case. It is well known that in a case relating to motor accident claims, the claimants are not required to prove the case as it is required to be done in a criminal trial. The Court must keep this distinction in mind."

10. Learned counsel for the respondent has submitted that involvement of vehicle in the accident has been rightly held to be doubtful as the F.I.R. was lodged against an unknown vehicle, the number of the vehicle was not mentioned in the F.I.R. The owner also contended that he had long back sold the vehicle. It is further submitted that the author of the F.I.R. was not examined on oath and in the alternative, it is further submitted that the evidence of the witnesses is rightly not believed by the tribunal as their presence is found to be doubtful at the time of accident. It is further submitted that the claimants have though changed advocate have not examined the real brother who was with the deceased and has prayed for dismissal of this appeal.

11. Heard learned Advocates for the litigating parties.

12. Recently in **First Appeal From Order No.866 of 2003, Smt. Santosh & others versus United India Insurance Company and others,** decided on 4.3.2020, this Court has held as under:

*"While interpreting the provisions of Section 168 and 168 (4) of the Motor Vehicle Act, 1988 (hereinafter referred as the "Act') were ignored by the Tribunal while deciding the matter. The Tribunal rejected the clam petition, though the deceased was admitted in the hospital and the F.I.R. clearly spelt out that it was due to the involvement of the vehicle. This fact was proved as the driver fled away with the vehicle though G.D. entry also there with police authorities. The post mortem report also proved the fact that deceased died due to accidental injuries. The vehicle tractor trolley was proved to be involved in the accident. The tribunal held that the driver, owner and insurance of the motor cycle was not joined as a party. The accident had taken place on 25.05.2001 at 9.30 p.m. as a result of involvement of tractor trolly which was not disputed by owner or driver or Insurance Company which has been proved by cogent evidence just because there are certain contradictions in the testimony of the witness and because who got the injured, in the hospital is not mentioned, the claim petition was dismissed and being the claimants' case is disbelieved. The fact is that the charge sheet was filed pursuant to F.I.R lodged is not just because in dispute the tractor trolly was not confiscated detained on the spot it is held that the vehicle was not involved in the said accident. Recently the High court of Gujarat in J**oshi RajendrakumarPopatlal Vs. ThakorRamnajiHamirji and Others, reported in 2020 ACJ 365** has held that the Tribunal should not decide claim petition by taking hyper technical approach and thereby frustrate the provision of beneficial peace of legislation. The Apex Court in **Bimla Devi and Ors. Vs. Satbir Singh and***

Ors. 2013 (4) SCC 345 *has held that hyper technicality should not be allowed to frustrate the aim of beneficial peace legislation. In our case hyper technicality of the learned Tribunal has resulted into the flaw in his award. It was established that the deceased had definitely met with the accident involving two vehicles. It was also proved that the accident was between the tractor trolley and the motor cycle on which the deceased was plying. The technical defect of pleading should not have been made the basis of rejection of the claim petition. I am supported in my view by the decision of Apex Court in the case of* ***Gurdeep Singh v. Bhim Singh, (2013) 11 SCC 507,*** *wherein provision of Section 173 of the "Act' read with Section 96 of the Code of Civil Procedure,1908 will permit this court to reverse the perverse findings reached by the tribunal. The Apex Court decisions in* ***Sharanmma V. North-East Karnataka RTC, (2013) 11 SCC 517.*** *The judgment in* ***DulcinaFernandes V. Joaquim Xavier, First Appeal No. 216 of 2004, decided on 14.11.2008*** *with also help the claimants. Therefore also the appeal will have to succeed."*

13. I am unable to accept the submission of ld advocate appearing on behalf of Insurance Company that the petition has been rightly rejected as there was no mention of the number of the vehicle in the FIR and that the deposition of witness was also sketching.

14. The F.I.R. was lodged promptly though the number of the vehicle was not mentioned later on during the investigation it was found that the vehicle was involved in the accident. The charge-sheet was laid which has not been doubted or challenged by anybody. Written statement has been filed by owner accepted that he has sold the vehicle. There is no denial of accident. The witness who has filed the charge-sheet has been extensively cross examined by the advocate for the Insurance Company and nothing could be made out that it was a planted vehicle. The facts go to prove that had it been a planted vehicle, the owner would not have taken such a stand that his vehicle was sold long back which shows that he has been rightly charge-sheeted. The newly impleaded owner has not even appeared before the Tribunal or before this Court which goes to show that the finding of fact of the Tribunal requires to be upturned. I am supported in my view by the decision of the Supreme Court in **Mangla Ram Versus Oriental Insurance Company Limited and others, Laws(SC) (2018) 49** and also in the case of Sunita and Others Versus Rajasthan State Road Corporation and another, 2019(1) TAC 710 (SC) relied by counsel for appellant, wherein the Apex Court has reiterated that trappings of civil litigation be not strictly adhered to. I am fortified in my view by the decision of the Apex Court in **Vimla Devi and others Vs. National Insurance Company Limited and another, (2019) 2 SCC 18.**

15. Appeal is partly allowed.

16. The judgment and decree shall stand quashed and set aside. The record be sent back to the Tribunal for deciding on the other issues which shall be decided on or before 31st May, 2021 after affording opportunity of hearing to all.

(2020)12ILR A139
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.12.2020

BEFORE

THE HON'BLE RITU RAJ AWASTHI, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Misc. Bench No. 7894 of 2020

Avinash Jain (In F.I.R. Avinash Chand Jain) ...Applicant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Applicant:
Shri Naved Mumtaz Ali

Counsel for the Respondents:
G.A.

Criminal Law-Criminal Procedure Code (2 of 1974) - Section 482 - Quashing of proceedings - Offences u/Ss. 406, 420 of IPC - S. 406 IPC - necessary ingredients - misappropriation or conversion for own use of the property entrusted - *Held* - Offence u/S.406 of IPC, not made out as it has been mentioned in the F.I.R. itself that the petitioner returned the Gem after testing alongwith test certificate to the complainant - S. 420 - one of necessary ingredient is fraudulent or dishonest *inducement* - *Held* - nothing in the F.I.R. to disclose that the petitioner induced respondent no.4 to deliver any property - As there is no inducement so it cannot be inferred that petitioner cheated respondent no.4 in any manner - Proceedings liable to be quashed. (Para 18, 20, 24, 27)

Writ Petition allowed. (E- 5)

List of Cases cited: -

1. St. of Har & ors. Vs Bhajan Lal & ors. 1992 SCC(Cri.) 426

2.Prof. R.K.Vijaysarathy & anr. Vs Sudha Seetharam & anr. Cri. Appeal No.238 of 2019 dated 15.2.2019

3. Anand Kumar Mahatta Vs State (NCT of Delhi) & anr. (2019) 11 SCC706

(Delivered by Hon'ble Saroj Yadav, J.)

1. This writ petition has been filed by Shri Avinash Jain challenging the First Information Report dated 11.3.2020 (hereinafter abbreviated to as '**F.I.R.**') bearing Case Crime No.0098 of 2020, under Sections 406, 420, 504 and 506 I.P.C., Police Station Chowk, District Lucknow, lodged by respondent no.4 Shri Sanjeev Pandey.

2. In short, this writ petition reveals that opposite party no.4 lodged F.I.R. stating that respondent no.4 gave a patrimonial blue Gem to the petitioner at "New Gem Testing Laboratory" for testing. Rs.900/- testing fee was charged and a certificate had been issued certifying that the Gem was Synthetic.

3. It has also been written in the F.I.R. that on the very same day in the evening at 6.00 p.m., respondent no.4 went to the 'shop' of the petitioner to know the authenticity of the alleged Gem where the petitioner abused and threatened to kill respondent no.4.

4. It has also been alleged that when respondent no.4 tried to find out regarding the qualification of the petitioner, it came out that the petitioner has a three months' proficiency and a title of Graduate Gemologist from an American Trust i.e. G.I.A. The Informant had also stated that he doubts that so many persons throughout India have been working as Graduate Gemologist causing damage to the valuable assets of India.

5. The petitioner assailed the F.I.R. on the following main grounds :-

i). No case under Sections 406, 420, 504 and 506 of Indian Penal Code (for short '***I.P.C.***') is made out against the petitioner, out of the facts mentioned in the F.I.R.

ii). The petitioner had returned the alleged Gem to respondent no.4 after testing, hence there was no misappropriation.

iii). During the testing process, nothing was done by the petitioner which amounted to offence caused under Section 420 I.P.C.

(iv). No alleged incident of threatening to kill or abusing to respondent no.4 by the petitioner occurred. Thus, allegations of criminal intimidation have been levelled due to mala fides.

(v). The Gemological Institute of America is a non profit Institute dedicated to Research and Education in the field of Gemology.

(vi). The Graduate Gemologists Diploma offers a Comprehensive Education in Gemology. The allegations have been levelled to extort the money from the petitioner.

6. Learned A.G.A. appeared on behalf of respondent nos.1, 2 and 3.

7. Notice was issued to respondent no.4 Shri Sanjeev Pandey (Complainant).

8. Respondent no.4 sought time to file counter affidavit, which was granted but he did not file any counter affidavit.

9. Learned A.G.A. filed short counter affidavit dated 14.10.2020 wherein it has been stated that from investigation, no credible evidence regarding commission of offences under Sections 504 and 506 I.P.C. was found, therefore these sections were deleted from the array of offence as invoked against the accused/petitioner and the investigation is going on regarding the other offences.

10. Thereafter, a rejoinder affidavit dated 4.11.2020 was filed on behalf of the petitioner by his cousin brother Shri Aviral Jain denying the averments made in the short counter affidavit filed on behalf of respondent nos.1,2 and 3 regarding fair and impartial investigation and alleged that the petitioner is being harassed by the investigating officer.

11. It has also been mentioned in the rejoinder affidavit that E-mail receipts from the concerned Institute regarding Diploma by the petitioner have also been marked to the Police Station Chowk, District Lucknow but respondent nos.1, 2 and 3 have purposely concealed the said communication in the short counter affidavit.

12. Heard counsel for the petitioner Shri Naved Mumtaz Ali and learned A.G.A. for respondent nos.1 to 3.

13. Counsel for the petitioner relied upon following case laws :-

i). State of Haryana and others Vs. Bhajan Lal and others : 1992 Supreme Court Cases (Cri.) 426

ii). Prof. R.K.Vijaysarathy & another Vs. Sudha Seetharam & another

Judgement dated 15.2.2019 : Criminal Appeal No.238 of 2019 arising out of Special Leave Petition (Crl.) No.1434 of 2018.

iii). Anand Kumar Mahatta Vs. State (NCT of Delhi) and another :

(2019) 11 Supreme Court Cases 706.

14. The counsel for the petitioner argued that no offence under Section 406 or 420 I.P.C. is made out from the averments made in the F.I.R. and the offences under Sections 504/506 I.P.C. have already been dropped by the investigating officer as there occurred no such incident.

15. Learned A.G.A. submitted that Sections 504 and 506 I.P.C. have been deleted as in the investigation, it was found that no such incident has occurred and investigation is going on regarding other offences.

16. Petitioner's counsel referred the guidelines (i), (iii), and (v) mentioned in paragraph 102, as issued by the Hon'ble Apex Court in the case of ***State of Haryana Vs. Bhajan Lal*** (supra) which are quoted as under :-

"(1).Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2)..xxxxxxxxxx

(3). Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4).....xxxxxxxxxxxxx

(5). Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused."

17. Now, we have to examine that whether the facts mentioned in the F.I.R. 'taken at their face value and accepted in their entirety', *prima facie* constitute any offence?

Offence punishable under Section 406 I.P.C. is criminal breach of trust which has been defined under Section 405 I.P.C.

Section 405 I.P.C. runs as under :-

"405. *Criminal breach of trust.--Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".*

18. In the present matter, F.I.R. discloses that a Gem was given to the petitioner for testing and that was returned by the petitioner to respondent no.4 after testing alongwith certificate. There is nothing about misappropriation of the Gem or any other property of respondent no.4 by the petitioner.

19. The Hon'ble Apex Court in ***Prof. R.K.Vijaysarathy and another (supra)*** has laid down as under :

"A careful reading of Section 405 shows that the ingredients of a criminal breach of trust are as follows :-

i). A person should have been entrusted with property, or dishonestly use or dispose of that property or willfully suffer any other person to do so ; and

iii). That such misappropriation, conversion, use or disposal should be in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract which the person has made, touching the discharge of such trust."

20. We analysed the facts mentioned in the F.I.R. The necessary ingredient of offence under Section 406 I.P.C. i.e. misappropriation or conversion for own use of the property entrusted is not there. It has been mentioned in the F.I.R. itself that the petitioner returned the Gem after testing alongwith test certificate, thus the offence under Section 406 I.P.C. is not made out.

21. Now, comes offence under Section 420 I.P.C. Section 420 I.P.C. runs as under :-

*"**420.** Cheating and dishonestly inducing delivery of property.-- Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."*

22. To constitute the offence under Section 420 I.P.C., 'cheating' is an essential ingredient and 'cheating' has been defined under Section 415 I.P.C. which runs as under :-

*"**415.** Cheating.--Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".*

23. Hon'ble Apex Court in ***Prof. R.K.Vijaysarathy and another (supra)*** has laid down as under :

" The ingredients to constitute an offence of cheating are as follows :-

i). there should be fraudulent or dishonest inducement of a person by deceiving him ;

ii).(a). the person so induced should be intentionally induced to deliver any property to any person or to consent that any person shall retain any property, or

(b). the person so induced should be intentionally induced to do or to omit to do anything which he would not do or omit if he were not so deceived ; and

(iii). in cases covered by (ii) (b) above, the act or omission should be one which caused or is likely to cause damage or harm to the person induced in body, mind, reputation or property.

A fraudulent or dishonest inducement is an essential ingredient of the offence. A person who dishonestly induces another person to deliver any property is liable for the offence of cheating."

24. There is nothing in the F.I.R. to disclose that the petitioner induced respondent no.4 to deliver any property. As there is no inducement so it cannot be inferred that petitioner cheated respondent no.4 in any manner. Hence the facts disclosed in the F.I.R. do not constitute this offence too.

25. As regards rest of the offences ; in the short counter affidavit filed on behalf of respondent nos.1 to 3, it has been stated that from investigation, no credible evidence regarding offences under Section 504 and 506 I.P.C. was found therefore sections 504 and 506 I.P.C. have been dropped. Furthermore, respondent no.4 (complainant) who is an Advocate as has been revealed by the counsel of the petitioner during arguments, after seeking time to file counter affidavit did not file any counter affidavit to refute the allegations made in the petition against him or to justify his averments made in the F.I.R.

26. In the case of ***Anand Kumar Mahatta Vs. State (supra)***, the Hon'ble Apex Court has held as under :-

"30. It is necessary here to remember the words of this Court in State of Karnataka Vs. L.Muniswamy which reads as follows : (SCC p.703, para 7)

"7..... In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed."

27. In the above circumstances, we are of the considered view that the F.I.R. does not disclose prima facie commission of offence under Sections 406 and 420 I.P.C. The allegations of the F.I.R. have been controverted by the petitioner and it has been alleged that the complaint was lodged with the motive to extort money and respondent no.4 did not file counter affidavit to rebut the averments of the petitioner though ample time was granted to him for the purpose. The allegations regarding offences under Sections 504, 506 I.P.C. have already been found false by the investigating officer, hence we find it a fit case to quash the F.I.R.

28. In view of the above, the writ petition is **allowed.** Accordingly, First Information Report dated 11.3.2020 bearing Case Crime No.0098 of 2020, under Sections 406, 420, 504, 506 I.P.C., Police Station Chowk, District Lucknow is hereby quashed.

(2020)12ILR A144
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.12.2020

BEFORE

THE HON'BLE PANKAJ MITHAL, J.

THE HON'BLE SAURABH LAVANIA, J.

Misc. Bench No. 23900 of 2020

M/S Ats Reality Pvt. Ltd. ...Petitioner
Versus
U.P. Real Estate Appellate Tribunal Lko. & Ors. ...Respondents

Counsel for the Petitioner
Kunwar Sushant Prakash

Counsel for the Respondents:
C.S.C., Prashant Kumar, Shobhit Mohan Shukla

(A) Civil Law -Real Estate (Regulation and Development) Act (16 of 2016) - Appeal - Pre-deposit – Section 43(5), Proviso - Interpretation - where a promoter files an appeal it shall not be entertained, unless the promoter first deposits at least thirty per cent of the penalty, or such higher percentage as may be determined or the total amount to be paid to the allottee including interest and compensation - Argument of promoter that promoter is only liable to pay thirty percent of the penalty or thirty percent of the total amount to be paid to the allottee including interest and compensation - *Held* - Proviso in providing deposit of at least thirty percent qualifies penalty amount only and not total amount to be paid to allottee - if only penalty is awarded then at least thirty percent of same has to be deposited before the appellate authority. For the rest, such as on amount related to interest or compensation or amount which was deposited by allottee and ordered to be returned, the expression "thirty percent" would not apply & that the promoter is liable to deposit the whole amount directed to be paid (Para 14, 17,19)

Complaints made by allottees against promoter alleging delay in possession, and claiming charges/compensation on account of inordinate delay in putting allottees in possession - RERA (Real Estate Regulatory Authority) directed petitioner to put allottees in possession & for payment of interest @ MCLR + 1% from

13.11.2017 till the date of offer of the possession - Petitioner preferred statutory appeal – Tribunal dismissed Appeal as the requisite amount required to be paid as a pre-condition for entertaining and hearing the appeals u/s 43 (5) was not deposited - Tribunal held that it has no discretionary power to permit the promoter to deposit only 30% of the total amount directed to be paid as compensation and interest to the allottees - Held - No illegality on the part of Tribunal (Para 20)

B. Constitution of India - Article 226 - Real Estate Regulatory Authority (RERA) - judicial review of order passed by RERA under Article 226 is not permissible - as there is a statutory appeal provided against it (Para 27)

Writ Petition dismissed. (E-5)

List of Cases cited: -

1. T. Chitty Babu Vs U.O.I. & ors. W.P. No.29933 of 2019 & W.M.P. No.29844 of 2019

2. M/s Lotus Realtech Pvt. Ltd. Vs St. of Har. & ors. C.W.P. No.15205 of 2020 (O&M) Dt. 23.9.2020

3. M/s Ansal Properties & Infrastructure Ltd. Vs U.O.I. & ors. Misc. Bench No.5867 of 2020

4. Shree Chamundi Mopeds Ltd. Vs Church or South India Trust Association CSI Cinod Secretariat, Madras 1992 AIR 1439

5. Titaghur Paper Mills Co. Ltd. & anr. Vs St. of Orissa & ors. (1983) 2 SCC 433

6. Wolverhampton New Waterworks Co. Vs Hawkesford (1859) 6 CBNS 336, 356

7. Mafatlal Industries Ltd. & ors. Vs U.O.I. & ors. (1997) 5 SCC 536

(Delivered by Hon'ble Pankaj Mithal, J. & The Hon'ble Saurabh Lavania, J.)

1. Heard Sri Prashant Chandra, Senior Advocate assisted by Sri Sushant Prakash and Ms. Mahima Pahwa, learned Counsel for the petitioner, Sri Shobhit Mohan Shukla, learned Counsel for respondent Nos.2, Sri Anand Kumar Singh, learned Standing Counsel for respondent No.3/State and Mr. Prashant Kumar, learned Counsel for respondent No.4/Yamuna Expressway Industrial Development Authority.

2. The petitioner is a Private Limited Company engaged in the promotion of development and construction work. It works as a promoter. In respect of one of it's scheme ATS ALLURE, the petitioner is registered as a promoter with RERA (Real Estate Regulatory Authority). Eight complaints were made by different allottees in connection with the above Scheme alleging delay in possession, charging of interest for the delayed period and claiming charges/compensation on account of inordinate delay in putting allottees in possession.

3. All the aforesaid complaints were decided by RERA vide judgment and order dated 25.6.2020 wherein apart from other directions, the petitioner was directed to put the allottees in possession of the respective units allotted to them latest by 31.3.2021 and for payment of interest @ MCLR + 1% from 13.11.2017 till the date of offer of the possession excluding the lockdown period 24.3.2020 to 30.9.2020 due to COVID-19 pandemic. The interest amount was directed to be adjusted in the final outstanding balance to be paid by the allottees and in the event, the interest payable exceeds the balance amount, the same was directed to be paid as directed above.

4. Aggrieved by the aforesaid order dated 25.06.2020, petitioner preferred a statutory appeal before the Real Estate Appellate Tribunal (hereinafter referred to

as ***'the Tribunal']***. Similar appeals were also preferred by the other allottees against the orders passed by RERA in their respective complaints. They all remained defective as the requisite amount required to be paid as a pre-condition for entertaining and hearing the appeals was not deposited by the petitioner but were clubbed together.

5. All appeals (total 10) were dismissed vide order dated 18.10.2020 as despite several opportunities, the petitioner failed to comply with the mandatory condition contained in 43 (5) of the Real Estate (Regulation and Development) Act, 2016 [hereinafter referred to as the ***'2016 Act']***. The Tribunal held that it has no discretionary power to permit the promoter to deposit only 30% of the total amount directed to be paid as compensation and interest to the allottees.

6. Sri Prashant Chandra, Senior Counsel appearing for the petitioner submitted that the petitioner had deposited 30% of the amount as contemplated under Section 43 (5) of the 2016 Act and as such, the appeal was competent which could not have been dismissed. The Tribunal has manifestly erred in interpreting Sub-Section (5) of Section 43 of the 2016 Act to hold that the promoter is liable to deposit the whole amount directed to be paid, whereas the condition is only for payment of 30% of the penalty or the total amount including interest and compensation. If the said condition is read otherwise it would make the condition to be unreasonable and onerous and in turn, would render the provision of statutory appeal to be illusory and negatory.

7. In response to the argument so advanced on behalf of the petitioner, Sri Shobhit Mohan Shukla, learned Counsel for RERA, Sri Anand Kumar Singh, learned Standing Counsel and Sri Prashant Kumar, learned Counsel for respondent No.4 submitted that the language of the proviso to Sub-Section (5) of Section 43 of the 2016 Act is plain and simple. It provides that the appeal shall not be entertained, if the promoter has not deposited with the Tribunal at least 30% of the penalty or the total amount payable to the allottee including interest and compensation, if any, or both as the case may be for hearing of the appeal. It has also been submitted by them that the validity of Sub-Section (5) of Section 43 of 2016 Act has been upheld by various High Courts, including that of Madras, Punjab & Haryana and Allahabad and as such, there is no scope for this Court to interfere in the matter.

8. Sri Prashant Chandra then submitted that the decisions of Madras High Court and Punjab & Haryana High Court are already under stay by the Apex Court and that he has been informed that SLP has also been filed against the decision of the Allahabad High Court upholding the validity of Section 43 (5) of 2016 Act. He further submitted that such a provision has to be read in harmonious manner so as to make the provision workable, rather than to defeat its object by literary interpretation.

9. The entire controversy as argued before us revolves around the true and correct interpretation of the proviso to Sub-Section (5) of Section 43 of 2016 Act and if it is arbitrary and bad in law.

10. It is thus important to reproduce Sub-Section (5) of Section 43 of 2016 Act which reads as under:-

43 (5) Any person aggrieved by any direction or decision or order made by the Authority or by an adjudicating officer under this Act may prefer an appeal before

the Appellate Tribunal having jurisdiction over the matter.

Provided that where a promoter files an appeal with the Appellate Tribunal, it shall not be entertained, without the promoter first having deposited with the Appellate Tribunal atleast thirty per cent. of the penalty, or such higher percentage as may be determined by the Appellate Tribunal, or the total amount to be paid to the allottee including interest and compensation imposed on him, if any, or with both, as the case may be, before the said appeal is heard.

Explanation, -- For the purpose of this sub-section "person" shall include the association of allottees or any voluntary consumer association registered under any law for the time being in force."

11. The aforesaid provision on its plain and simple reading provides for an appeal before the Tribunal. The appeal, apart from other persons such as allottees/complainants or any other party aggrieved can also be filed by a promoter. It is in the case of an appeal filed by the promoter that the aforesaid proviso provides that it shall not be entertained unless the promoter deposits

(i) at least thirty percent of the penalty, or such higher percentage as may be determined by the Appellate Tribunal,

or

(ii) the total amount to be paid to the allottee including interest and compensation.

12. Therefore, for the purposes of entertaining and hearing an appeal filed by the promoter, it is essential for the promoter to make the deposit as contemplated here-in-above.

13. The argument is that the promoter is only liable to pay thirty percent of the penalty or thirty percent of the total amount to be paid to the allottee including interest and compensation. In other words, according to Sri Chandra, the words 'thirty percent' used therein refers not only to the penalty amount, but also to the total amount to be paid to the allottee including interest and compensation.

14. To our mind, this is not the correct way of reading the aforesaid proviso. The aforesaid proviso in providing deposit of at least thirty percent qualifies the penalty amount only and not the total amount to be paid to the allottee. This is clear from the use of the word 'or' between the penalty and the total amount. In view of the use of the conjunction 'or', thirty percent only qualifies the penalty and not the total amount. Otherwise, the word 'total' may not have been added before the word 'amount' used therein.

15. The clause, ***"or such higher percentage as may be determined by the Appellate Tribunal"*** appearing after the word 'penalty' in the aforesaid proviso also refers to the penalty only.

16. In order to make things simpler, the relevant portion of the said proviso may be read as under after omitting the clause for the time being:-

"Provided that where a promoter files an appeal with the Appellate Tribunal, it shall not be entertained, without the promoter first having deposited with the Appellate Tribunal atleast thirty per cent. of the penalty or the total amount to be paid to the allottee including interest and compensation imposed on him, if any, or with both, as the case may be, before the said appeal is heard."

17. Now, if we see the use of words 'thirty percent' it denotes that it qualifies penalty only and since thereafter the word 'or' is used, it does not qualify the words 'total amount' referred thereafter in the proviso. In short, in its literal interpretation, it means (i) atleast thirty percent of the penalty; or (ii) the total amount to be paid to the allottee including interest and compensation. In this way, it is clear that the amount liable to be deposited by the promoter for entertaining and hearing of his/her appeal is either atleast thirty percent of the penalty or the total amount to be paid to the allottee including interest and compensation. There cannot be any other meaning or interpretation of the aforesaid proviso.

18. The use of the words 'if any' or with 'both' in the aforesaid proviso is also very relevant and important for the purposes of interpretation of the aforesaid proviso. The legislature appears to be conscious of the fact that the promoter under the orders of RERA, may be required to either deposit penalty or any other amount payable to the allottee including interest and compensation, if any, and in some cases may be both. So in the case where penalty alone has to be paid, the appeal would be competent if atleast thirty percent of it or any higher amount, as may be determined by the Tribunal is deposited, but where any other amount is directed to be paid, the total of the said amount including interest and compensation is also to be deposited as a condition precedent or both of them.

19. The language coughed/set forth in provision in issue appears to be used after due consideration of other provisions of 2016 Act such as Section 12, which provides for return of entire investment alongwith interest and compensation; Section 14, which provides grant of compensation to allottee; Section 18 (1), as per which the allottee would be entitled to amount deposited by him with promoter alongwith interest as also compensation from promoter if he withdraw himself from the project and if does not intend to withdraw from the project then in that event the allottee is entitled to interest for every month of delay; Section 18 (2) and Section 18 (3), which relate to grant of compensation as allottee, and Section 38, which empowers the authority to impose penalty or interest. In this view also, there appears to be no ambiguity in the proviso in issue, i.e., proviso to Section 43 (5) of 2016 Act and the provision in issue has to be read in the light of provisions referred to here-in-above. It is important to read the relevant provisions of the 2016 Act conjointly. Accordingly, if only penalty is awarded then at least thirty percent of same has to be deposited before the appellate authority. For the rest, such as on amount related to interest or compensation or amount which was deposited by allottee and ordered to be returned, the expression "thirty percent" would not apply.

20. In view of the aforesaid discussion, we do not find that there is any error or illegality on the part of the Tribunal in construing or interpreting the true sense of the proviso to Sub-Section (5) of Section 43 of the 2016 Act.

21. Having held as above, we proceed on the second aspect of the matter whether such a condition of deposit of the total amount would be unfair, unreasonable, arbitrary or onerous so as to make the appeal to be illusion.

22. In this connection, first of all, the petitioner has not challenged the vires or the validity of Sub-Section (5) of Section 43 of 2016 Act. At the same time, the

validity of the aforesaid provision has been upheld not only by the Madras High Court in ***T. Chitty Babu1*** and Punjab & Haryana High Court in ***M/s Lotus Realtech Pvt. Ltd.2*** but also by the Allahabad High Court in ***M/s Ansal Properties3***. The said decisions may be under challenge in superior Court and there may be stay in respect of the decisions of Madras High Court and Punjab & Haryana High Court, nonetheless, in view of the decision of the Apex Court in Shree Chamundi Mopeds Ltd.4 the said decisions continue to exist in the law books and do not seize to exist. Moreover, there is no stay against the decision of the Allahabad High Court. The said decision in clear and unequivocal manner lays down that the condition of depositing the amount as contemplated under Section 43 (5) of the 2016 Act is neither unreasonable or onerous. The Court in holding as such held that the earlier decisions cited from the side of the promoter are of no help as they were rendered in connection with taxation laws, whereas in the cases under RERA, the amount is required to be deposited after complete adjudication of the lis for entertaining and hearing the appeal thereafter.

23. The position is different where the 'lis' regarding liability to pay any amount is adjudicated by an independent authority or court as in those cases the liability stands determined with findings and reasoning.

24. In the light of the above, we have no option but to follow the opinion given by a coordinate Bench of the Allahabad High Court and to hold that the condition of pre-deposit contained in the above provision is not unfair and unreasonable.

25. There is another way of looking to the aforesaid problem. The judgment and order passed by RERA is like a money decree which cannot ordinarily be stayed in appeal on the analogy of the language of Order 41 Rule 5 of Code of Civil Procedure including Allahabad amendment therein. Thus applying the same analogy, we are of the view that the legislature in its wisdom has rightly provided for the deposit of the total amount including interest and compensation or atleast thirty percent of the penalty as a condition precedent for entertaining and hearing the appeal of the promoter. The money decrees if complied with during pendency of appeal do not result in any irreparable loss and injury which cannot be compensated adequately subsequently.

26. The challenge to the Appellate Order dated 19.10.2020 thus fails.

27. We have not been addressed so as to assail the order dated 25.6.2020 passed by RERA obviously for the reason that judicial review of it under Article 226 of the Constitution of India is not permissible when there is a statutory appeal provided against it and the same has failed for one reason or the other.

28. We may usefully refer to the exposition of the Apex Court in Titaghur5, wherein it is observed that where a right or liability is created by a statute, which gives a special remedy for enforcing it, the remedy provided by that statute must only be availed of.

29. In paragraph 11 of the above report, the Court observed thus:-

"11. Under the scheme of the Act, there is a hierarchy of authorities before which the petitioners can get adequate redress against the wrongful acts complained of. The petitioners have the

right to prefer an appeal before the Prescribed Authority under sub-section (1) of Section 23 of the Act. If the petitioners are dissatisfied with the decision in the appeal, they can prefer a further appeal to the Tribunal under sub-section (3) of Section 23 of the Act, and then ask for a case to be stated upon a question of law for the opinion of the High Court under Section 24 of the Act. The Act provides for a complete machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Article 226 of the Constitution. It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in Wolverhampton6 in the following passage:

"There are three classes of cases in which a liability may be established founded upon statute. . . . But there is a third class, viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it.... The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."

The rule laid down in this passage was approved by the House of Lords in Neville v. London Express Newspapers Ltd. (1919 AC 368) and has been reaffirmed by the Privy Council in Attorney-General of Trinidad and Tobago v. Gordon Grant & Co. Ltd. (1935 AC 532) and Secretary of State v. Mask & Co. (AIR 1940 PC 105). It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine."

(emphasis supplied)"

30. In the subsequent decision in Mafatlal7, the Apex Court went on to observe that an Act cannot bar and curtail remedy under Article 226 or 32 of the Constitution. The Court, however, added a word of caution and expounded that the constitutional Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise its jurisdiction consistent with the provisions of the enactment. To put it differently, the fact that the High Court has wide jurisdiction under Article 226 of the Constitution, does not mean that it can disregard the substantive provisions of a statute and pass orders which can be settled only through a mechanism prescribed by the statute.

31. In view of what has been stated above, the writ petition filed by the promoter fails and is accordingly ***dismissed.***

(2020)12ILR A150
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 14.12.2020

BEFORE

THE HON'BLE ALOK MATHUR, J.

Application U/S 482/378/407 No. 770 of 2015

C.B.I., New Delhi ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Amarjeet Singh Rakhra, Varun Pandey

Counsel for the Opp. Parties:
Govt. Advocate, Pranshu Agarwal

Criminal Law - Code of Criminal Procedure, 1973- Section 397(2)- Section 311- Maintanability-Rejection of an application under section 311 of the Cr. P. C. would amount to an interlocutory order against which a revision is not maintainable as per section 397(2) of the Cr. P. C. and the judgment would be no-est and of no consequence. Further, even the Additional District and Sessions Judge ruled against the petitioner and therefore no interference is required in the present petition with the order of trial court.

An order passed u/s 311 Cr.Pc, being an interlocutory order, no criminal revision is maintainable against it.

Criminal Law - Code of Criminal Procedure, 1973- Section 164- Section 281- Indian Evidence Act, 1872- Section 74- The petitioner is requiring summoning of the Judicial Officer only with regard to giving evidence to the fact that the statement was made voluntarily and was not taken under pressure as deposed by the witnesses during trial. In light of the provisions of section 164 read with section 281 of the Cr. P. C. the statement of the complainant as well as the other witnesses of the prosecution were to be recorded in the manner provided in the said sections and further no declaration was required by the Magistrate with regard to the voluntariness of the statement as it was only a statement of the complainant. The application of the petitioner requiring summoning of a judicial officer to prove the voluntariness of the statement was clearly misconceived. The statement recorded under section 164 of the Cr. P. C. would be a public document as per Section 74 of the Evidence Act and, therefore, does not require any formal proof by summoning the Magistrate to prove the same.

The statement made u/s 164 of the Cr.Pc is a public document and does not require any declaration from the judicial officer as to the voluntariness of the said statement.

Revision partly allowed. (Para 17, 25, 26) (E-10)

Judgements/ Case law relied upon:-

1. U.O.I Vs Orient Engg.& Commercial Co. Ltd., (1978) 1 SCC 10

2. Sethuraman Vs Rajamanickam (2009) 5 SCC 153

3. Asif Hussain Vs St. of U.P. & anr.2007 SCC online All 1125

4. Mohd. Jamiludin Nasir Vs St.of W.B., (2014) 7 SCC 443

5. Guruviindapalli Anna Rao Vs St. of A.P. [2003 Crl. L. J. 3253]

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

1. The entire controversy encompassing this petition can aptly be summed up in the following words of Bentham:-

"Witnesses are the eyes and ears of justice. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralyzed, and it no longer can constitute a fair trial"

2. The Central Bureau of Investigation has approached this Court with the prayer to quash the order dated 19/08/2014 passed by the Special Judge, C.B.I., Lucknow in Criminal Revision No.711 of 2014 *(CBI versus Shiv Saran Upadhaya)* as well as the order dated 10/03/2014 passed by Special Judicial Magistrate, C.B.I., Lucknow in case No.2 of 2014, whereby the application made by the Central Bureau of investigation for

issue of summons to the then Judicial Magistrate, who recorded statements under section 164 of the Cr. P. C. of the witnesses and who subsequently turned hostile during trial, be examined as witness to prove the voluntariness of statements, has been rejected.

3. It has been submitted by the counsel for the petitioner that the opposite party No.2, who has been the erstwhile President of the Central Bar Association, District Court Lucknow, on 06/11/2008 along with a group of lawyers called for a strike and reached the District Court Campus, Lucknow and asked the Chaukidar Shri Mohd Anees and Shri Dinesh Kumar Verma, Lift Operators to hand over the keys of the multi-storey building and lift, with a view to paralyze the functioning of the District Court; that the said employees of the District Court refused to hand over the keys of the multi-storey building and lift to the group of lawyers headed by opposite party No.2, due to which they were mercilessly beaten and keys were forcibly snatched from them.

4. The aforesaid incident was Informed to the then Districts and Sessions Judge and a request was made to deploy additional forces so that peace would be restored in the District Court campus as due to the assault and misbehaviour with District Court Employees, their colleagues had started an agitation resulting in derailment of court proceedings.

5. Initially an FIR no. 460/2008 was registered at Police Station-Wazirganj, Lucknow on 06/11/2008 against opposite party No.2 and 15-20 other unknown advocates under sections 322, 353, 504, 506, 307 IPC, Section 7 of the Criminal Law Amendment Act and Section 3 of Prevention of Damage to Public Property Act. A complaint in this regard was given by Chaukidar Shri Mohd Anees which was duly forwarded by the District and Sessions Judge.

6. The investigation was conducted by the police and the charge sheet was forwarded to the Circle Officer on 26/08/2009 which was duly returned to the Investigating Officer with the remark that the address of the accused (opposite party no.2) has not been mentioned and there is no details of the other 15-20 advocates who have been mentioned in the First Information Report.

7. The investigating officer on 15/11/09 submitted a final report (closure) to the Superintendent of Police (City) (West), Lucknow mentioning that the complainant witnesses were examined but they were not ready to give any evidence against the accused. Subsequently a final report was filed by the local police on 30/10/2009 which was accepted by the court on 18/02/2010.

8. The aforesaid developments came to the knowledge of this Court while hearing writ petition No. 9925 (MB) 2010 and, by means of order dated 28/10/2010 it directed that the investigation of the case be done by the C.B.I.

9. During investigation by the C.B.I. the complainant Shri Mohd Anees confirmed the allegations in the statement given under section 161 Cr.P.C. and also specifically named opposite party No.2. Similarly, other five persons who are employees of the District Court, Lucknow were examined and the statements under Section 161 Cr.P.C. were recorded and all of them confirmed the version of the complaint.

10. Statements under section 164 Cr. P .C. of PW1 to PW6 were also recorded, where these witnesses have voluntarily supported the version of the first information report as well as the previous statement under section 161 of the Cr.P.C.

11. During trial PW1 to PW4 and PW6 turned hostile, which led to the filing of the application requesting for the appearance of Special Judicial Magistrate (Pollution) Lucknow. The trial court by means of the impugned order dated 10/03/2014 rejected the application, against which the revision was preferred before the District and Sessions Judge, Lucknow which was also rejected by means of order dated 19/08/2014 which has been impugned before this Court in this petition.

12. It has been contended by Shri Shiv P. Shukla, learned counsel appearing for the petitioner that five prosecution witnesses after having been examined and having the statement recorded under section 161 Cr. P.C. were produced before Special Judicial Magistrate, where the statements under section 164 Cr. P. C. were recorded, have subsequently turned hostile during the trial. They have stated that the statements under section 164 Cr. P. C. were recorded under pressure. The C.B.I. in the aforesaid circumstances wanted to examine the Special Judicial Magistrate before whom the said statements were recorded to prove that the statements were recorded voluntarily contrary to what has been stated by the said witnesses during trial.

13. Opposing the petition counsel for opposite party No.2 Sri Pranshu Agarwal, Advocate submitted firstly that the petition under section 482 was not maintainable in as much as the application under section 311 of the Cr. P. C. was rejected by the trial court against which the revision was preferred before the Additional District Judge. The rejection of an application under section 311 of the Cr. P. C. amounts to an interlocutory order, against which no revision was maintainable, and also that once revision has been rejected, a petition under section 482 Cr.P.C. would not be maintainable.

14. Secondly, it was submitted that the statement under Section 164 of the Cr. P. C. was a public document and it was not necessary to summon the Judicial Magistrate to prove the authenticity of such document and, therefore, the application for summoning of the Judicial Magistrate was rightly rejected. He further submitted that an embargo was placed as per the provisions of Section 121 of the Evidence Act for summoning of judicial officers and, therefore, the Judicial Magistrate cannot be summoned to give evidence with regard to the fact where he was acting in the capacity of a judicial officer.

In support of his contentions reliance has been placed on the case of ***Union of India Vs. Orient Engg.& Commercial Co. Ltd., (1978) 1 SCC 10 at page 11*** as under:-

"Counsel for the appellant has objected, in this appeal, to the examination, as a witness, of an arbitrator who has given his award on a dispute between the appellant and the 1st respondent. His contention is that, on broad principle and public policy, it is highly obnoxious to summon an arbitrator or other adjudicating body to give evidence in vindication of his award. This is a wholesome principle as- is evident from s. 121 of the Indian Evidence Act. That provision states that no Judge or Magistrate shall, except upon the special

order of some court to which he is subordinate be compelled to answer any questions as to his own conduct in court as such Judge or Magistrate or as anything which came to his knowledge in court as such Judge or Magistrate, but he may be examined as toother matters which occurred in his presence whilst he was so acting. Of course, this--section does not apply proprio vigore to the situationpresent here. But it is certainly proper for the court to bear in mindthe reason behind this rule when invited to issue summons to an arbitrator. Indeed, it will be a very embarrassing and, in many cases, objectionable if every quasi-judicial authority or tribunal were put to the necessity of greeting into the witness box and testify as to what weighed in his mind in reaching his verdict. We agree with the observations of Walsh, A.C.J. in Khub Lal v. Bishambhar Sahai(1) where the learned Judge has pointed out that the slightest attempt to get to the materials of his decision,, to get back to his mind and to examine him as to why and how he arrived at a particular decision should be immediately and ruthlessly excluded as undesirable."

15. The first objection raised by the counsel for the opposite party is with regard to the maintainability of the petition under section 482 Cr.PC. Undoubtedly, the rejection of an application under section 311 of the Cr. P. C. would amount to an interlocutory order against which a revision is not maintainable as per section 397(2) of the Cr. P. C. This aspect of the matter has been considered by the Hon'ble Supreme Court in the case of ***Sethuraman vs Rajamanickam (2009) 5 SCC 153*** wherein the Supreme Court has held:-

"5. Secondly, what was not realized was that the order passed by the Trial Court refusing to call the documents and rejecting the application under Section 311 Cr.P.C., were interlocutory orders and as such, the revision against those orders was clearly barred under Section 397 (2) Cr.P.C."

16. The Division Bench of this Court in the case of ***Asif Hussain vs State of U.P. and another*** reported in ***2007 SCC online All 1125*** has also taken the same view and held:-

"5. It has been held by a large number of decisions of this Court as well as Supreme Court that order summoning or refusing to summon witnesses are interlocutory as they do not decide any substantive of right of the litigating parties, which are in an issue at the trial. Again the number of such decision has been referred to in the referring order of the learned single judge dated 30/11/2006 and, therefore it is not necessary to reproduce the same here.

6. We therefore, answer the reference by holding that the order of learned Sessions Judge under section 3 Cr. P. C. refusing to summon witnesses, sought to be called by the accused, is a purely interlocutory order from the point of view of the accused - applicant and no revision again the same is maintainable."

17. Considering the aforesaid legal proposition which is squarely applicable to the facts of the present case, once the application under section 311 of the Cr. P. C. was rejected by the trial court, it was not open for the Central Bureau of Investigation to move a revision under section 397 before the Additional District & Sessions Judge. The revision, therefore, was not maintainable and the judgment would be no-est and of no consequence. Further, even the Additional District and Sessions Judge ruled against the petitioner and therefore no interference is required in

the present petition with the order of trial court.

18. To consider the arguments raised by the applicant even on merits it is necessary to go through the various statutory provisions in this regard.

19. According to section 164 Cr. P. C. :-

"164. Recording of confessions and statements.

(1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial: Provided that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.

(2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.

(3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorise the detention of such person in police custody.

(4) Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect:-" I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A. B. Magistrate".

(5) Any statement (other than a confession) made under sub- section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.

(6) The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is to be inquired into or tried."

20. According to the aforesaid provision if any confessional statement is being recorded during course of investigation before the Judicial Magistrate then it has to be ensured that the person making such a statement is making it voluntarily and in case there is doubt in the mind of the Magistrate that the same is not being made voluntarily, he has sufficient discretion to decline from recording such a statement.

21. As per the dictum of the Apex court in the case of ***Mohd. Jamiludin Nasir v. State of W.B., (2014) 7 SCC 443*** wherein it has been held:-

"21. Going by the prescriptions contained in Section 164 Cr. P. C., what is

to be ensured is that the confession is made voluntarily by the offender, that there was no external pressure particularly by the police, that the person concerned's mindset while making the confession was uninfluenced by any external factors, that he was fully conscious of what he was saying, that he was also fully aware that based on his statement there is every scope for suffering the conviction which may result in the imposition of extreme punishment of life imprisonment and even capital punishment of death, that prior to the time of the making of the confession he was in a free state of mind and was not in the midst of any persons who would have influenced his mind in any manner for making the confession, that the statement was made in the presence of the Judicial Magistrate and none else, that while making the confession there was no other person present other than the accused and the Magistrate concerned and that if he expressed his desire not to make the confession after appearing before the Magistrate, the Magistrate should ensure that he is not entrusted to police custody. All the above minute factors were required to be kept in mind while recording a confession made under Section 164 CrPC in order to ensure that the confession was recorded at the free will of the accused and was not influenced by any other factor. Therefore, while considering a confession so recorded and relied upon by the prosecution, the duty of the Sessions Judge is, therefore, to carefully analyse the confession keeping in mind the above factors and if while making such analysis the learned Sessions Judge develops any iota of doubt about the confession so recorded, the same will have to be rejected at the very outset. It is, therefore, for the Sessions Judge to apply his mind before placing reliance upon the confessional statement made under Section 164 CrPC and convince itself that none of the above factors were either violated or given a go-by to reject the confession outright. Therefore, if the Sessions Judge has chosen to rely upon such a confession recorded under Section 164 CrPC, the appellate court as well as this Court while examining such a reliance placed upon for the purpose of conviction should see whether the perception of the courts below in having accepted the confession as having been made in its true spirit provides no scope for any doubt as to its veracity in making the statement by the accused concerned and only thereafter the contents of the confession can be examined."

22. In ***Guruviindapalli Anna Rao Vs. State of A.P. [2003 Crl. L. J. 3253]***, a Division Bench of the Andhra Pradesh High Court held that since the previous statement of a witness under Section 164 Cr. P. C., has been recorded by a Magistrate, it is a public document, the Magistrate need not be summoned and examined as a witness. The Division Bench observed as under :

"7.We would like to put one more discrepancy on record, viz., that while recording evidence, the learned II Additional Sessions Judge had summoned the I Additional Munsif Magistrate, Tenali (PW.10) to prove the statement of P.W.1 recorded by him under Section 164 Cr.P.C. This Court has already ruled if any Magistrate records the statement of a witness under Section 164 Cr.P.C, it is not necessary for the Sessions Judges to summon that Magistrate to prove the contents of the statement recorded by him. This Court has already ruled that when a Magistrate, discharging his official functions as such, records the statement of

any witness under Section 164 Cr.P.C, such statement is a 'public document' and it does not require any formal proof. Moreover, it is seen that the learned II Additional Sessions Judge, Guntur, while recording the evidence of the I Additional Munsif Magistrate, Tenali (PW.10), has exhibited the statement of P.W.1 recorded by the Magistrate as Ex.P.10. As a matter of fact, such statement cannot be treated as a substantive piece of evidence. Such statement can be made use of by the prosecution for the purpose of corroboration, or by the defence for contradiction, under Section 145 of the Evidence Act. Therefore, the II Additional Sessions Judge, Guntur, is directed to note the provisions contained in Section 145 of the Evidence Act. Even if a statement is recorded by a Magistrate, it is not a substantive piece of evidence, but it is only a previous statement."

23. The manner of recording confessions and statements has been dealt differently in Section 164 Cr. P. C. With regard to recording of confession it has been provided under subsection (2) the Magistrate is bound to explain to the person making the same about the confession about to be recorded and its impact upon the person making, and further that a declaration has to be made by the Magistrate with regard to the fact that the Magistrate has duly explained to the person making it about the nature of the confession and also that the same is voluntary. With regard to a statement other than confession, has to be recorded in the manner provided for recording of evidence and further there is one more distinction, as laid down in sub clause (4) of section 164 which provides that while recording a confession a declaration is to be made by the Magistrate that the same has been made voluntary and also that the same has been duly explained to the person making it.

24. Considering the aforesaid statutory provisions in light of the facts of the instant case, it is clear that the petitioner is requiring summoning of the Judicial Officer only with regard to giving evidence to the fact that the statement was made voluntarily and was not taken under pressure as deposed by the witnesses during trial.

25. In light of the provisions of section 164 read with section 281 of the Cr. P. C. the statement of the complainant as well as the other witnesses of the prosecution were to be recorded in the manner provided in the said sections and further no declaration was required by the Magistrate with regard to the voluntariness of the statement as it was only a statement of the complainant. The application of the petitioner requiring summoning of a judicial officer to prove the voluntariness of the statement was clearly misconceived.

26. The statement recorded under section 164 of the Cr. P. C. would be a public document as per Section 74 of the Evidence Act and, therefore, does not require any formal proof by summoning the Magistrate to prove the same. This view of the matter has been has been so interpreted.

27. Learned trial court has rightly rejected the application moved under Section 311 Cr. P. C. for summoning the Judicial Officer and no interference is required to be made with the said order.

28. In light of the above, the order dated 19/08/2014 passed by the Special Judge, C.B.I., Lucknow (Court No.4) in Criminal Revision No.711 of 2014 *(CBI*

versus Shiv Saran Upadhaya) is set aside and the order dated 10/03/2014 passed by Special Judicial Magistrate, C.B.I., Lucknow in case No.2 of 2014 (C.B.I. Vs. Shiv Sharan Upadhyay) is upheld.

29. The petition is **partly allowed**.

(2020)12ILR A158
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 09.11.2020

BEFORE

THE HON'BLE ALOK MATHUR, J.

Application U/S 482/378/407 No. 2384 of 2020

Manoj Kumar Yadav ...Applicant
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicant:
Sri P.K. Mishra

Counsel for the Opp. Parties:
G.A.

Criminal Law - Protection of Women From Domestic Violence Act, 2005 – Section 19- Section 12(1) – Report of Protection Officer- is not mandatory- The trial court is under obligation to consider the report of the Protection Officer or the Service Provider while considering the application under Section 19 of Protection of Women From Domestic Violence Act, 2005, if the same is available on record. In case there is no report available on record then the Magistrate is not under any obligation to call for the same before passing any orders on an application under Section 19 of Protection of Women From Domestic Violence Act, 2005. Section 12(1) does not mandate that an application seeking relief under the Act be accompanied with the Domestic Incident Report (hereinafter referred to as "DIR') or even that it should be moved by a protection officer. Even Rule 6 which stipulates the form and manner of making application to the Magistrate does not require that the Domestic Incident Report must accompany an application for relief made under Section 12 of the Act. It is only the proviso to Section 12 of the Protection of Women from Domestic Violence Act, 2005, which mandate that the Magistrate shall consider the Domestic Incident Report received by him from the Protection Officer or the Service Provider. No obligation to call for Domestic Incident Report (DIR) has been imposed upon the Magistrate.

The trial court is under obligation to consider the report of the Protection Officer only if the same is on record and it is not mandatory to file the same either with the application u/s 19 or for the Magistrate to call for it.

Protection of Women From Domestic Violence Act, 2005 – Section 12- Non-consideration of the report as provided under Section 12 of the Domestic Violence Act by the Protection Officer/Service Provider - No such objection was raised before the trial court and therefore it is not open for the applicant to raise it for the first time before this Court in proceedings under Section 482 Cr.P.C., unless he can satisfactorily demonstrate that he was precluded from raising the said issue before the trial court.

Where no objection is raised before the trial court about non-consideration of the report of the Protection Officer, then no such objection can be taken at this stage.

Criminal Law - Protection of Women From Domestic Violence Act, 2005 – Section 23- Ex parte orders -No separate application is required to be filed for exercise of powers under Section 23 of the Act. The magistrate has to act on the application filed under Section 12 of the Act and in cases he is satisfied that the application discloses that the respondent is committing or has committed an act of domestic violence or there is likelihood that the respondent may commit an act of domestic violence, he may grant an ex-parte order.

No illegality in passing ex- parte orders where the Magistrate is satisfied that the application discloses the commission of an act of domestic violence.

Criminal Law - Code of Criminal Procedure, 1973- Section 125, Protection of Women From Domestic Violence Act, 2005 – Section 19- The order under Section 125 Cr.P.C. and residence order U/S 19 of the Domestic violence Act operate in two different spheres, and grant of maintenance U/S 125 Cr.P.C. cannot limit the grant of relief U/S 19 D.V. Act which provide for residence for the aggrieved person by invoking provision of Section 12(2) of D.V. Act. While passing an order under Section 19 of D.V. Act, the Magistrate would grant relief envisaged in Sub-Clause (a) to (f) which clearly do not provide for payment of compensation or damages, and therefore the impugned order passed U/s 19 of the Act providing for residency of the aggrieved person cannot be said to be violation of Section 12(2) of the Act.

Grant of Maintenance u/s 125 of the Cr.Pc cannot limit the grant of relief u/s 19 of the Act as both reliefs operate in different spheres and the relief of residence can only be provided u/s 19 of the Act as the same does not contemplate the grant of compensation or damages.

Application u/s 482 Cr.Pc accordingly rejected. (Para 11, 12, 13, 15, 20, 25, 26) (E-3)

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

1. Heard Sri P.K. Mishra, learned counsel for applicant as well as Sri Balkeshwar Srivastava, learned A.G.A. for State.

2. By means of instant application under Section 482 Cr.P.C., the applicant has assailed the order dated 28.09.2020 passed by Judicial Magistrate, III, Faizabad in Complaint Case No. 1720/18(Kiran Yadav Vs. Manoj) under Section 12 of Protection of Women From Domestic Violence Act, 2005 P.S. Mahila Thana, Faizabad.

3. It has been submitted by learned counsel for applicant that respondent No. 2 is legally wedded wife and respondent No. 3 is his minor daughter and the applicant and the respondent Nos. 2 were married on 06.05.2013. It has been submitted that respondent No. 2 preferred a complaint in the Court of Judicial Magistrate - III, Faizabad under Section 12 of the Domestic violence Act, 2005 wherein she stated that applicant and respondent No. 2 were married on 06.05.2013 and the Vidai was performed on 07.05.2013 and the at time of Vidai, the father of the complainant had paid Rs. one lakh fifty one thousand and gifted ornaments and household etc. but the applicant was not satisfied with the dowry and made demand for further amount of Rs. 2 lakhs.

4. In the light of the fact that the demand of dowry was not fulfilled then applicant started harassing the complainant. It has also been alleged that mother-in-law of respondent No. 2 threw hot Ghee upon the leg of respondent No. 2 as a result of which she sustained serious injury at that time when she was pregnant. She gave birth to her daughter on 20.10.2015. Thereafter, respondent No. 2 had moved an application under Section 125 Cr.P.C. before the Family Court, Faizabad seeking maintenance and has also filed a Criminal Complaint against the applicant and his family members before Judicial Magistrate-III, Faizabad under Section 198A/323/504/506 I.P.C. and 3/4 D.P.Act.

5. Family Court by means of order dated 30.05.2018 and 01.05.2019 directed the applicant to pay Rs. 4,000/- per month as interim maintenance to respondent Nos.

2 & 3. It has further been submitted that she also filed a Criminal Revision No. 592/2019 before this Court where certain directions have been issued by this Court for payment of amount of maintenance to the respondent No. 2.

6. With regard to the controversy in the present dispute, it has been submitted that respondent No. 2 moved an application on 07.05.2019 under Section 19 of Domestic violence Act, 2005 before Judicial Magistrate - III, Faizabad along with a complaint under Section 12 of Domestic violence Act, 2005 seeking appropriate direction to the applicant to provide for her residence. The applicant opposed the said application and filed his objections before the trial court and the application under Section 12 read with Section 19 of Domestic violence Act, 2005 was rejected by the trial court by means of order dated 13.08.2019.

7. Against the said order, an appeal was filed under Section 29 of the Domestic violence Act, 2005 by the respondent No. 2 and the same was allowed by the Additional District and Sessions Judge, Faizabad on 08.07.2020 whereby he set aside the order dated 13.08.2019 and remanded the matter to be decided on merits.

8. After remission of the said matter, the Magistrate has passed the order dated 28.09.2020 which has been impugned in the present application.

9. By means of the impugned order, the Judicial Magistrate-III, Faizabad has allowed the application of respondent No. 2 providing for her to reside with the applicant failing which he has been directed to pay sum of Rs. 4,000/- per month from which she can rent suitable accommodation for herself and her daughter. The aforesaid order has been assailed by the counsel for applicant by means of present application under Section 482 Cr.P.C.

10. Learned counsel for applicant has assailed the order mainly on three grounds. Firstly, that the said order has been passed without obtaining a report as prescribed under Section 12 of the Protection of Women from Domestic violence Act wherein it has been provided that the Magistrate shall take into consideration any domestic incident report received by him from the Protection Officer or the Service Provider. It has been submitted that in the instant case no report has been submitted by Protection Officer or the Service Provider. Secondly, applicant has contended that no application under Section 23 was moved by the respondent No. 2 and therefore no no order could have been passed in favour of the applicant in exercise of power under Section 12 of the Domestic Violence Act and thirdly, the court below has erroneously allowed the application of the applicant without taking into consideration the provisions of Section 12(2) of the D.V. Act and without considering that the applicant has already been directed under proceeding under Section 125 Cr.P.C. to pay an amount of Rs. 4,000/- per month as maintenance which he is already paying.

11. With regard to first contention raised by learned counsel for applicant that the impugned order has been passed without seeking a report as prescribed under Section 19 of Protection of Women From Domestic Violence Act, 2005, it has been submitted that it is mandatory for the Magistrate to seek such report before

passing any order under Section 19 of Protection of Women From Domestic Violence Act, 2005 and in absence of said report the impugned order is illegal and arbitrary and beyond powers granted to the Magistrate and deserves to be set aside.

12. It is noteworthy that Section 12(1) does not mandate that an application seeking relief under the Act be accompanied with the Domestic Incident Report (hereinafter referred to as "DIR') or even that it should be moved by a protection officer. Even Rule 6 which stipulates the form and manner of making application to the Magistrate does not require that the Domestic Incident Report must accompany an application for relief made under Section 12 of the Act. It is only the proviso to Section 12 of the Protection of Women from Domestic Violence Act, 2005, which mandate that the Magistrate shall consider the Domestic Incident Report received by him from the Protection Officer or the Service Provider. No obligation to call for Domestic Incident Report (DIR) has been imposed upon the Magistrate. Since the petition is filed before the Magistrate under Section12 of the Act, the Magistrate is empowered to issue summons to the respondents.

13. The proviso to Section 12 of Protection of Women From Domestic Violence Act, 2005 has been duly considered and interpreted by this court as well as several other High Courts. It has been so interpreted as to mean that the trial court is under obligation to consider the report of the Protection Officer or the Service Provider while considering the application under Section 19 of Protection of Women From Domestic Violence Act, 2005, if the same is available on record. In case there is no report available on record then the Magistrate is not under any obligation to call for the same before passing any orders on an application under Section 19 of Protection of Women From Domestic Violence Act, 2005. This aspect of the matter has been duly considered by the Additional District and Sessions Judge, Court No. 11, Faizabad while deciding the revision petition filed by respondent No. 2 where the applicant was also heard. I do not find any infirmity with this aspect of the matter as dealt by the trial court.

14. After remanding the proceedings to the trial court, the impugned order dated 28.09.2020 has been passed by the Judicial magistrate, Faizabad where after hearing the applicant has considered the entire factual matrix has passed the order providing for residence and payment of Rs. 4,000/- per month as interim measure.

15. It was also submitted that before the Judicial Magistrate, the applicant had also filed his objections on 06.08.2009 which were duly considered by him. It has clearly been borne out from the impugned order dated 28.09.2020, that in the objections preferred by the applicant he had not raised any issue with regard to non-consideration of the report as provided under Section 12 of the Domestic Violence Act by the Protection Officer/Service Provider. No such objection was raised before the trial court and therefore it is not open for the applicant to raise it for the first time before this Court in proceedings under Section 482 Cr.P.C., unless he can satisfactorily demonstrate that he was precluded from raising the said issue before the trial court.

16. The legal aspect of the said matter has already been considered above and it has been brought on record that there was

no report of the Protection Officer/Service provider under Section 12 of the Domestic Violence Act and therefore the same could not have been considered by the Magistrate while passing the impugned order.

17. A perusal of the Protection of women from Domestic violence Act, 2005 as well as the rules of 2006 would indicate that an aggrieved person as described in Section 2(a) can either move an application herself to the magistrate or may give information to the protection officer with regard to the commission of an act of domestic violence. In case the application/information is given to the protection officer he shall make a domestic incidents report in the manner prescribed to the magistrate and also forward a copy thereof to the police officer in charge of the police station within local limits of postal section domestic violence is alleged to have been committed.

18. According to rule 6 of the rules of 2006 of the application by the aggrieved person shall be in form-II or nearly as possible thereto and in case assistance of protection officer is sought by the aggrieved person for filing of the application that the same is has to be in form-III.

19. The magistrate is seized of a proceedings initiated on the basis of an application submitted by the aggrieved person under Section 12 of the Domestic violence Act may pass suitable residence orders under Section 19 of the act satisfied that the domestic violence has taken place and is empowered to pass any of the orders as provided for in sub-clause (a) to (f) of Section 19 of the Act.

20. With regard to ex parte orders, section 23 provides that in any proceedings before the magistrate, he may pass such interim orders as he deems just and proper. From a bare reading of Section 23 it is clear that no separate application is required to be filed for exercise of powers under Section 23 of the Act. The magistrate has to act on the application filed under Section 12 of the Act and in cases he is satisfied that the application discloses that the respondent is committing or has committed an act of domestic violence or there is likelihood that the respondent may commit an act of domestic violence, he may grant an ex-parte order.

21. While interpreting the provisions of domestic violence act, which is an piece of social legislation widest amplitude has to be given in interpreting the provisions to see that the objective of the legislation is fulfilled, rather than limiting the exercise of the power of the magistrate on the basis of mere technicalities. The argument of the counsel for the applicant is bereft of any reason with regard to the fact that the respondent should have given an application under Section 23 which would have only enabled the Magistrate tate to exercise the powers therein. The 2nd ground raised by the applicant is therefore bereift of merit and is accordingly rejected.

23. With regard to the third and last contention raised by learned counsel for applicant that the application of respondent No. 2 has been allowed without taking into consideration the provisions of Section 12(2) of the Act wherein it has been provided that *"The relief sought for under sub-section (1) may include a relief for issuance of an order for payment of compensation or damages without prejudice to the right of such person to institute a suit for compensation or damages for the injuries caused by the acts*

of domestic violence committed by the respondent: "

"Provided that where decree for any amount as compensation or damages has been passed by any court in favour of the aggrieved person, the amount, if any, paid or payable in pursuance of the order made by the Magistrate under this Act shall be set off against the amount payable under such decree and the decree shall, notwithstanding anything contained int eh Code of civil Procedure, 1908 (5 of 1908), or any other law for the time being in force, be executable for the balance amount, if any, left after such set off."

24. With regard to the said contention of the applicant, it is noticed that the application under Section 12 of the Act has been considered and decided by the learned Magistrate while directing the applicant to provide residence to the respondent No. 2 failing which he has to give an amount of Rs. 4,000/- per month as a measure of interim relief to the respondent No. 2 so that she can find a suitable accommodation/ residence.

25. The maintenance granted under Section 125 Cr.P.C. is different from the relief granted to the respondent No. 2 by means of impugned order and therefore Section 12(2) of the Act is not attracted in the facts of the present case.

26. The order under Section 125 Cr.P.C. and residence order U/S 19 of the Domestic violence Act operate in two different spheres, and grant of maintenance U/S 125 Cr.P.C. cannot limit the grant of relief U/S 19 D.V. Act which provide for residence for the aggrieved person by invoking provision of Section 12(2) of D.V. Act. The arguments of the petitioner is clearly misconceived. Section 12 (2) of the Domestic violence Act would come into play only when the court is considering the application for grant of payment of compensation or damages. While passing an order under Section 19 of D.V. Act, the Magistrate would grant relief envisaged in Sub-Clause (a) to (f) which clearly do not provide for payment of compensation or damages, and therefore the impugned order passed U/s 19 of the Act providing for residency of the aggrieved person cannot be said to be violation of Section 12(2) of the Act.

27. I do not find any infirmity with the impugned order dated 28.09.2020. The present application under Section 482 Cr.P.C. lacks merit and deserves no interference by this Court, therefore, the present application under Section 482 Cr.P.C. is **dismissed.**

(2020)12ILR A163
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.12.2020

BEFORE

THE HON'BLE IRSHAD ALI, J.

Application U/S 482/378/407 No. 3104 of 2020

Arun Kumar Mishra & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Rupendra Kumar Porwal, Samir Agrawal, Vivek B. Rai

Counsel for the Opp. Parties:
G.A.

Criminal Law - Indian Penal Code, 1860- Section 405,Section 409, Code of Criminal Procedure, 1973- Section 482-

Summoning- Compromise- Return of alternative plot- There is sufficient material to establish the payment in pursuance to an agreement to handover the plot on deposit of certain money. The investigating officer upon examination of the totality of the case found that the petitioners have committed breach of trust and after taking money from the complainant, have not provided plot as assured by them- Apparent that harassment has been made to the complainant by committing "breach of trust". If, such a reputed firm is permitted to be involved in harassment of common people, it will ruin the entire society and will demotivate the peoples, who are willing to purchase plots and flats. The terms of compromise which establishes that the petitioners themselves have admitted the crime by making compromise with the complainant to return the alternative plot.

Where admittedly the petitioner has taken money from the complainant in pursuance of an agreement and having failed to provide the plot, has thereafter entered into a compromise then despite such compromise the offence of breach of trust u/s 405 of the IPC is made out against the petitioner.

Criminal Application accordingly rejected. (Para 8. 9, 10) (E-3)

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

1. Heard learned counsel for the petitioners and Sri Rajesh Kumar Singh, learned AGA for the respondent - State.

2. This petition under Section 482 CrPC has been filed challenging the charge sheet and the order of cognizance, whereby summon has been issued against the petitioners.

3. Brief fact of the case is that an agreement was executed between the parties to provide plot and in pursuance thereof certain money was deposited by the complainant, however, the petitioners could not provided the plot as per the agreement and after taking money the FIR was registered against the petitioners under Sections 406, 420, 467, 468, 471, 504, 506, 409 and 34 IPC. The investigating officer submitted charge sheet, wherein sufficient material was found under Section 409 IPC.

4. Assailing the order, submission of learned counsel for the petitioners is that the petitioners entered into a compromise and have returned alternative plot to the complainant, therefore, the entire proceeding is liable to be set-aside in terms of compromise arrived at between the parties. He further submitted that the trial court has not taken cognizance of submission advanced before it and has proceeded to issue summon to the petitioners, therefore, his submission is that the entire proceeding is per-se illegal and is liable to be set-aside.

5. On the other hand, learned AGA - Sri Rajesh Kumar Singh submitted that once an agreement was executed between the parties and in pursuance thereof money was paid to the petitioners and if there is a breach of trust, the petitioners have committed a crime, therefore, in terms of compromise, they are not entitled to get an order from this court.

6. He further submitted that it is a temporary embezzlement of money paid by the complainant. He next submitted that by giving alternative plot after submission of charge-sheet against the petitioners, the crime, which has been committed, cannot be compromised.

7. I have considered the submissions advanced by learned counsel for the parties and perused the material on record.

8. On perusal of the charge-sheet, it is reflected that there is sufficient material to establish the payment in pursuance to an agreement to handover the plot on deposit of certain money. The investigating officer upon examination of the totality of the case found that the petitioners have committed breach of trust and after taking money from the complainant, have not provided plot as assured by them.

9. Section 405 of the Indian Penal Code provides as under :-

"405. Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits 'criminal breach trust'."

9. Looking to the facts and circumstances of the case, it is apparent that harassment has been made to the complainant by committing "breach of trust" and in such circumstances the complainant has lodged the FIR. The petitioners belong to Ansal Group, which is a renowned real estate firm and as per news reportings, it is highlighted that Ansal Group has played fraud on the mass with public and there are so many FIRs lodged against it. If, such a reputed firm is permitted to be involved in harassment of common people, it will ruin the entire society and will demotivate the peoples, who are willing to purchase plots and flats.

10. I have also perused the terms of compromise which establishes that the petitioners themselves have admitted the crime by making compromise with the complainant to return the alternative plot, therefore, this court is of the view that there is no illegality in the order impugned and in submission of charge sheet.

11. The petition lacks merit and is hereby **rejected.**

(2020)12ILR A165
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 18.11.2020

BEFORE

THE HON'BLE ALOK MATHUR, J.

Application U/S 482/378/407 No. 4495 of 2018

Sri Kant Mishra ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
R.N. Shukla, R.M. Tripathi

Counsel for the Opp. Parties:
Govt. Advocate

Criminal Law - Code of Criminal Procedure, 1973- Section 311, Section 482 Cr.Pc- Rejection of application u/s 311 Cr.Pc- Revision- Maintainability of- Order under Section 311 Cr.P.C. is an interlocutory order and therefore against the rejection of an application under Section 311 Cr.P.C., a revision was not maintainable and therefore learned Additional District and Sessions Judge, Pratapgarh has wrongly assumed jurisdiction and exercised the revisional powers under Section 397 Cr.P.C.

An order passed u/s 311 of the Cr.Pc, is an interlocutory order and a criminal revision against the said order is not maintainable.

Criminal Application allowed. (Para 14) (E-3)

Case law/ Judgements relied upon:-

1. Sethuraman Vs Rajamanickam, (2009) 2 SCC (Cr) 627

2. Mohit @ Sonus & anr Vs St. of U.P. & anr., (2013) 3 SCC (Cri.) 727

3. Girish Kumar Suneja Vs C.B.I., (2011) 14 SCC 809

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

1. Notices were issued to respondent No. 2 by the earlier order of this Court dated 25.07.2018.

2. Office has reported by its report dated 27.09.2018 that notices have been served personally.

3. The service on respondent No. 2 is sufficient.

4. Heard Sri R.M. Tripathi, learned counsel for applicant as well as learned A.G.A. for the State.

5. No one appears on behalf of respondent No. 2.

6. By means of the present application under Section 482 Cr.P.C., the applicant has assailed the order passed by the Additional District and Sessions Judge, Pratapgarh dated 11.06.2018 in Criminal Revision No. 103/2017 (District Government Counsel (Criminal), Pratapgarh Vs. Sri Kant) and Criminal Revision No. 104/2017 (Uma Shankar Vs. State of U.P. and Sri Kant Mishra) allowing the said revisions filed by the State and Uma Shankar respectively against the order dated 06.04.2017 passed by Additional Chief Judicial Magistrate, Court No. 13, Pratapgarh. By means of the said impugned order, the trial court rejected the application under Section 311 of the Cr.P.C. It has been submitted by the counsel for the applicant that a complaint was lodged by Sri Sukhra on 10.03.1993 under Section 467, 468, 409, 420, 421 I.P.C., P.S. Lalganj, District - Pratapgarh.

7. It has further been submitted that after investigation the chargesheet was submitted and during trial five witnesses were examined by the prosecution. Towards the end of the trial one Mr. Uma Shanker appeared before the trial court on 06.10.2015 and moved an application with a request to file certain documents. On the said application, comments of the State/Prosecution Officer were sought for. Incidentally, the State also filed an application under Section 311 Cr.P.C. requesting the Court to summon the said Uma Shanker as witness with the object of placing the receipt No. 33/39281 as evidence before the Court. The applicant filed his objection against the said application under Section 311 Cr.P.C. The learned trial court by means of the judgment and order dated 06.04.2017 has rejected the application moved by Uma Shanker. Aggrieved by the order of trial court dated 06.04.2017, Uma Shanker as well as State filed Criminal Revisions which have been allowed by means of impugned order dated 11.06.2018

8. One of the main contention raised by the counsel for applicant is that the said revision is not maintainable inasmuch as under Section 397 of the Cr.P.C. a revision is not maintainable against an interlocutory order, and the order of the trial court passed in exercise of power vested under Section 311 of the Cr.P.C. rejecting the application for summoning of any witness or any witness not included in the chargesheet was the interlocutory order and therefore the

Additional District and Sessions Judge, Pratapgarh has wrongly exercised the powers not vested in him under Section 397 of the Cr.P.C.

9. In support of his contention, learned counsel has relied upon the judgment of the Hon'ble the Supreme Court in the case of **Sethuraman Vs. Rajamanickam, 2009 (2) SCC (Cr) 627,** in paragraph No. 5 of the said judgment, Hon'ble the Supreme Court has categorically held that the orders passed by the trial court refusing to to call the documents and rejecting the application under Section 311 Cr.P.C., were interlocutory orders and as such, the revision against those orders was clearly barred under Section 397 (2) Cr.P.C., paragraph No. 4 is quoted as under:-

"Secondly, what was not realized was that the order passed by the Trial Court refusing to call the documents and rejecting the application under Section 311 Cr.P.C were interlocutory orders and as such, the revision against those orders was clearly barred under Section 397 (2) Cr.P.C. The Trial Court, in its common order, had clearly mentioned that the cheque was admittedly signed by the respondent/accused and the only defence that was raised, was that his signed cheques were lost and that the appellant/complainant had falsely used one such cheque. The Trial Court also recorded a finding that the documents were not necessary. This order did not, in any manner, decide anything finally. Therefore, both the orders, i.e., one on the application under Section 91 Cr.P.C. for production of documents and other on the application under Section 311 Cr.P.C. for recalling the witness, were the orders of interlocutory nature, in which case, under Section 397 (2), revision was clearly not maintainable. Under such circumstances, the learned Judge could not have interfered in his revisional jurisdiction. The impugned judgment is clearly incorrect in law and would have to be set aside."

10. It has been submitted by learned counsel for applicant that despite the fact that such objection was never raised before the revisional court still this Court in exercise of power under Section 482 Cr.P.C. will have the jurisdiction to set aside the proceedings as the same are arbitrary and without jurisdiction.

11. It is clear from the report as well as the arguments raised by learned counsel for applicant that the trial court had rejected the application under Section 311 Cr.P.C. by a detailed order dated 06.04.2017. Aggrieved by the said order, the said Uma Shanker as well as State filed a revision which was allowed on merits. The trial court only considered the necessity and relevance of the receipt sought to be placed before the trial court in evidence without looking into the fact as to whether the revision itself was maintainable or not.

12. Hon'ble the Supreme Court in the case of **Mohit alias Sonus & another Vs. State of U.P. and Another, 2013 (3) SCC (Cri.) 727** held that sub-section (2) of Section 397 puts a restriction on exercise of such power in relation to an interlocutory order passed by the Criminal courts in any appeal, inquiry, trial or other proceeding.

13. Hon'ble the supreme Court in the case of **Girish Kumar Suneja Vs. C.B.I., 2011 (14 SCC 809** describing different nature of orders and while dealing with the scope of Section 397 (2) of Code of Criminal Procedure held as follows:-

"17. There are three categories of orders that a court can pass-final, intermediate and interlocutory. There is no doubt that in respect of a final order, a court can exercise its revision jurisdiction-that in respect of a final order of acquittal or conviction. There is equally no doubt that in respect of an interlocutory order, the court cannot exercise its revision jurisdiction. As far as an intermediate order is concerned, the court can exercise tis revision jurisdiction since it is not a interlocutory order.

18. The concept of an intermediate order first found mention in ***Amar Nath Vs. State of Haryana (1977) 4 SCC 137*** *in which case the interpretation and impact of Section 397 (2) of the Cr.P.C. came up for consideration. This decision is important for two reasons. Firstly, it gives the historical reason for the enactment of Section 397(20 of Cr.P.C. and secondly considering that historical background, it gives a justification for a restrictive meaning to Section 482 of the Cr.P.C.*

21. The concept of an intermediate order was further elucidated in ***Madhu Limaye Vs. State of Maharashtra, (1977) 4 SCC 551*** *by 4 of 5(5) CRM-M-29578-2019 (O&M) contradistinguishing a final order and an interlocutory order. This decision lays down the principle that an intermediate order is one which is interlocutory in nature but when reserved, ti has the effect of terminating the proceedings and thereby resulting in a final order. Two such intermediate orders immediately come to mind - an order taking congnizance of an offence and summoning an accused and an order for framing charges. Prima facie these orders are interlocutory in natu4re, but when an order taking congnizance and summoning an accused is reversed, it has the effect of terminating the proceedings against that person resulting in a final order in his or her favour. similarly, an order for framing of charges if reversed has the effect of discharging the accused person and resulting in a final order in his or her favour. therefore, an intermediate order is one which if passed in a certain way, the prceedings would terminate but if passed in another way, the proceedings would continue. "*

14. In light of the fact that order under Section 311 Cr.P.C. is an interlocutory order and therefore against the rejection of an application under Section 311 Cr.P.C., a revision was not maintainable and therefore learned Additional District and Sessions Judge, Pratapgarh has wrongly assumed jurisdiction and exercised the revisional powers under Section 397 Cr.P.C. Under such circumstances, the learned Additional District and Sessions Judge, Pratapgarh should not have interfere with the order passed by trial court. The impugned order dated 11.06.2018 is clearly erroneous and is accordingly is set aside.

15. The application is **allowed.**

16. The trial court is expected to conclude the trial expeditiously without giving any unnecessary adjournments.

(2020)12ILR A168
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.11.2020

BEFORE

THE HON'BLE RAJIV JOSHI, J.

Application U/S 482 No. 8463 of 2020

Amarjeet @ Kaluwa ...Applicant(In Jail)
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Kamal Krishna, Sri Mohd. Afzal

Counsel for the Opp. Parties:
A.G.A., Sri Pradeep Singh Sengar

Criminal Law -Code of Criminal Procedure, 1973- Section 311- In order to enable the

Court to find out the truth and render a just decision, the salutary provisions of Section 311 are enacted whereunder any court by exercising its discretionary power at any stage of inquiry, trial or other proceeding can summon any person in attendance though not summoned as a witness or recall or re-examine any person already examined who are expected to be able to throw light upon the matter in dispute. This power is to exercised with caution and circumspection. Recall is not a matter of course and the discretion has been given to the court has to be exercised judicially to prevent failure of justice.

Any Court may summon any witness at any stage of any inquiry , trial or other proceeding as a witness for the just decision of the case but the said power has to be exercised with caution and circumspection.

Criminal Law- Code of Criminal Procedure, 1973- Section 311- No requirement under the law to file questionnaire along with the application for recalling the witness-There can be no dispute that the accused has a right to summon any evidence/witness which may be relevant for proper appreciation of the prosecution evidence and to substantiate his defence, therefore, in any case when the mobile and pen drive have already been exhibited in the record, then, recall of the injured witness appears to be necessary for his re-examination by the defence on the question of that video clip- No prejudice is likely to be caused either to the prosecution or the defence in case the injured witness P.W.-5 Nitin is recalled for his re-examination on the point of aforesaid video clip.

There is no requirement under the law for filing a questionnaire or list with the application filed u/s 311 Cr.Pc. and the accused has a right to summon any evidence or witness if it appears to be essential for the just decision of the case.

Criminal Application allowed. (Para 16, 20, 21) (E-3)

Judgements/ Case law relied upon:-

1. Vijay Kumar Vs St. of U.P & anr., (2011) 8 SCC 136

2. Zahira Habibullah Sheikh & anr. Vs St. of Guj. & ors., (2006) 3 SCC 374

3. State (NCT of Delhi) Vs Shiv Kumar Yadav & anr., (2016) 2 SCC 402

(Delivered by Hon'ble Rajiv Joshi, J.)

1. The present application under Section 482 Cr.P.C has been moved with a prayer to quash the impugned order dated 14.2.2020 passed by Additional Session Judge, Hapur in Special Session Trial No. 89 of 2018 (State Vs. Amarjeet @ Kaluwa and others) under sections 302, 307, 201, 376D, 394, 411 and 120 IPC and section ¾ POCSO Act, 2012 arising out of Case Crime No. 438 of 2018, Police Station Hapur Dehat, whereby the application (No. 22/1) dated 10.01.2020 of the applicant moved under Section 311 Cr.P.C. for recalling PW-5 Nitin (injured witness) has been rejected.

2. Heard Sri Kamal Krishna, learned Senior Advocate assisted by Sri Mohd. Afzal, learned counsel for the applicant, learned A.G.A. for the State, and Sri Pradeep Singh Sengar, learned counsel for the opposite party no. 2. Perused the record.

3. The facts as reflect from the record are that opposite party no. 2 had lodged an FIR to the effect that on 05.09.2018 in the morning when he had gone to bring fodder from his field and his wife and son Himanshu had gone to Delhi due to some work, his daughter/victim aged about 12 years and son Nitin aged about 10 both were at home. At about 1.30 p.m. his nephew Lalit gave an information to the informant that Nitin has received some knife injury at his neck. Getting this information, he reached home and did not find his daughter there. Soon thereafter, he reached Nandani Hospital, where his son Nitin

was admitted, on regaining consciousness, his son has disclosed that co-accused Ankur Teli and Sonu @ Pauwa were committing rape upon her sister and when he raised alarm, they had caused injury on his neck by knife and thereafter he concealed himself in the house. When he regained consciousness, he found himself in hospital. When informant reached at home along with police, he found the entire house hold goods scattered all over the place and jewellary etc. was missing. When police party made search of his daughter, her dead body was found in naked and dead condition in the room beneath straw. On this information, Case Crime No. 438 of 2018 was registered against the co-accused Ankur Teli and Sonu @ Pauwa at P.S. Hapur Dehat, District Hapur on 05.09.2019 at about 20.05 hours.

4. After investigation, charge sheet has been submitted in the case against the accused-applicant along with two other co-accused on 27.10.2018 under the above mentioned sections and after charges having been framed against the accused persons, statements of 13 witnesses have been recorded in the trial. The statement of PW-13, Kaushalendra Singh, Investigating Officer, was recorded before the trial court on 23.7.2019. The cross-examination of the said witnesses was done by the accused persons. Subsequently, on the basis of statement of PW-13, whereby the applicant came to know about some Compact Disc (C.D.) containing statement of the injured- Nitin, which was the part of case diary, he moved an application with a prayer that the C.D. containing videography of the statement of injured Nitin, may be given to the applicant and then cross-examination of PW-13 can be done. The said application dated 22.7.2019 was rejected by the trial court vide order dated 24.7.2019.

5. Against the aforesaid order, the applicant preferred an application u/s 482 Cr.P.C. No. 30532 of 2019, which was allowed by this Court on 16.9.2019 directing the trial court to provide a copy of the C.D.. Thereafter, an application was moved on behalf of the applicant for supply of a copy of the aforesaid C.D., which was rejected by the trial court vide order dated 22.10.2019.

6. Against the said order of the trial court dated 22.10.2019, the applicant again moved an application u/s 482 Cr.P.C. No. 39761 of 2019, which was allowed by this Court vide order dated 13.11.2019. The operative portion of the said order reads as under:

"I find that the Coordinate Bench of this Court had already passed an order dated 16.09.2019 directing for providing the copy of the said CD, therefore the best possible efforts ought to have been made by the trial court to provide a copy of the same. In my opinion, the trial court ought to have sent the damaged CD to Central Forensic Science Lab, Hyderabad with a direction for preparing a copy of the same, if the same was possible/feasible and in case any report is received from the end of the Central Forensic Science Laboratory, Hyderabad the same could have been taken into consideration. If the copy of the same was not possible to be made, the appropriate order could have been passed taking into consideration the said report.

12. In view of above, the impugned order is set aside and it is directed to the trial court that it shall send the damaged CD to Central Forensic Science Laboratory, Hyderabad for a copy of it to be prepared within a period of 15 days and obtain a report in respect to opinion of the said laboratory within a specified time period to be fixed by it and after receipt of such a report from laboratory, it may pass appropriate order.

13. The application stands allowed. "

7. Subsequently, the C.D was sent to Central Forensic Laboratory as per the order this Court and after analysis, a report was submitted by the Central Forensic Laboratory on 9.12.2019 to the effect that the C.D is damaged and the Laboratory does not have the facility to retrieve the data from broken/damaged C.D. This chapter came to an end. Subsequently, all the prosecution witnesses have been examined before the trial court. The statement of the accused was also recorded on 11.9.2019 under Section 313 Cr.P.C.. Thereafter, the case was fixed for defence evidence of the accused persons under Section 233 of Cr.P.C. Subsequently, the applicant in his defence evidence produced the list of witnesses on 3.1.2020 and also produced the mobile (Vivo) and pen drive.

8. It is submitted by the accused-applicant that the mobile phone contained the video clip of injured witness PW-5 Nitin, recorded when he was treated in the hospital. Thereafter, it was made viral and also shared with the mobile of the applicant.

9. The applicant in defence produced DW-2 Krishna Pal Yadav @ Monu before the trial court along with the video clip in the mobile (Vivo) and pen drive with certificate under Section 65-B of Indian Evidence Act. As per the applicant, in this video clip, the injured Nitin was disclosing the names of the accused persons involved in the offence. The pen drive and mobile phone containing the video clip was exhibited by the trial court. The statement of DW-2 was recorded on 10.1.2020. The applicant on the same day i.e. 10.1.2020 moved an application under Section 311 Cr.P.C. to recall the witness PW-5 Nitin (injured) for his re-examination on the question of said video clip.

10. The trial court vide impugned order dated 14.2.2020 rejected the application filed under Section 311 Cr.P.C. on the ground that the application has been moved just to delay the trial; that no list of questions have been given and further that the evidence of both the sides has been concluded.

11. The order dated 14.2.2020 passed by Additional Session Judge, Hapur in Special Session Trial No. 89 of 2018 is impugned in the present application.

12. While assailing the order impugned, learned counsel for the applicant firstly submitted that application under section 311 has illegally been rejected by the court below on the ground that the application has been moved just to delay the trial. According to the learned counsel, since the applicant is in jail, there is no question for delaying the trial by the applicant. It is further submitted by the learned counsel for applicant that there is no requirement in law to submit a list of questionnaire along with the application filed under Section 311 Cr.P.C. for recalling a witness. It is next submitted by learned counsel for the applicant that the only stage for submitting/producing the video clip of the injured witness PW-5 Nitin is under Section 233 Cr.P.C., which comes after recording of statement under Section 313 Cr.P.C. and the accused-applicant can only produce the video clip only in his defence before the trial court and not before that, and therefore, the further examination of PW-5 Nitin is necessary for the purpose of confronting his statement contained in the video clip in which he has disclosed the

names of actual accused persons, who have committed the offence. It is lastly submitted by learned counsel for the applicant that no prejudice will be caused to the prosecution, if the injured witness P.W.-5 Nitin is confronted with the said video clip in his re-examination.

13. On the other hand, learned counsel for the informant as well as learned AGA supported the impugned order and submitted that the entire evidence in the matter has been closed, the video clip including the pen drive is already in the knowledge of the accused-applicant, which is apparent from the statement of PW-2 recorded on 5.9.2018 and the application has been moved at a very belated stage, which has rightly been rejected by the trial court.

14. I have considered the submissions so raised by learned counsel for the parties.

15. Before considering the statement, provision of Section 311 Cr.P.C., is quoted hereunder:

"311. Power to summon material witness, or examine person present*-Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or. recall and re- examine any person already examined; and the Court shall summon and examine or recall and re- examine any such person if his evidence appears to it to be essential to the just decision of the case."*

16. From bare perusal of Section 311 Cr.P.C., it is apparent that in order to enable the Court to find out the truth and render a just decision, the salutary provisions of Section 311 are enacted whereunder any court by exercising its discretionary power at any stage of inquiry, trial or other proceeding can summon any person in attendance though not summoned as a witness or recall or re-examine any person already examined who are expected to be able to throw light upon the matter in dispute. The object of the provision as a whole is to do justice not only from the point of view of the accused and the prosecution but also from the point of view of an orderly society. This power is to exercised with caution and circumspection. Recall is not a matter of course and the discretion has been given to the court has to be exercised judicially to prevent failure of justice. Therefore, the reasons for exercising this power should be spelt out in the order.

17. In ***Vijay Kumar v. State of Uttar Pradesh and Anr., (2011) 8 SCC 136,*** the Apex Court while explaining scope and ambit ofSection 311has held as under:-

"17. ThoughSection 311confers vast discretion upon the court and is expressed in the widest possible terms, the discretionary power under the said section can be invoked only for the ends of justice. Discretionary power should be exercised consistently with the provisions of CrPCand the principles of criminal law. The discretionary power conferred underSection 311has to be exercised judicially for reasons stated by the court and not arbitrarily or capriciously".

18. In ***Zahira Habibullah Sheikh (5) andAnr. v. State of Gujarat and Others, (2006) 3 SCC 374***, the Apex Court has considered the concept underlining underSection 311as under:-

"27. The object underlyingSection 311of the Code is that there may not be failure of justice on account of mistake of

either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the court to summon a witness under the section merely because the evidence supports the case of the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials underthe Codeand empowers the Magistrate toissue summons to any witness at any stage of such proceedings, trial or enquiry. InSection 311the significant expression that occurs is "at any stage of any inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind".

19. In ***State (NCT of Delhi) v. Shiv Kumar Yadav & Anr., (2016) 2 SCC 402,*** it was held thus:-

".... Certainly, recall could be permitted if essential for the just decision, but not on such consideration as has been adopted in the present case. Mere observation that recall was necessary "for ensuring fair trial" is not enough unless there are tangible reasons to show how the fair trial suffered without recall. Recall is not a matter of course and the discretion given to the court has to be exercised judiciously to prevent failure of justice and not arbitrarily. While the party is even permitted to correct its bona fide error and may be entitled to further opportunity even when such opportunity may be sought without any fault on the part of the opposite party, plea for recall for advancing justice has to be bona fide and has to be balanced carefully with the other relevant considerations including uncalled for hardship to the witnesses and uncalled for delay in thetrial. Having regard to these considerations, there is no ground to justify the recall of witnesses already examined".

20. Now, in the present case, the statement of the injured PW-5 has been recorded on 12.2.2019 and cross-examination of the said witness was also conducted by the accused. The pen drive (Kha 2) as well as video clip (Kha 3) have already been exhibited by the court, which appears to be necessary for just decision of the case. So far as the observation made by the trial court that the said application is without the list of questionnaire is concerned, it is firstly stated that there is no requirement under the law to file questionnaire along with the application for recalling the witness and secondly that it is clearly mentioned in the application under section 311,Cr.P.C. itself that injured witness P.W.-5 Nitin is to be summoned with regard to the contents of his video clip. When the accused-applicant is in jail, therefore, there is also no occasion to delay the proceeding of the trial. There can be no dispute that the accused has a right to summon any evidence/witness which may be relevant for proper appreciation of the prosecution evidence and to substantiate his defence, therefore, in any case when the mobile and pen drive have already been exhibited in the record, then, recall of the injured witness appears to be necessary for his re-examination by the defence on the question of that video clip.

21. Taking into consideration the entire facts and circumstances as well as

the earlier orders passed by this Court referred to above, in the considered opinion of this Court, no prejudice is likely to be caused either to the prosecution or the defence in case the injured witness P.W.-5 Nitin is recalled for his re-examination on the point of aforesaid video clip. The trial court has not dealt with the merits of the case and proceeded to reject the application on irrelevant grounds.

22. Consequently, the order dated 14.2.2020 passed by Additional Session Judge, Hapur in Special Session Trial No. 89 of 2018 (State Vs. Amarjeet @ Kaluwa and others) cannot be sustained in the eyes of law and the same is hereby set aside.

23. The application stands allowed. The trial court is directed to recall the injured witness PW-5 Nitin under section 311 Cr.P.C. for the said purpose at an early date.

(2020)12ILR A174
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.12.2020

BEFORE

THE HON'BLE SHAMIN AHMED, J.

Application U/S 482 No. 12474 of 2020

Chhotu ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Amit Saran, Sri Niklank Kumar Jain

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

Criminal Law- Code of Criminal Procedure, 1973- Section 167 (2) – Right to default bail- It is evident from the record itself that the applicant was taken custody in alleged crime on 02.02.2020 and till expiry of 90 days i.e. 02.05.2020 the investigating agency failed to submit any charge sheet/challan against the applicant within the meaning of Section 173(2) CrPC before the court of learned Special Judge, POCSO Act/Additional Sessions Judge, Etah and the same was filed on 01.06.2020 much after expiry of 90 days, thus the trial court ought to have allowed applicant's application moved under Section 167(2) CrPC and released the applicant on default bail, but the learned court below had committed manifest error of law in rejecting applicant's application vide order dated 3.6.2020.

Where the prosecution fails to submit the Chargesheet/ Police Report u/s 173 (2) within 90 days, an indefeasible right to default bail accrues to the accused.

Criminal Application allowed. (Para 9) (E-3)

Case law/ Judgements relied upon:-

1. Rakesh Kumar Paul Vs St. of Assam, (2017) 15 SCC 67

2. Bikramjit Singh Vs The State of Punj. in Criminal Appeal No.667 of 2020 arising out of SLP (Crl.) No.2933 of 2020, decided on 12.10.2020

3. Pragya Singh Thakur Vs St. of Maha. (2011) 10 SCC 445

4. U.O.I Vs Nirala Yadav (2014) 9 SCC 457

5. Syed Mohd. Ahmad Kazmi Vs. State (Govt. of NCT of Delhi) (2012) 12 SCC 1

6. Saravanan Vs State rep. by the Inspr, of Police (Criminal Appeal Nos.681-682 of 2020, arising from S.L.P. (Criminal) Nos.4386/4387/2020)

(Delivered by Hon'ble Shamim Ahmed, J.)

1. This application under Section 482 CrPC has been filed by the applicant for

quashing the order dated 3.6.2020 passed by Special Judge POCSO Act/Additional Sessions Judge, Etah in Bail Application No.545 of 2020 (CNR No. UPET01-002463-2020) Chhotu vs. State of U.P., in relation to Case Crime No.26 of 2020, under Sections 363, 366, 342, 328, 376, 506 IPC and Section 4 POCSO Act, Police Station Nidhauli Kalan District Etah. Further, prayer has been made to release the accused applicant on default bail in Case Crime No.26 of 2020, under Sections 363, 366, 342, 328, 376, 506 IPC and Section 4 POCSO Act, Police Station Nidhauli Kalan District Etah exercising power under Section 167(2) CrPC so that justice be done.

2. Heard Sri Amit Daga, learned counsel for the applicant as well as learned AGA for the State and perused the record.

3. The facts of the case as argued by the learned counsel for the applicant are as under:

(i) In regard to an incident which is said to have taken place on 8.12.2019 at some unknown time one First Information Report was registered at Police Station Nidhauli Kalan, District Etah on 29.1.2020 at about 16.00 hrs under the orders/direction of SSP, Etah passed on the application of Km. Preeti with the allegations that the informant is minor girl aged about 16 years and she is the student of Intermediate class. It is further alleged that on 8.12.2019 the informant (prosecutrix) had gone to her relative's home located in Mohalla Kila, Nidhauli Kalan, District Etah where resident of her village namely Chhotu (applicant) and Shyamveer reached and on call of Chhotu she came out from home and on the pretext of accident of her brother, aforesaid persons took her into Max vehicle and on reaching Sikandrabad, Shyamveer left their company and therefore Chhotu (applicant) took her to Delhi at some unknown place and committed rape with her till 14.12.2019 after administering some drugs to her. It is further alleged that somehow the informant (prosecutrix) informed her family members about the incident and despite various efforts the police of concerned police station neither reported the incident nor sent the informant (prosecutrix) for medical examination. On the basis of the aforesaid FIR, one criminal case as Case Crime No. 26 of 2020 for the offence punishable under Sections 363, 366, 342, 328, 376, 506 IPC and Section 4 POCSO Act was registered against the applicant and co-accused Shyamveer at Police Station Nidhauli Kalan District Etah.

(ii) After registration of the aforesaid FIR, the police started investigation. During the course of the investigation, the investigating officer recorded the statement of the informant (prosecutrix) under Section 161 CrPC in which she has allegedly reiterated the allegations of the FIR in refined manner and further alleged that she was forcibly taken to Delhi and subjected to rape till 14.12.2019 and she came out from the clutches of the accused then she made efforts to lodge the FIR. It is further alleged that she is minor and her date of birth is 15.10.2004.

(iii) It is alleged by the prosecution that prior to recording the aforesaid statement, the informant (prosecutrix) was put up for medical examination at District Women Hospital, Etah on 30.1.2020 and on the same day she was allegedly medically examined at aforesaid hospital. As per the medical

examination report of the informant (prosecutrix), in the opinion of the doctor, no injury was seen at any body part including the genital part of the informant (prosecutrix).

(iv) After showing the aforesaid statement of the informant (prosecutrix), the Investigating Officer has shown arrest of the accused applicant in the instant criminal case on 2.2.2020 and on the same day he was put up before the court of learned Magistrate for judicial custody remand.

(v) During the course of the investigation, the Investigating Officer put up the informant (prosecutrix) before the court of lernaed Magistrate for the purposes of recording her statement under Section 164 CrPC.

(vi) Thereafter the Investigating Officer recorded the statements of some independent witnesses namely Sukhbeer Singh, Mohar Singh, Brijesh Sharma and Durveen Singh under Section 161 CrPC, in which they have allegedly stated that co-accused Shyamveer, who is named in the FIR, happens to be the uncle of accused applicant Chhotu and since the applicant and Km. Preeti were having love affairs, thus the informant (prosecutrix) was enticed away by applicant Chhotu on 8.12.2019.

(vii) After recording the statements of the aforesaid independent witnesses the Investigating officer came to the conclusion that co-accused Shyamveer has nothing to do with the allegations levelled in the FIR and he has been falsely roped in the instant criminal case. With the said observation/conclusion, the Investigating Officer gave clean chit to co-accused Shyamveer from all the charges and further investigated the crime in question only against the accused applicant.

(viii) After conclusion of the investigation, the Investigating Officer prepared the charge sheet/challan with the observation that the applicant had committed an offence and liable to be prosecuted for the offence punishable under Sections 363, 366, 342, 376, 506 IPC and Section 4 POCSO Act and submitted the same before the court of learned Special Judge (POCSO Act) on 1.6.2020, much after expiry of 90 days. On the same day learned trial court (Special Judge POCSO Act/Additional Sessions Judge, Etah) was pleased to take cognizance on the charge sheet/challan so submitted against the accused applicant.

(ix) Learned counsel for the applicant further submits that on careful and exhaustive perusal of the charge sheet/challan, it reveals that the same was prepared by the Investigating Officer on 2.3.2020 and the same has been marked as submitted on 15.5.2020 whereupon cognizance was taken by the court below on 1.6.2020.

(x) Since the accused applicant was challaned and taken into custody in the instant criminal case on 2.2.2020 and despite expiry of 90 days no charge sheet/challan was submitted against him before the learned Special Judge, POCSO Act, Etah, thus the applicant sought default bail under Section 167(2) CrPC by moving an application dated 25.5.2020. Accused applicant is also ready to furnish adequate sureties and personal bond to the satisfaction of the court concerned.

(xi) It is categorically submitted by the learned counsel for the applicant that

till 25.5.2020 the date on which the applicant moved an application under Section 167(2) CrPC for grant of default bail, no charge sheet/challan was available before the court below and the same was filed/submitted by the concerned investigating agency before the court below after moving the said application only on 1.6.2020 and whereupon cognizance was taken by the court below on 1.6.2020.

4. Learned counsel for the applicant submits that despite the undisputed fact on record that the applicant was taken into custody in the instant criminal case on 2.2.2020 and despite expiry of 90 days no charge sheet/challan was submitted by the investigating agency before the court below, the court below vide order dated 3.6.2020 rejected the application of the applicant for default bail. Hence the present application under Section 482 CrPC before this Court challenging the validity of the aforesaid impugned order.

5. On the other hand, learned AGA appearing for the State has filed counter affidavit with the contention that from the report of D.C.R.B. there is only one case pending against the applicant except the present case. It is further contended in paragraph 6 and 7 of the counter affidavit that during the course of the investigation credible evidence has been collected against the accused applicant and thereafter the Investigating Officer has submitted charge sheet against him for the offence punishable under Sections 363, 366, 342, 376, 506 IPC and Section 4 POCSO Act before the Special Judge POCSO Act on 1.6.2020 whereby the court below has taken cognizance after perusing the material available on record. It is further contended that the learned Special Judge after perusing the material evidence on record as well as otherevidences has rightly rejected the bail application of the applicant vide order dated 3.6.2020. Further in paragraph 13 of the counter affidavit it was stated that the learned trial court has not committed any manifest error of law in misinterpreting the observation/order of the Hon'ble Apex Court. The learned court below after considering the legal proposition of law laid down by the Hon'ble Madras High Coiurt in the case of *Settu vs. The State represented by the Inspector of Police,* while deciding the applicant's application moved under Section 167(2) CrPC.

6. Sri Amit Daga, learned counsel for the applicant submits that as his argument has already been accepted by the State in paragraph 7 of their counter affidavit that charge sheet was filed in the present case on 1.6.2020 whereupon the court below has taken cognizance, he does not want to file rejoinder affidavit.

7. I have considered the rival submissions of the learned counsel for the parties and perused the record.

8. Section 167 of CrPC lays down the procedure to be followed when investigation cannot be completed in 24 hours. Section 167(1) and (2) of the Code is reproduced as under:

"167. Procedure when investigation cannot be completed in twenty-four hours.-(1) Whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by Section 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or

the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the Accused to such Magistrate.

(2) The Magistrate to whom an Accused person is forwarded under this Section may, whether he has or has not jurisdiction to try the case, from time to time, authorize the detention of the Accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the Accused to be forwarded to a Magistrate having such jurisdiction:

Provided that (a) the Magistrate may authorise the detention of the Accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the Accused person in custody under this paragraph for a total period exceeding,--(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years; (ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the Accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this Sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter; (b) no Magistrate shall authorise detention in any custody under this Section unless the Accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage; (c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police." Sub-section (2) stipulates that the magistrate cannot authorise detention of the accused in custody on expiry of such period of 90 days or 60 days as the case may be and shall release him on bail, if the accused person is prepared to and furnishes bail."

9. It is evident from the record itself that the applicant was taken custody in alleged crime on 02.02.2020 and till expiry of 90 days i.e. 02.05.2020 the investigating agency failed to submit any charge sheet/challan against the applicant within the meaning of Section 173(2) CrPC before the court of learned Special Judge, POCSO Act/Additional Sessions Judge, Etah and the same was filed on 01.06.2020 much after expiry of 90 days, thus the trial court ought to have allowed applicant's application moved under Section 167(2) CrPC and released the applicant on default bail, but the learned court below had committed manifest error of law in rejecting applicant's application vide order dated 3.6.2020.

10. Even though in the counter affidavit filed by the State, the State has also admitted this fact in paragraph 6 and 7 of the counter affidavit that during the course of investigation credible evidence

has been collected against the accused applicant and the investigating officer during investigation has collected specific allegation and thereafter has submitted charge sheet for the offence punishable under Section 363, 366, 342, 376, 506 IPC and Section 4 POCSO Act before the learned Special Judge, POCSO Act on 1.6.2020 whereby the court has taken cognizance after perusing the material available on record, therefore it is beyond doubt to say that the charge sheet was filed after the expiry of 90 days from the date of the arrest of the applicant and the application for default bail was filed by the applicant much prior i.e. on 25.5.2020. Accordingly, in view of the provisions contained under Section 167(2) CrPC the applicant is entitled to get the benefit for grant of default bail by the court below and the impugned order passed by the court below dated 3.6.2020 was against the provisions of Section 167(2) CrPC.

11. In this regard, reference may be made to the law as laid down by the Hon'ble Apex Court in the case of **Rakesh Kumar Paul vs State of Assam, (2017) 15 SCC 67**. The relevant extract of the aforesaid judgment is given in paragraph 40 which is being quoted hereinbelow:

"40. In the present case, it was also argued by learned counsel for the State that the petitioner did not apply for "default bail' on or after 4-1-2017 till 24-1-2017 on which date his indefeasible right got extinguished on the filing of the charge sheet. Strictly speaking this is correct since the petitioner applied for regular bail on 11-1-2017 in the Gauhati High Court - he made no specific application for grant of "default bail'. However, the application for regular bail filed by the accused on 11-1-2017 did advert to the statutory period for filing a charge sheet having expired and that perhaps no charge sheet had in fact being filed. In any event, this issue was argued by learned counsel for the petitioner in the High Court and it was considered but not accepted by the High Court. The High Court did not reject the submission on the ground of maintainability but on merits. Therefore it is not as if the petitioner did not make any application for default bail - such an application was definitely made (if not in writing) then at least orally before the High Court. In our opinion, in matters of personal liberty, we cannot and should not be too technical and must lean in favour of personal liberty. Consequently, whether the accused makes a written application for "default bail' or an oral application for "default bail' is of no consequence. The concerned court must deal with such an application by considering the statutory requirements namely, whether the statutory period for filing a charge sheet or challan has expired, whether the charge sheet or challan has been filed and whether the accused is prepared to and does furnish bail."

12. Further, the Hon'ble Apex Court in the case of **Bikramjit Singh vs The State of Punjab in Criminal Appeal No.667 of 2020** arising out of **Special Leave Petition (Crl.) No.2933 of 2020, decided on 12.10.2020,** was pleased to observe in paragraph 24 to 30 as under:

"24. The question as to whether default bail can be granted once a charge sheet is filed was authoritatively dealt with in a decision of a Three- Judge Bench of this Court in **Uday Mohanlal Acharya v. State of Maharashtra** (2001) 5 SCC 453. The majority judgment of G.B. Pattanaik, J. reviewed the decisions of this Court and in particular the enigmatic expression "if

already not availed of" in **Sanjay Dutt** (supra). The Court then held:

"13....The crucial question that arises for consideration, therefore, is what is the true meaning of the expression "if already not availed of"? Does it mean that an accused files an application for bail and offers his willingness for being released on bail or does it mean that a bail order must be passed, the accused must furnish the bail and get him released on bail? In our considered opinion it would be more in consonance with the legislative mandate to hold that an accused must be held to have availed of his indefeasible right, the moment he files an application for being released on bail and offers to abide by the terms and conditions of bail. To interpret the expression "availed of" to mean actually being released on bail after furnishing the necessary bail required would cause great injustice to the accused and would defeat the very purpose of the proviso to Section 167(2) of the Criminal Procedure Code and further would make an illegal custody to be legal, inasmuch as after the expiry of the stipulated period the Magistrate had no further jurisdiction to remand and such custody of the accused is without any valid order of remand. That apart, when an accused files an application for bail indicating his right to be released as no challan had been filed within the specified period, there is no discretion left in the Magistrate and the only thing he is required to find out is whether the specified period under the statute has elapsed or not, and whether a challan has been filed or not. If the expression "availed of" is interpreted to mean that the accused must factually be released on bail, then in a given case where the Magistrate illegally refuses to pass an order notwithstanding the maximum period stipulated in Section 167 had expired, and yet no challan had been filed then the accused could only move to the higher forum and while the matter remains pending in the higher forum for consideration, if the prosecution files a charge-sheet then also the so-called right accruing to the accused because of inaction on the part of the investigating agency would get frustrated. Since the legislature has given its mandate it would be the bounden duty of the court to enforce the same and it would not be in the interest of justice to negate the same by interpreting the expression "if not availed of" in a manner which is capable of being abused by the prosecution. A two-Judge Bench decision of this Court in State of M.P. v. Rustam [1995 Supp (3) SCC 221 : 1995 SCC (Cri) 830] setting aside the order of grant of bail by the High Court on a conclusion that on the date of the order the prosecution had already submitted a police report and, therefore, the right stood extinguished, in our considered opinion, does not express the correct position in law of the expression "if already not availed of", used by the Constitution Bench in Sanjay Dutt [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433]...In the aforesaid premises, we are of the considered opinion that an accused must be held to have availed of his right flowing from the legislative mandate engrafted in the proviso to sub-section (2) of Section 167 of the Code if he has filed an application after the expiry of the stipulated period alleging that no challan has been filed and he is prepared to offer the bail that is ordered, and it is found as a fact that no challan has been filed within the period prescribed from the date of the arrest of the accused. In our view, such interpretation would subserve the purpose and the object for which the provision in question was brought on to the statute-book. In such a case, therefore, even if the

application for consideration of an order of being released on bail is posted before the court after some length of time, or even if the Magistrate refuses the application erroneously and the accused moves the higher forum for getting a formal order of being released on bail in enforcement of his indefeasible right, then filing of challan at that stage will not take away the right of the accused. Personal liberty is one of the cherished objects of the Indian Constitution and deprivation of the same can only be in accordance with law and in conformity with the provisions thereof, as stipulated under Article 21 of the Constitution. When the law provides that the Magistrate could authorise the detention of the accused in custody up to a maximum period as indicated in the proviso to sub-section (2) of Section 167, any further detention beyond the period without filing of a challan by the investigating agency would be a subterfuge and would not be in accordance with law and in conformity with the provisions of the Criminal Procedure Code, and as such, could be violative of Article 21 of the Constitution. There is no provision in the Criminal Procedure Code authorising detention of an accused in custody after the expiry of the period indicated in proviso to sub-section (2) of Section 167 excepting the contingency indicated in Explanation I, namely, if the accused does not furnish the bail...But so long as the accused files an application and indicates in the application to offer bail on being released by appropriate orders of the court then the right of the accused on being released on bail cannot be frustrated on the off chance of the Magistrate not being available and the matter not being moved, or that the Magistrate erroneously refuses to pass an order and the matter is moved to the higher forum and a challan is filed in interregnum. This is the only way how a balance can be struck between the so-called indefeasible right of the accused on failure on the part of the prosecution to file a challan within the specified period and the interest of the society, at large, in lawfully preventing an accused from being released on bail on account of inaction on the part of the prosecuting agency. On the aforesaid premises, we would record our conclusions as follows:

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3. On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnishes the bail as directed by the Magistrate.

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6. The expression "if not already availed of" used by this Court in Sanjay Dutt case [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] must be understood to mean when the accused files an application and is prepared to offer bail on being directed. In other words, on expiry of the period specified in para (a) of the proviso to sub-section (2) of Section 167 if the accused files an application for bail and offers also to furnish the bail on being directed, then it has to be held that the accused has availed of his indefeasible right even though the court has not considered the said application and has not indicated the terms and conditions of bail, and the accused has not furnished the same."

[Emphasis Supplied]

B.N. Agrawal J. dissented, holding:

"29. My learned brother has referred to the expression "if not already availed of" referred to in the judgment in Sanjay Dutt case [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] for arriving at Conclusion 6. According to me, the expression "availed of" does not mean mere filing of application for bail expressing therein willingness of the accused to furnish the bail bond. What will happen if on the 61st day an application for bail is filed for being released on bail on the ground of default by not filing the challan by the 60th day and on the 61st day the challan is also filed by the time the Magistrate is called upon to apply his mind to the challan as well as the petition for grant of bail? In view of the several decisions referred to above and the requirements prescribed by clause (a)(ii) of the proviso read with Explanation I to Section 167(2) of the Code, as no bail bond has been furnished, such an application for bail has to be dismissed because the stage of proviso to Section 167(2) is over, as such right is extinguished the moment the challan is filed.

30. In this background, the expression "availed of" does not mean mere filing of the application for bail expressing thereunder willingness to furnish bail bond, but the stage for actual furnishing of bail bond must reach. If the challan is filed before that, then there is no question of enforcing the right, howsoever valuable or indefeasible it may be, after filing of the challan because thereafter the right under default clause cannot be exercised."

25. The law laid down by the majority judgment in this case was however not followed in **Pragya Singh Thakur v. State of Maharashtra** (2011) 10 SCC 445. This hiccup in the law was then cleared by the judgment in **Union of India v. Nirala Yadav** (2014) 9 SCC 457, which exhaustively discussed the entire case law on the subject. In this judgment, a Two-Judge Bench of this Court referred to all the relevant authorities on the subject including the majority judgment of **Uday Mohanlal Acharya** (supra) and then concluded:

"44. At this juncture, it is absolutely essential to delve into what were the precise principles stated in Uday Mohanlal Acharya case [(2001) 5 SCC 453 : 2001 SCC (Cri) 760] and how the two-Judge Bench has understood the same in Pragyna Singh Thakur [(2011) 10 SCC 445 : (2012) 1 SCC (Cri) 311] . We have already reproduced the paragraphs in extenso from Uday Mohanlal Acharya case [(2001) 5 SCC 453 : 2001 SCC (Cri) 760] and the relevant paragraphs from Pragyna Singh Thakur [(2011) 10 SCC 445 : (2012) 1 SCC (Cri) 311] . Pragyna Singh Thakur [(2011) 10 SCC 445 : (2012) 1 SCC (Cri) 311] has drawn support from Rustam [1995 Supp (3) SCC 221 :1995 SCC (Cri) 830] case to buttress the principle it has laid down though in Uday Mohanlal Acharya case [(2001) 5 SCC 453 : 2001 SCC (Cri) 760] the said decision has been held not to have stated the correct position of law and, therefore, the same could not have been placed reliance upon. The Division Bench in para 56 which has been reproduced hereinabove, has referred to para 13 and the conclusions of Uday Mohanlal Acharya case [(2001) 5 SCC 453 : 2001 SCC (Cri) 760] . We have already quoted from para 13 and the conclusions.

45. The opinion expressed in paras 54 and 58 in Pragyna Singh Thakur

[(2011) 10 SCC 445 : (2012) 1 SCC (Cri) 311] which we have emphasised, as it seems to us, runs counter to the principles stated in Uday Mohanlal Acharya [(2001) 5 SCC 453 : 2001 SCC (Cri) 760] which has been followed in Hassan Ali Khan [(2011) 10 SCC 235 : (2012) 1 SCC (Cri) 256] and Sayed Mohd. Ahmad Kazmi [(2012) 12 SCC 1 : (2013) 2 SCC (Cri) 488] . The decision in Sayed Mohd. Ahmad Kazmi case [(2012) 12 SCC 1 : (2013) 2 SCC (Cri) 488] has been rendered by a three-Judge Bench. We may hasten to state, though in Pragyna Singh Thakur case [(2011) 10 SCC 445 : (2012) 1 SCC (Cri) 311] the learned Judges have referred to Uday Mohanlal Acharya case [(2001) 5 SCC 453 : 2001 SCC (Cri) 760] but have stated the principle that even if an application for bail is filed on the ground that the charge- sheet was not filed within 90 days, but before the consideration of the same and before being released on bail, if the charge-sheet is filed the said right to be enlarged on bail is lost. This opinion is contrary to the earlier larger Bench decisions and also runs counter to the subsequent three-Judge Bench decision in Mustaq Ahmed Mohammed Isak case [(2009) 7 SCC 480 : (2009) 3 SCC (Cri) 449] . We are disposed to think so, as the two-Judge Bench has used the words "before consideration of the same and before being released on bail", the said principle specifically strikes a discordant note with the proposition stated in the decisions rendered by the larger Benches.

46. At this juncture, it will be appropriate to refer to the dissenting opinion by B.N. Agarwal, J. in Uday Mohanlal Acharya case [(2001) 5 SCC 453 : 2001 SCC (Cri) 760] . The learned Judge dissented with the majority as far as interpretation of the expression "if not already availed of" by stating so: (SCC p. 481, paras 29-30)

"29. My learned Brother has referred to the expression "if not already availed of' referred to in the judgment in Sanjay Dutt case [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] for arriving at Conclusion 6. According to me, the expression "availed of' does not mean mere filing of application for bail expressing therein willingness of the accused to furnish the bail bond. What will happen if on the 61st day an application for bail is filed for being released on bail on the ground of default by not filing the challan by the 60th day and on the 61st day the challan is also filed by the time the Magistrate is called upon to apply his mind to the challan as well as the petition for grant of bail? In view of the several decisions referred to above and the requirements prescribed by clause (a)(ii) of the proviso read with Explanation I to Section 167(2) of the Code, as no bail bond has been furnished, such an application for bail has to be dismissed because the stage of proviso to Section 167(2) is over, as such right is extinguished the moment the challan is filed.

30. In this background, the expression "availed of' does not mean mere filing of the application for bail expressing thereunder willingness to furnish bail bond, but the stage for actual furnishing of bail bond must reach. If the challan is filed before that, then there is no question of enforcing the right, howsoever valuable or indefeasible it may be, after filing of the challan because thereafter the right under default clause cannot be exercised."

On a careful reading of the aforesaid two paragraphs, we think, the two-Judge Bench in Pragyna Singh Thakur

case [(2011) 10 SCC 445 : (2012) 1 SCC (Cri) 311] has somewhat in a similar matter stated the same. As long as the majority view occupies the field it is a binding precedent. That apart, it has been followed by a three- Judge Bench in Sayed Mohd. Ahmad Kazmi case [(2012) 12 SCC 1 : (2013) 2 SCC (Cri) 488] . Keeping in view the principle stated in Sayed Mohd. Ahmad Kazmi case [(2012) 12 SCC 1 : (2013) 2 SCC (Cri) 488] which is based on three-Judge Bench decision in Uday Mohanlal Acharya case [(2001) 5 SCC 453 : 2001 SCC (Cri) 760] , we are obliged to conclude and hold that the principle laid down in paras 54 and 58 of Pragyna Singh Thakur case [(2011) 10 SCC 445 : (2012) 1 SCC (Cri) 311] (which has been emphasised by us: see paras 42 and 43 above) does not state the correct principle of law. It can clearly be stated that in view of the subsequent decision of a larger Bench that cannot be treated to be good law. Our view finds support from the decision in Union of India v. Arviva Industries India Ltd. [(2014) 3 SCC 159]."

26. Also, in **Syed Mohd. Ahmad Kazmi v. State (Govt. of NCT of Delhi)** (2012) 12 SCC 1, Section 43-D of the UAPA came up for consideration before the Court, in particular the proviso which extends the period for investigation beyond 90 days up to a period of 180 days. An application for default bail had been made on 17.07.2012, as no charge sheet was filed within a period of 90 days of the appellant's custody. The charge sheet in the aforesaid case was filed thereafter on 31.07.2012. Despite the fact that this application was not taken up for hearing before the filing of the charge sheet, this Court held that this since an application for default bail had been filed prior to the filing of the charge sheet the "indefeasible right" spoken of earlier had sprung into action, as a result of which default bail had to be granted.

The Court held:

"25. Having carefully considered the submissions made on behalf of the respective parties, the relevant provisions of law and the decision cited, we are unable to accept the submissions advanced on behalf of the State by the learned Additional Solicitor General Mr Raval. There is no denying the fact that on 17-7-2012, when CR No. 86 of 2012 was allowed by the Additional Sessions Judge and the custody of the appellant was held to be illegal and an application under Section 167(2) CrPC was made on behalf of the appellant for grant of statutory bail which was listed for hearing. Instead of hearing the application, the Chief Metropolitan Magistrate adjourned the same till the next day when the Public Prosecutor filed an application for extension of the period of custody and investigation and on 20-7-2012 extended the time of investigation and the custody of the appellant for a further period of 90 days with retrospective effect from 2-6-2012. Not only is the retrospectivity of the order of the Chief Metropolitan Magistrate untenable, it could not also defeat the statutory right which had accrued to the appellant on the expiry of 90 days from the date when the appellant was taken into custody. Such right, as has been commented upon by this Court in Sanjay Dutt [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] and the other cases cited by the learned Additional Solicitor General, could only be distinguished (sic extinguished) once the charge-sheet had been filed in the case and no application has been made prior thereto for grant of statutory bail. It is well-established that if an accused does not exercise his right to grant of statutory bail

before the charge-sheet is filed, he loses his right to such benefit once such charge-sheet is filed and can, thereafter, only apply for regular bail.

26. The circumstances in this case, however, are different in that the appellant had exercised his right to statutory bail on the very same day on which his custody was held to be illegal and such an application was left undecided by the Chief Metropolitan Magistrate till after the application filed by the prosecution for extension of time to complete investigation was taken up and orders were passed thereupon.

27. We are unable to appreciate the procedure adopted by the Chief Metropolitan Magistrate, which has been endorsed by the High Court and we are of the view that the appellant acquired the right for grant of statutory bail on 17- 7-2012, when his custody was held to be illegal by the Additional Sessions Judge since his application for statutory bail was pending at the time when the application for extension of time for continuing the investigation was filed by the prosecution. In our view, the right of the appellant to grant of statutory bail remained unaffected by the subsequent application and both the Chief Metropolitan Magistrate and the High Court erred in holding otherwise."

27. In a fairly recent judgment reported as **Rakesh Kumar Paul v. State of Assam** (2017) 15 SCC 67, a Three-Judge Bench of this Court referred to the earlier decisions of this Court and went one step further. It was held by the majority judgment of Madan B. Lokur, J. and Deepak Gupta, J. that even an oral application for grant of default bail would suffice, and so long as such application is made before the charge sheet is filed by the police, default bail must be granted. This was stated in Lokur, J.'s judgment as follows:

"37. This Court had occasion to review the entire case law on the subject in Union of India v. Nirala Yadav [Union of India v. Nirala Yadav, (2014) 9 SCC 457 : (2014) 5 SCC (Cri) 212] . In that decision, reference was made to Uday Mohanlal Acharya v. State of Maharashtra [Uday Mohanlal Acharya v. State of Maharashtra, (2001) 5 SCC 453 : 2001 SCC (Cri) 760] and the conclusions arrived at in that decision. We are concerned with Conclusion (3) which reads as follows: (Nirala Yadav case [Union of India v. Nirala Yadav, (2014) 9 SCC 457 : (2014) 5 SCC (Cri) 212] , SCC p. 472, para 24)

""13. (3) On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnishes the bail as directed by the Magistrate.' (Uday Mohanlal case [Uday Mohanlal Acharya v. State of Maharashtra, (2001) 5 SCC 453 : 2001 SCC (Cri) 760] , SCC p. 473, para 13)"

38. This Court also dealt with the decision rendered in Sanjay Dutt [Sanjay Dutt v. State, (1994) 5 SCC 410 : 1994 SCC (Cri) 1433] and noted that the principle laid down by the Constitution Bench is to the effect that if the charge-sheet is not filed and the right for "default bail" has ripened into the status of indefeasibility, it cannot be frustrated by

the prosecution on any pretext. The accused can avail his liberty by filing an application stating that the statutory period for filing the charge-sheet or challan has expired and the same has not yet been filed and therefore the indefeasible right has accrued in his or her favour and further the accused is prepared to furnish the bail bond.

39. This Court also noted that apart from the possibility of the prosecution frustrating the indefeasible right, there are occasions when even the court frustrates the indefeasible right. Reference was made to Mohd. Iqbal Madar Sheikh v. State of Maharashtra [Mohd. Iqbal Madar Sheikh v. State of Maharashtra, (1996) 1 SCC 722 : 1996 SCC (Cri) 202] wherein it was observed that some courts keep the application for "default bail" pending for some days so that in the meantime a charge-sheet is submitted. While such a practice both on the part of the prosecution as well as some courts must be very strongly and vehemently discouraged, we reiterate that no subterfuge should be resorted to, to defeat the indefeasible right of the accused for "default bail" during the interregnum when the statutory period for filing the charge-sheet or challan expires and the submission of the charge-sheet or challan in court.

Procedure for obtaining default bail

40. In the present case, it was also argued by the learned counsel for the State that the petitioner did not apply for "default bail" on or after 4-1-2017 till 24-1-2017 on which date his indefeasible right got extinguished on the filing of the charge-sheet. Strictly speaking, this is correct since the petitioner applied for regular bail on 11-1-2017 in the Gauhati High Court -- he made no specific application for grant of "default bail". However, the application for regular bail filed by the accused on 11-1-2017 did advert to the statutory period for filing a charge-sheet having expired and that perhaps no charge-sheet had in fact being filed. In any event, this issue was argued by the learned counsel for the petitioner in the High Court and it was considered but not accepted by the High Court. The High Court did not reject the submission on the ground of maintainability but on merits. Therefore it is not as if the petitioner did not make any application for default bail -- such an application was definitely made (if not in writing) then at least orally before the High Court. In our opinion, in matters of personal liberty, we cannot and should not be too technical and must lean in favour of personal liberty. Consequently, whether the accused makes a written application for "default bail" or an oral application for "default bail" is of no consequence. The court concerned must deal with such an application by considering the statutory requirements, namely, whether the statutory period for filing a charge- sheet or challan has expired, whether the charge-sheet or challan has been filed and whether the accused is prepared to and does furnish bail.

41. We take this view keeping in mind that in matters of personal liberty and Article 21 of the Constitution, it is not always advisable to be formalistic or technical. The history of the personal liberty jurisprudence of this Court and other constitutional courts includes petitions for a writ of habeas corpus and for other writs being entertained even on the basis of a letter addressed to the Chief Justice or the Court.

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Application of the law to the petitioner

45. On 11-1-2017 [Rakesh Kumar Paul v. State of Assam, 2017 SCC OnLine Gau 573] when the High Court dismissed the application for bail filed by the petitioner, he had an indefeasible right to the grant of "default bail" since the statutory period of 60 days for filing a charge-sheet had expired, no charge-sheet or challan had been filed against him (it was filed only on 24-1-2017) and the petitioner had orally applied for "default bail". Under these circumstances, the only course open to the High Court on 11-1-2017 was to enquire from the petitioner whether he was prepared to furnish bail and if so then to grant him "default bail" on reasonable conditions. Unfortunately, this was completely overlooked by the High Court.

46. It was submitted that as of today, a charge-sheet having been filed against the petitioner, he is not entitled to "default bail" but must apply for regular bail -- the "default bail" chapter being now closed. We cannot agree for the simple reason that we are concerned with the interregnum between 4-1-2017 and 24-1-2017 when no charge-sheet had been filed, during which period he had availed of his indefeasible right of "default bail". It would have been another matter altogether if the petitioner had not applied for "default bail" for whatever reason during this interregnum. There could be a situation (however rare) where an accused is not prepared to be bailed out perhaps for his personal security since he or she might be facing some threat outside the correction home or for any other reason. But then in such an event, the accused voluntarily gives up the indefeasible right for default bail and having forfeited that right the accused cannot, after the charge- sheet or challan has been filed, claim a resuscitation of the indefeasible right. But that is not the case insofar as the petitioner is concerned, since he did not give up his indefeasible right for "default bail" during the interregnum between 4-1-2017 and 24-1-2017 as is evident from the decision of the High Court rendered on 11-1-2017 [Rakesh Kumar Paul v. State of Assam, 2017 SCC OnLine Gau 573] . On the contrary, he had availed of his right to "default bail" which could not have been defeated on 11-1-2017 and which we are today compelled to acknowledge and enforce.

47. Consequently, we are of the opinion that the petitioner had satisfied all the requirements of obtaining "default bail" which is that on 11-1-2017 he had put in more than 60 days in custody pending investigations into an alleged offence not punishable with imprisonment for a minimum period of 10 years, no charge-sheet had been filed against him and he was prepared to furnish bail for his release, as such, he ought to have been released by the High Court on reasonable terms and conditions of bail.

xxx xxx xxx

49. The petitioner is held entitled to the grant of "default bail" on the facts and in the circumstances of this case. The trial Judge should release the petitioner on "default bail" on such terms and conditions as may be reasonable. However, we make it clear that this does not prohibit or otherwise prevent the arrest or re-arrest of the petitioner on cogent grounds in respect of the subject charge and upon arrest or re-arrest, the petitioner is entitled to petition for grant of regular bail which application should be considered on its own merit. We also make it clear that this will not impact on the arrest of the petitioner in any other case."

28. Deepak Gupta, J. in his concurring opinion agreed with Lokur, J. as follows:

"82. The right to get "default bail" is a very important right. Ours is a country where millions of our countrymen are totally illiterate and not aware of their rights. A Constitution Bench of this Court in Sanjay Dutt [Sanjay Dutt v. State, (1994) 5 SCC 410 : 1994 SCC (Cri) 1433] has held that the accused must apply for grant of "default bail". As far as Section 167 of the Code is concerned, Explanation I to Section 167 provides that notwithstanding the expiry of the period specified (i.e. 60 days or 90 days, as the case may be), the accused can be detained in custody so long as he does not furnish bail. Explanation I to Section 167 of the Code reads as follows:

"Explanation I.--For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in para (a), the accused shall be detained in custody so long as he does not furnish bail."

This would, in my opinion, mean that even though the period had expired, the accused would be deemed to be in legal custody till he does not furnish bail. The requirement is of furnishing of bail. The accused does not have to make out any grounds for grant of bail. He does not have to file a detailed application. All he has to aver in the application is that since 60/90 days have expired and charge-sheet has not been filed, he is entitled to bail and is willing to furnish bail. This indefeasible right cannot be defeated by filing the charge-sheet after the accused has offered to furnish bail.

xxx xxx xxx

86. I agree and concur with the conclusions drawn and directions given by learned Brother Lokur, J. in paras 49 to 51 of his judgment."

P.C. Pant, J., however, dissented holding:

"113. The law laid down as above shows that the requirement of an application claiming the statutory right under Section 167(2) of the Code is a prerequisite for the grant of bail on default. In my opinion, such application has to be made before the Magistrate for enforcement of the statutory right. In the cases under the Prevention of Corruption Act or other Acts where Special Courts are constituted by excluding the jurisdiction of the Magistrate, it has to be made before such Special Court. In the present case, for the reasons discussed, since the appellant never sought default bail before the court concerned, as such is not entitled to the same."

A conspectus of the aforesaid decisions would show that so long as an application for grant of default bail is made on expiry of the period of 90 days (which application need not even be in writing) before a charge sheet is filed, the right to default bail becomes complete. It is of no moment that the Criminal Court in question either does not dispose of such application before the charge sheet is filed or disposes of such application wrongly before such charge sheet is filed. So long as an application has been made for default bail on expiry of the stated period before time is further extended to the maximum period of 180 days, default bail, being an indefeasible right of the accused under the first proviso to Section 167(2), kicks in and must be granted.

29. On the facts of the present case, the High Court was wholly incorrect in stating that once the challan was presented by the prosecution on 25.03.2019 as an application was filed by the Appellant on 26.03.2019, the Appellant is not entitled to default bail. First and foremost, the High Court has got the dates all wrong. The application that was made for default bail was made on or before 25.02.2019 and not 26.03.2019. The charge sheet was filed on 26.03.2019 and not 25.03.2019. The fact that this application was wrongly dismissed on 25.02.2019 would make no difference and ought to have been corrected in revision. The sole ground for dismissing the application was that the time of 90 days had already been extended by the learned Sub-Divisional Judicial Magistrate, Ajnala by his order dated 13.02.2019. This Order was correctly set aside by the Special Court by its judgment dated 25.03.2019, holding that under the UAPA read with the NIA Act, the Special Court alone had jurisdiction to extend time to 180 days under the first proviso in Section 43-D(2)(b). The fact that the Appellant filed yet another application for default bail on 08.04.2019, would not mean that this application would wipe out the effect of the earlier application that had been wrongly decided. We must not forget that we are dealing with the personal liberty of an accused under a statute which imposes drastic punishments. The right to default bail, as has been correctly held by the judgments of this Court, are not mere statutory rights under the first proviso to Section 167(2) of the Code, but is part of the procedure established by law under Article 21 of the Constitution of India, which is, therefore, a fundamental right granted to an accused person to be released on bail once the conditions of the first proviso to Section 167(2) are fulfilled. This being the case, we set aside the judgment of the High Court. The Appellant will now be entitled to be released on "default bail" under Section 167(2) of the Code, as amended by Section 43-D of the UAPA. However, we make it clear that this does not prohibit or otherwise prevent the arrest or re-arrest of the petitioner on cogent grounds, and upon arrest or re-arrest, the petitioner is entitled to petition for the grant of regular bail which application should be considered on its own merit. We also make it clear that this judgement will have no impact on the arrest of the petitioner in any other case.

30. The appeal is, accordingly, allowed, and the impugned judgement of the High Court is set aside. "

13. Further, the Hon'ble Apex Court in the case of **Saravanan vs State represented by the Inspector of Police (Criminal Appeal Nos.681-682 of 2020, arising from S.L.P. (Criminal) Nos.4386/4387/2020)**, decided on 15.10.2020, was pleased to observe in paragraph 8 and 9 as under:

"8.We have heard the learned counsel for the respective parties at length.

The short question which is posed for the consideration of this Court is, whether while releasing the appellant accused on default bail/statutory bail under Section 167(2), Cr.P.C., any condition of deposit of amount as imposed by the High Court, could have been imposed?

9. Having heard the learned counsel for the respective parties and considering the scheme and the object and purpose of default bail/statutory bail, we are of the opinion that the High Court has

committed a grave error in imposing condition that the appellant shall deposit a sum of Rs.8,00,000/while releasing the appellant on default bail/statutory bail. It appears that the High Court has imposed such a condition taking into consideration the fact that earlier at the time of hearing of the regular bail application, before the learned Magistrate, the wife of the appellant filed an affidavit agreeing to deposit Rs.7,00,000/. However, as observed by this Court in catena of decisions and more particularly in the case of Rakesh Kumar Paul (supra), where the investigation is not completed within 60 days or 90 days, as the case may be, and no chargesheet is filed by 60th or 90th day, accused gets an "indefeasible right" to default bail, and the accused becomes entitled to default bail once the accused applies for default bail and furnish bail. Therefore, the only requirement for getting the default bail/statutory bail under Section 167(2), Cr.P.C. is that the accused is in jail for more than 60 or 90 days, as the case may be, and within 60 or 90 days, as the case may be, the investigation is not completed and no chargesheet is filed by 60th or 90th day and the accused applies for default bail and is prepared to furnish bail. No other condition of deposit of the alleged amount involved can be imposed. Imposing such condition while releasing the accused on default bail/statutory bail would frustrate the very object and purpose of default bail under Section 167(2), Cr.P.C. As observed by this Court in the case of Rakesh Kumar Paul (supra) and in other decisions, the accused is entitled to default bail/statutory bail, subject to the eventuality occurring in Section 167, Cr.P.C., namely, investigation is not completed within 60 days or 90 days, as the case may be, and no chargesheet is filed by 60th or 90th day and the accused applies for default bail and is prepared to furnish bail."

14. Thus, in view of the observation made above and following the law as laid down by the Hon'ble Apex Court in Bikramjit Singh (supra), the right to default bail are not mere statutory rights under the first proviso to Section 167(2) of the Code, but is part of the procedure established by law under Article 21 of the Constitution of India, which is, therefore, a fundamental right granted to an accused person to be released on bail once the conditions of the first proviso to Section 167(2) are fulfilled.

15. I am in respectful agreement with the above view taken by the Hon'ble Apex Court.

16. Thus, considering the facts of the case that the application for default bail was filed prior to the filing of the charge-sheet, I am of the view that the applicant was entitled to be enlarged on default bail and non-grant of default bail and the rejection of the application for grant of default bail by the court below was wholly untenable in law. Therefore, the impugned order dated 03.06.2020 passed by the court below is hereby set aside.

17. Accordingly, the application under Section 482 CrPC is **allowed**. The applicant namely **Chhotu** is directed to be released on default bail under Section 167(2) CrPC on executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions :-

(1) The applicant will not make any attempt to tamper with the prosecution evidence in any manner whatsoever.

(2) The applicant will personally appear on each and every date fixed in the

court below and his personal presence shall not be exempted unless the court itself deems it fit to do so in the interest of justice.

(3) The applicant shall cooperate in the trial sincerely without seeking any adjournment.

(4) The applicant shall not indulge in any criminal activity or commission of any crime after being released on bail.

(5)The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad or certified copy issued from the Registry of the High Court, Allahabad.

(6) The concerned Court/Authority/Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing

18. It may be observed that in the event of any breach of the aforesaid conditions, the court below shall be at liberty to proceed for the cancellation of applicant's bail.

19. It is clarified that the observations, if any, made in this order are strictly confined to the disposal of the default bail under Section 167(2) CrPC and must not be construed to have any reflection on the ultimate merits of the case.

20. However, this Court makes it clear that this order does not prohibit or otherwise prevent the arrest or rearrest of the applicant on cogent grounds, in respect of the subject charge and in that event, the applicant will have to move a regular bail application for grant of bail which of course will be considered on its own merits. It is also made clear that this judgment/order shall have no impact on the arrest of the applicant in any other case.

(2020)12ILR A191
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.11.2020

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 No. 12724 of 2020

Babu Khan ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Jai Prakash Prasad

Counsel for the Opp. Parties:
A.G.A.

Criminal Law - Code of Criminal Procedure, 1973- Section 482- Scope of- Contention of the complaint was in corroboration, with evidence, collected by the Magistrate, during enquiry. There was sufficient ground for passing of impugned summoning order and the Magistrate was well within its jurisdiction to pass impugned summoning order. The factual aspect, being argued before this Court, is not to be seen by the Court, in exercise of its inherent jurisdiction, under Section 482 of Cr.P.C. - This Court, in exercise of inherent power, under Section 482 of Cr.P.C., is not expected to make analytic analysis of factual aspects because the same is a question, to be gone into, during course of trial, by the Trial court.

In the exercise of its inherent jurisdiction u/s 482 of the Cr.Pc , the factual aspects of the case cannot be looked into as the same is to be

considered in the course of trial by leading evidence.

Criminal Application rejected. (Para 6,7) (E-3)

Judgements/ Case law relied upon:-

1. St. of A.P Vs Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844

2. Hamida Vs Rashid, (2008) 1 SCC 474

3. Monica Kumar Vs St. of U. P, (2008) 8 SCC 781

4. Popular Muthiah Vs State, Rep. by Inspr. of Police, (2006) 7 SCC 296

5. Dhanlakshmi Vs R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494

6. St. of Bih. Vs Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This Application, under Section 482 of Code of Criminal Procedure, 1973, has been filed by the Applicant, Babu Khan, with a prayer for setting aside impugned summoning order, dated 6.6.2019, passed by the Additional Chief Judicial Magistrate, Court no.4, Aligarh, whereby, applicant has been summoned in Criminal Complaint Case No.12, New No.30 of 2018 (Shamsher vs. Babu Khan), under Section 138 of Negotiable Instrument Act In short N.I. Act), Police Station Quarsi, District Aligarh,, pending in the court of Additional Chief Judicial Magistrate, IV, Aligarh.

2. Learned counsel for applicant argued that in response to the notice given by the complainant, a reply, in detail, denying alleged issuance of cheque was given by the applicant, but, it was written in the complaint and affidavit, filed, in support thereof, that no reply of notice was there, which was utterly wrong and even then impugned summoning order has been passed, which was under abuse of process of law. Hence, for avoiding abuse of process of law, this Application, under Section 482 of Cr.P.C., has been filed, with above prayer.

3. Learned AGA, representing State of U.P., has vehemently opposed this Application.

4. Having heard learned counsel for both sides and gone through the impugned order as well as complaint filed before the Chief Judicial Magistrate, Aligarh, it is apparent that a complaint for offence punishable, under Section 138 of N.I. Act, of Police Station Quarsi, District Aligarh, was filed in the court of Chief Judicial Magistrate, being Complaint Case No.12 of 2018, by Shamsher against Babu Khan, with this contention that both of them were under acquaintance. On 15.6.2015, Rupess Three Lakhs and Fifty Thousand and on 20.6.2017, Rupees Two Lakhs, in all Rupees Five Lakhs and Fifty thousand, was taken by Babu Khan, for purchasing a house and solemnising marriage of his daughter and this money was paid by the complainant from the amount obtained by sale of his house, situated at Delhi. Subsequently, money was demanded back, but, it was not paid back. Ultimately, a cheque, dated 24.11.2017, bearing no. 085984, of Account No.50394686687 of Allahabad Bank, for Rupees Five Lakh and Fifty Thousand was issued in favour of complainant, Shamsher. It was assured to be honoured by the Bank, concerned, if deposit made on 24.11.2017. This was presented for its payment, but, was dishonoured by the Bank, vide its Bank Memo, dated 30.11.2017. A notice,

through counsel, was issued to Opposite party, but, even after service, no compliance was there. Hence, offence, punishable, under Section 138 of N.I. Act was made out and as such a prayer for punishment was made.

5. Learned Magistrate registered it as a complaint case and examined the complainant, under Section 200 of Cr.P.C., by way of affidavit, documentary evidence, original Cheque No. 085984, for Rupees Five Lakh and Fifty thousand, dated 24.11.2017, with its return memo of dishonour and notice issued through counsel, with its postal receipt, was filed and the contention in oral statement was in corroboration with the contention of the complaint, which stood further corroborate by documentary evidence, as above. Hence, a notice, dated 11.12.2017 was issued, which was served and within stipulated period, after non payment of the amount, within fifteen days, this complaint was filed on 4.1.2018. Hence, impugned summoning order, dated 6.6.2019, was passed, whereby, Babu Khan, applicant herein, was summoned for offence, punishable, under Section 138 of Negotiable Instrument Act.

6. Thus, contention of the complaint was in corroboration, with evidence, collected by the Magistrate, during enquiry. There was sufficient ground for passing of impugned summoning order, as above, and the Magistrate was well within its jurisdiction to pass impugned summoning order. The factual aspect, being argued before this Court, is not to be seen by the Court, in exercise of its inherent jurisdiction, under Section 482 of Cr.P.C.

7. Hence, under all above facts and circumstances, this Court, in exercise of inherent power, under Section 482 of Cr.P.C., is not expected to make analytic analysis of factual aspects because the same is a question, to be gone into, during course of trial, by the Trial court.

8. Apex Court, in **State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844**, has propounded that *"While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court"*. In another subsequent judgment, in the case of **Hamida v. Rashid, (2008) 1 SCC 474**, Hon'ble Apex Court propounded that *"Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice*". In again yet another judgment, in the case of **Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781,** the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." While interpreting this jurisdiction of High Court Apex Court, in the case of **Popular Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296,** has propounded *"High Court can exercise jurisdiction suo motu in the interest of*

justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings".

9. Regarding prevention of abuse of process of Court, Apex Court, in the case of **Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494,** has propounded *"To prevent abuse of the process of the Court, High Court, in exercise of its inherent powers under section 482, could quash the proceedings, but, there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive"* as well as in the case of **State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1,** Apex Court propounded *"In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not".*Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above.

10. In view of what has been discussed above, this Application, under Section 482 of Cr.P.C., merits **dismissal** and it stands dismissed accordingly.

(2020)12ILR A194
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.11.2020

BEFORE

THE HON'BLE DEEPAK VERMA, J.

Application U/S 482 No. 13126 of 2020

Smt. Asha ...Applicant
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Sri Raghuraj Kishore

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

Criminal Law- Code of Criminal Procedure, 1973- Section 311- The power conferred under Section 311 Cr.P.C. must be invoked by the Court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection- The powers under Section 311 Cr.P.C. is the discretion or the obligation of the Court to summon or recall a witness, but this discretion of the Court cannot be forced to be used by the accused or the prosecution. Applicant here is sister of deceased, who is not the informant nor the witness in the case and prosecution has examined P.W.1, who is real brother and eye witness of the deceased. In application, no reason has been given as to why earlier, application for examination of witness has not been moved and what is relevancy of his examination. The prosecution was given much opportunity to produce evidence and prosecution examined all the witness to whom he wanted to be examined but when Hon'ble High Court passed the order for expedite the trial then to linger on the case, moved present application under Section 311 Cr.P.C. It is well settled law that under Section 311 Cr.P.C. cannot be invoked mere to fill up lacuna of the case but to fair and just decision of the case.

No indefeasible right accrues to the prosecution or the defence for examining a witness u/s 311 of the Cr.Pc, as the said power is the discretion of the Court which must be exercised for the just decision of the case and not for allowing the prosecution to fill up the lacunae in its case or for delaying the trial.

Criminal Application rejected. (Para 17) (E-3)

Judgements/ Case laws cited :-

1. Shailendra Kumar Vs St. of Bih, AIR 2002 Supreme Court 270 (cited)

2. Hanuman Ram Vs St. of Raj. & ors. 2009 (64) ACC 895

3. Vijay Kumar Vs St. of U.P & ors. (2011) 11 SCR Page 893

4. Darya Singh & ors. Vs St. of Punj., AIR 1965 SC 328

5. Moirangthem Tomba Singh Vs St. of Manipur, 1984 Cr.L.J. 536

6. Natasha Singh Vs C.B.I., 2013 (2) UPCr.R 605

(Delivered by Hon'ble Deepak Verma, J.)

1. Learned AGA has filed counter affidavit today, which is kept on record.

2. Learned counsel for the applicant refused to file rejoinder affidavit.

3. Heard learned counsel for the applicant, learned A.G.A. for the State and perused the record.

4. This application under Section 482, Cr.P.C. has been filed to quash the order dated 24.02.2020 passed by Additional Sessions Judge, Court No.3, Saharanpur in S.T. No.605 of 2015, Crime No.169 of 2014 filed under Sections 147, 148, 149, 302, 120-B I.P.C., Police Station Kotwali, District Saharanpur.

5. It is contended by learned counsel for the applicant that F.I.R. was lodged by brother of the deceased, namely, Sanjai on 02.05.2014 at 02:30 pm registered as Case Crime No.169 of 2014, under Sections 147, 148, 149, 302, 120-B I.P.C. alleged therein that deceased Arvind @ Sheri, who was shot dead while he was driving his Activa Scooty. The Investigating Officer submitted that during trial, informant Sanjai Badhawa (eyewitness) had been examined as P.W. 1. Investigating Officer submitted his charge-sheet in which he has shown 34 witnesses. Rahul Kumar son of Virendra, R/o H/20 Numaish Camp Kotwali, Saharanpur is named as witness at Serial No.13 in charge sheet. He further submitted that witness-Rahul in his statement recorded under Section 61 Cr.P.C. has stated and supported the prosecution story but inadvertently the prosecution could not examine him during trial and, therefore, the applicant moved an application under Section 311 Cr.P.C. on 24.02.2020 to examine the Rahul in the case. He next submitted that in entire case except Rahul, all other witnesses are of conspirator are of formal in nature. The application under Section 311 Cr.P.C. is not to fill up the lacuna to strengthen the prosecution case or it will cause prejudice to the defence in any manner.

6. Learned counsel for the applicant has placed reliance over para 9 and 11 of the judgment of Hon'ble Apex Court passed in the case of **Shailendra Kumar Vs. State of Bihar, AIR 2002 Supreme Court 270**, para 9 and 11 are as follows:

9. In our view, in a murder trial it is sordid and repulsive matter that without informing the police station officer-in-charge, the matters are proceeded by the Court and by the APP and tried to be disposed of as if the prosecution has not led any evidence. From the facts stated above, it appears that accused wants to frustrate the prosecution by unjustified means and it appears that by one way or the other the Additional Sessions Judge as well as the APP have not taken any interest in

discharge of their duties. It was the duty of the Sessions Judge to issue summons to the investigating officer if he failed to remain present at the time of trial of the case. The presence of investigating officer at the time of trial is must. It is his duty to keep the witnesses present. If there is failure on part of any witness to remain present, it is the duty of the Court to take appropriate action including issuance of bailable/non-bailable warrants as the case may be. It should be well understood that prosecution cannot be frustrated by such methods and victims of the crime cannot be left in lurch.

11. Bare reading of the aforesaid section reveals that it is of very wide amplitude and if there is any negligence, latches or mistakes by not examining material witnesses, the Courts function to render just decision by examining such witnesses at any stage is not, in any way, impaired. This Court in Rajendra Prasad Vs. Narcotic Cell [(1999) 6 SCC 110] observed, After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.

7. Per contra, learned AGA opposed the submission of learned counsel for the applicant and contended that charge-sheet No.92 of 2014 was submitted on 23.07.2014 in the present case in which there was 36 witnesses were recorded. The first informant Sanjai (brother of deceased) was at Serial No.1 and the name of witness-Rahul Kumar placed at Serial No.13 and Sanjai (P.W. 1) is eyewitness of the present case. During investigation he was recorded, as such, he is witness in the case but further submitted that it is well settled law that during trial the prosecution can examine as many as witnesses as it deem fit. In the present case 11 prosecution witnesses have been examined and proceedings under Section 313 Cr.P.C. had already been recorded and prosecution evidence has been closed and case had been fixed for argument. He further submitted that the present applicant is not the informant nor eye witness in the proceedings and application filed by him is not showing cogent reason to persuade the trial court to exercise its power under Section 311 Cr.P.C. Moresoever, the applicant-Smt. Asha is merely a pairokar/sister of deceased and she is not first informant of the present case. The first informant has already been examined by the trial court and he claimed himself to be an eye witness and is real brother of the deceased. He further submitted that prosecution had produced 11 witnesses in the present case to prove its case and case is fixed for argument. It is well settled law that under Section 311 Cr.P.C. cannot be invoked mere to fill up any lacuna. He further informed the Court that while rejecting the third bail of the accused-Sunny @ Cheeda this Court vide order dated 18.01.2018 directed the trial court to expedite the trial of the present case and conclude the same within a period of eight months from the said date. Again while rejecting the fourth bail application No.43588 of 2019 of accused Sunny @ Cheeda this Court vide order dated 13.12.2019 again directed to expedite the trial and conclude the same within a period of two months from the date of production of certified copy of the order and the impugned order passed by trial court is just and proper and based upon consideration of each and every aspect and order does not suffer from any irregularities or illegality.

8. The Section 311 Cr.P.C. are reproduced herein below:

"311. Power to summon material witness or examine person present - *Any Court may, at any stage of*

any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."

9. A bare perusal of Section goes to show that it is divided in two parts. In the first part, the word used is "may" and thereby giving jurisdiction to the Court to pass order as per its discretion and the second part uses the word "shall" which makes obligatory for the Court to pass such order. The provision of Section 311 Cr.P.C., thus, first is a supplementary provisions enabling and in certain circumstances imposition on the Court with the duty of examining a material witness who could not brought before it. It is couched in the widest possible terms and clause for non limitation either with regard to the stage of the trial nor with regard to the manner, it should be exercised.

10. It is true that the power of the Court under Section 311 Cr.P.C. is of a very wide in nature but in what manner such power should be exercised has been a matter of discretion before the superior Courts.

11. In the case of **Hanuman Ram vs. State of Rajasthan and others 2009 (64) ACC 895,** the Hon'ble the Apex Court has laid down as to what is the object of the Section 311 Cr.P.C and how the discretion provides thereunder should be exercised. Para 6 of the judgment reads as follows:

"The object underlying section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the Court to summon a witness under the section merely because the evidence supports the case for the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers Court to issue summons to any witness at any stage of such proceedings, trial or enquiry. In section 311 the significant expression that occurs is "at any stage of inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as wide the power the greater is the necessity for application of judicial mind."

12. Again in the case of **Vijay Kumar vs State of U.P and others (2011) 11 SCR Page 893**, the Hon'ble the Apex Court has held as follows:

"It is hardly needs to be emphasized that power under Section 311 should be exercised for the just decision of the case. The wide discretion conferred on the court to summon a witness must be exercised judicially, as wider the power, the greater is the necessity for application of the judicial mind. Whether to exercise the power or not would largely depend upon the facts and circumstances of each case. As is provided in the Section, power to

summon any person as a witness can be exercised if the court forms an opinion that the examination of such a witness is essential for just decision of the case."

At another place of the same judgment the following observation has been made by Hon'ble the Apex Court:

"Though Section 311 confers vast discretion upon the court and is expressed in the widest possible terms, the discretionary power under the said Section can be invoked only for the ends of justice. Discretionary power should be exercised consistently with the provisions of the Code of and the principles of criminal law. The discretionary power conferred under Section 311 has to be exercised judicially for reasons stated by the Court and not arbitrarily or capriciously. Before directing the learned Special Judge to examine."

The Apex Court while upholding as above observed that in the application to recall the witnesses, no specific reasons were mentioned as to how the examination of the witnesses proposed to be summoned was necessary and arrived at the conclusion and after discretion that the power under section 311 of the Code of Criminal Procedure 1973 were exercised arbitrarily by the Court."

13. In **Darya Singh and others Vs. State of Punjab, AIR 1965 SC 328** a Full Bench of the Apex Court has held as under:-

"In our opinion, this argument is entirely misconceived. It is well settled that in a murder case, it is primarily for the prosecutor to decide which witnesses he should examine in order to unfold his story. It is obvious that a prosecutor must act fairly and honestly and must never adopt the device of keeping back from the Court eye-witnesses only because their evidence is likely to go against the prosecution case. The duty of the prosecutor is to assist the court in reaching a proper conclusion in regard to the case which is brought before it for trial. It is no doubt open to the prosecutor not to examine witnesses who, in his opinion have not witnessed the incident, but normally he ought to examine all the eye-witnesses in support of his case. It may be that if a large number of persons have witnessed the incident, it would be open to the prosecutor to make a selection of those witnesses, but the selection must be made fairly and honestly and not with a view to suppress inconvenient witnesses from the witness-box. If at the trial it is shown that persons who had witnessed the incident have been deliberately kept back, the Court may draw an inference against the prosecution and may, in a proper case, regard the failure of the prosecutor to examine the said witnesses as constituting a serious infirmity in the proof of the prosecution case. In such a case if the ends of justice require, the Court may even examine such witnesses by exercising its power under Section 540; but to say that in every murder case, the Court must scrutinise the police diary and make a list of witnesses whom the prosecutor must examine is virtually to suggest that the Court should itself take the role of a prosecutor. The powers of the Court under Sectino 540 can and ought to be exercised in the interests of justice whenever the Court feels that the interests of justice so require, but that does not justify Mr. Bhasin's contention that the failure of the Court to have exercised its power under Section 540 has introduced a serious infirmity in the trial itself."

14. In **Moirangthem Tomba Singh Vs. State of Manipur, 1984 Cr.L.J. 536** it has been observed as under:-

"That apart as submitted by the learned public prosecutor, reviewing on the decision Darya Singh v. State of Punjab (AIR 1965 SC 328) : 1965 (1) Cri LJ 350). The duty of the prosecution is normally to examine all the eye-witnesses but if the selection was made fairly and honestly and not with a view to suppress inconvenient witness from the witness box no adverse inference could be drawn against the prosecution."

15. The Hon'ble Apex Court in the case of **Natasha Singh Vs. C.B.I.**, reported in **2013 (2) UPCr.R 605,** has stated that the scope and object of the provision is to enable the Court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 Cr.P.C. must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred under Section 311 Cr.P.C. must therefore, be invoked by the Court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection.

16. From perusal of Hon'ble Apex Court judgment cited by applicant's counsel it is very much clear that fact of the case is entirely different from the present factual disputes.

17. The powers under Section 311 Cr.P.C. is the discretion or the obligation of the Court to summon or recall a witness, but this discretion of the Court cannot be forced to be used by the accused or the prosecution. While considering the present case it is clear that on behalf of the deceased sister an application under Section 311 Cr.P.C. had been moved in which no ground at all were brought forward as to why the witness needs to be summoned for examination whereas P.W.1 who is eye witness has been examined and cross examined. Applicant here is sister of deceased, who is not the informant nor the witness in the case and prosecution has examined P.W.1, who is real brother and eye witness of the deceased. There are 36 witnesses whose statements have been recorded by Investigating Officer. All are not required to be examined. Prosecution has to consider which witness has to be produced and to be examined. Out of 36 witness, 11 prosecution witnesses have been examined and prosecution evidence have been closed. The Hon'ble High Court while rejecting bail application of accused, directed the court below to conclude the trial expeditiously within a period of two months from the date of production of certified copy of this order. In application, no reason has been given as to why earlier, application for examination of witness has not been moved and what is relevancy of his examination. The prosecution was given much opportunity to produce evidence and prosecution examined all the witness to whom he wanted to be examined but when Hon'ble High Court passed the order for expedite the trial then to linger on the case, moved present application under Section 311

Cr.P.C. It is well settled law that under Section 311 Cr.P.C. cannot be invoked mere to fill up lacuna of the case but to fair and just decision of the case.

18. In the end, I do not find any illegality in the impugned order requiring any interference by this Court in exercise of inherent power under Section 482 Cr.P.C. and consequently, the prayer for quashing the impugned order dated 24.02.2020 passed by Additional Sessions Judge, Court No.3, Saharanpur in S.T. No.605 of 2015, Crime No.169 of 2014 filed under Sections 147, 148, 149, 302, 120-B I.P.C., Police Station Kotwali, District Saharanpur is refused.

19. The present 482 Application lacks merit and is accordingly, **dismissed**.

(2020)12ILR A200
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.11.2020

BEFORE

THE HON'BLE SUNEET KUMAR, J.

Application U/S 482 No. 13226 of 2020

S.K. Srivastava, IRS(Retd.) ...Applicant
Versus
C.B.I. & Ors. ...Respondents

Counsel for the Applicant:
Sri Shashi Dhar Shukla

Counsel for the Opp. Parties:
A.S.G.I., Sri Ravi Prakash, Sri Sanjay Kumar Yadav, Sanjeev Kumar Pandey

Criminal Law - Indian Penal Code, 1860- Section 120B – Section 34- Section 109- Distinction between- The most important ingredient of the offence "criminal conspiracy" is the agreement between two or more persons to do an illegal act or an act not illegal by illegal means - Section 34 embodies the joint liability in doing a criminal act, the essence of the act being the existence of common intention, participation in the commission of the offence in furtherance of the common intention invites its application. On the other hand Section 109 may be attracted even if the abettor is not present when the offence abetted is committed provided that he has instigated the commission of the offence or has engaged one or more persons in a conspiracy to commit an offence and pursuant to that conspiracy some act or illegal omission takes place or has intentionally aided the commission of an offence by an act or illegal omission.

Where Section 34 talks about joint liability in doing a criminal act with meeting of minds with a common intention, Section 109 makes out an offence of conspiracy where there is abetment , intentional aid or instigation to do the offence and the presence of the abettor is not necessary at the time of commission of the offence.

Criminal Law - Code of Criminal Procedure, 1973- Section 482- It is settled principle of law that at the stage of framing of charge, in proceedings under Section 482 Cr.P.C., it is not open for the Court to enter into the sufficiency of the evidence in order to appreciate the documents and the statements in support of the charge- It is not a case where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused. Further, the criminal proceedings is not manifestly attended with mala fide and/or the proceedings maliciously instituted with an ulterior motive against the applicant merely performing appellate power in the backdrop of the allegations and evidences. It is well established proposition of law that a criminal prosecution, if otherwise justifiable and based upon adequate evidence does not suffer on account of mala fide or vendetta of the complainant. The evidence and the surrounding circumstances taken on face

value constitute commission of the offence under Section 120B, 420 IPC and Section 7 of Prevention of Corruption Act, 1988, against the applicant and co-accused.

The Court cannot appreciate the evidence and go into the factual aspects at the stage of framing charge u/s 482 Cr.Pc and it is to be seen only whether the commission of the offence is made out or not on the basis of the uncontroverted allegations made in the FIR and the evidence collected during the course of the investigation and as to whether the criminal proceedings are manifestly instituted with malafides and vendetta.

Criminal Application rejected. (Para 22, 24, 25, 26) (E-3)

Case Law / Judgements relied upon:-

1. Anil Mahajan Vs Bhor Industries Ltd. & ors. (2005) 10 SCC 228

2. Kehar Singh Vs State (Delhi Administration), (1988) 3 SCC 609

3. Noor Mohammad Mohd. Yusuf Momin Vs St. of Maha., 1971 AIR 885

4. Mohd. Akbar Dar Vs St. of J & K, AIR 1981 SC 1548

5. Radhey Shyam Vs Kunj Behari & ors. AIR 1990 SC 121

6. St. of Har. & ors. Vs Ch. Bhajan Lal & ors. 1992 AIR 604

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

Order on Application Nos. Nil of 2020 filed under Chapter XXII Rule 1 of High Court Rules

During the course of argument the said applications has not been pressed by learned counsel for the applicant, accordingly, the applications are dismissed as not pressed.

Order on Application under Section 482 Cr.P.C.

1. On the matter being taken up, Shri Ravi Prakash, learned counsel appearing for Central Bureau of Investigation (for short "C.B.I.') submits that baseless and derogatory allegations have been made in the petition, as well as, in the rejoinder affidavit filed by the applicant against several persons including him.

2. It is urged that the allegations taken on face value are scandalous and contemptuous. It is submitted that contempt proceedings be initiated against the applicant.

3. On specific query, learned counsel submits that no application for drawing contempt proceedings against the applicant has been filed, but submits that the Court suo moto take notice of the scandalous pleadings.

4. Be that as it may, the Court is not inclined to enter into the controversy without there being a formal application to that effect. However, disposal of the instant petition would not preclude the learned counsel for the C.B.I. or any other aggrieved person from raising the issue and seeking remedy in an appropriate proceedings in accordance with law. The matter is kept open.

5. By the instant application filed under Section 482 of Code of Criminal Procedure (for short "Cr.P.C.'), the applicant seeks the following reliefs:

"i. To set aside & quash the order dated 14.2.2020 of learned Special Judge, Anti Corruption, CBII, Ghaziabad by which

the cognizance has been taken by the Court in the matter of CBI RC 1202019A0004 dated 4.7.2019 filed by the CBI.

ii. To also set aside & quash the Chargesheet dated 14.2.2020 under Section 120B & 420 IPC, 1860 r.w. Section 7 of the Prevention of Corruption Act, 1988 & which has been forwarded by I.O., ACB, CBI, Ghaziabad in CBI RC1202019A0004 dated 4.7.2019.

iii. To grant Ad-interim ex-parte stay of proceedings in CBI RC No. 1202019A0004 dated 4.7.2019 u/s 120B & 420 IPC, 1860 & Section 7 of P.C. Act, 1988 & to further grant Ad-interim Ex-parte stay on all the consequential proceedings initiated or bring initiated based upon CBI RC No. 1202019A0004 dated 4.7.2019 & Chargesheet.

iv. To summon the records of the Trial Court of the present case."

6. The applicant/accused is challenging the charge-sheet, cognizance order and the consequential proceedings arising therefrom.

7. The facts, for the purposes of the case, briefly stated, is that the C.B.I. registered a regular case on the written complaint of Director General of Income Tax (Vigilance) on directions of the Commissioner, Central Vigilance Commission, New Delhi, dated 1 July 2019. The allegation against the applicant, a (compulsory) retired official while posted as Commissioner Income Tax (Appeals) (for short "CIT(A)-I'), with additional charge of CIT(A)-II Noida, during December 2018 to 11 June 2019, indulged in acts of omission and commission adverse to the interest of revenue. It is further alleged that the orders passed by the applicant in the capacity of an appellate authority were antedated i.e. after his retirement on 11 June 2019. The orders were uploaded on the ITBA system after demitting office. The investigation further reveals falsification of records; it is further alleged that during this period 13 appeals was decided by the applicant in conspiracy with co-accused Anil Kumar (Chartered Accountant), which were beyond the jurisdiction of CIT(A) Noida. These appeals fall within the jurisdiction of CIT(A) Ghaizabad. It is alleged that the appellate orders were procured orders for extraneous consideration. The applicant never held the charge of CIT(A) Ghaziabad during the period September 2018 to 11 June 2019.

8. Learned counsel appearing for the applicant submits that applicant being a quasi judicial authority, exercising appellate jurisdiction, under the statutory provisions was competent to decide the appeals, both on the subject matter and jurisdiction; there is no evidence on record to show that the orders passed in the appeals were procured for extraneous considerations; proper notice was given to the assessees in all the appeals, the notices have been brought on record; the appeals were decided on merit after due notice to the concerned official of the department. The learned counsel has drawn the attention of the Court to various orders and circulars of the department in particular circulars dated 30 December 2019 and 31 December 2019 to submit that applicant had jurisdiction to hear and decide the alleged appeals. It is further urged that allegation of calling for records and deciding the appeals is not borne out from the material or any evidence. The appeals were filed through the e-filing system.

9. It is further urged by learned counsel for the applicant that it is a case of

malicious prosecution to harass the applicant; taking the allegations and evidence on face value, the ingredients of the offence against the applicant is not made out. He submits that the proceeding is liable to be quashed being abuse of the process of the Court.

10. In rebuttal, learned counsel appearing for the CBI submits that the ingredients of the offence of cheating, criminal conspiracy and under Section 7 of the Prevention of Corruption Act, 1988, is made out; he further submits that exercise of inherent power of the Court under Section 482 Cr.P.C. is limited, the Court would not enter into the merit or consider the defence being raised by the applicant; it is urged that only a, prima facie, case linking the applicant to the offence has to be examined at the stage of framing of charge.

11. I have heard Shri V.P. Srivastava, learned Senior Counsel, assisted by Shri Shashi Dhar Shukla, learned counsel for the applicant and Shri Ravi Prakash, learned counsel appearing for the C.B.I. and perused the record.

12. In nutshell, allegation against the applicant is that by virtue of his position as appellate authority he dishonestly and fraudulently adjudicated 13 appeals outside his jurisdiction conspiring with the co-accused, thereby, causing wrongful loss at Rs. 7.26 crores to the revenue. The assessment orders in all the appeals was passed by the concerned Income Tax Officer of Ghaziabad. The aggrieved assessees were required to file the appeals within the jurisdiction of CIT(A) Ghaziabad, however, co-accused Anil Kumar (Chartered Accountant) though being fully aware of this fact filed the appeals at CIT Noida. It is alleged that co-accused Anil Kumar entered into criminal conspiracy during the relevant period with the applicant to get the appeals decided, including his and his wife's appeal, thereby, causing loss to the revenue and corresponding wrongful gain to the accused persons.

13. It is further alleged that the dishonest intention is reflected from the evidence in support of the charge that the order-sheet and other records pertaining to the appeals were not maintained, the date of submission of the appeals, the date of last hearing and date of final order and the nature of order passed thereon was not indicated. It is further asserted on the strength of evidence that applicant with dishonest intention did not sent the mandatory notice/intimation to the concerned Assessing Officer in the prescribed form (ITNS-51) enclosing the appeal memo. Without receipt of ITNS-51 duly filled by the concerned Assessing Officer and returned to the CIT appeals, the appeals could not have been heard, neither date could have been fixed for hearing. It is further alleged that the applicant in capacity of appellate authority did not requisition the assessment records from the Assessing Officer.

14. It is further alleged that the applicant framed/manufactured false/incorrect records with an intent to cheat the department to give an impression that hearing had taken place in at least 6 out of 13 appeals. In some of the appeals (viz. assessee Sanjay Mittal), the notice for hearing was sent by speed post on 30 January 2018 fixing 7 January 2019 for hearing. The record of the post office Moradnagar shows that the speed post was served on 3 January 2019. However, the

orders on the said appeal came to be passed on 31 December 2018. It is alleged that acknowledgement slip was not sent with the notice. The appeal of the assessee Sanjay Mittal came to be allowed and disposed of in his favour which was done dishonestly by the applicant. Tax liability at Rs. 67,82,836/- was allowed in favour of the assessee and against the revenue.

15. Further, it is alleged that the circulars of the Central Board of Direct Taxes, New Delhi, was not complied by the applicant by not issuing the appellate orders within 15 days of the order by registered post or through service/circulation without requiring the assessee/appellant to file an application in that regard. The date of hearing was deliberately not mentioned in the order-sheets of any of the 13 appeals, thereby, giving an opportunity to the applicant to antedate such orders, which were uploaded after demitting office. It is alleged that in the 13 appeals applicant caused wrongful loss at Rs. 7.26 crores to the revenue and commensurate wrongful gain to the assessee, co-accused and himself.

16. The record further reveals that during course of investigation on search of the residential premises of the applicant on 5 July 2019 Indian currency at Rs. 16,44,970/- was found from the possession of the applicant which is alleged to be part of the undue financial gain obtained by the accused.

17. The allegations and the material/evidence placed on record, taken on face value, prima facie, make out the ingredients of the offence of criminal conspiracy, cheating and abuse of his position as public servant obtaining undue advantage for wrongful gains and causing wrongful loss to the revenue.

18. The investigation further reveals the circumstances and chain of events pointing towards the dishonest conspiracy. In respect of all 13 appeals no assessment records or miscellaneous records for the assessment year 2015-16 and earlier years were ever called by the applicant at any stage of hearing. It is further revealed during investigation that the appellate orders were typed by a private typist Shri Amar Kumar Das and his wife Smt. Nalni Parva Das who are not employees of the department. Further, one of the typist is class 9th pass and having no knowledge of English language nor of computer, laptop/desktop. The bills raised by the typist were processed on the directions of the applicant.

19. In nutshell, the acts of commission and omission on the part of the applicant in respect of the appeals is that the applicant in connivance with co-accused Anil Kumar, (Chartered Accountant)/assessee entertained and adjudicated the appeals without having jurisdiction; no order-sheet and other records indicating the date of submission of appeal, date of hearings, date of final order and nature of final order in respect of appeals was prepared; the applicant without mandatory intimation to the Assessing Officer and without receipt of ITNS-51, duly filled by the Assessing Officer, the appeals were heard; the assessment records pertaining to the appeals was not summoned from the concerned Assessing Officers; false and manufactured records was created in respect of the appeals to indicate the hearing and disposal of the appeal of the assessees noted therein; some of the appeals has been shown to have been allowed and disposed of in favour of the assessee when it was not at the hearing stage; appellate orders are antedated having passed after the applicant demitting office.

20. In **Anil Mahajan vs. Bhor Industries Ltd. And others 2005 (10) SCC 228**, the Supreme Court observed as under:

"The substance of the complaint is to be seen. Mere use of the expression "cheating" in the complaint is of no consequence."

21. The evidence and the material brought on record, prima facie, establishes that applicant abusing his position as Commissioner (Appeals) entered into criminal conspiracy with co-accused Anil Kumar (Chartered Accountant) as a public servant, obtained undue advantage for extraneous considerations, committed acts of commission and omission with mala fide intentions thereby causing wrongful loss to the department and wrongful gain to the assessees and himself. The evidence and the surrounding circumstances taken on face value constitute commission of the offence under Section 120B, 420 IPC and Section 7 of Prevention of Corruption Act, 1988, against the applicant and co-accused.

22. Section 120B I.P.C. deals with the punishment for criminal conspiracy. The offence of "criminal conspiracy" is defined under Section 120A I.P.C. The most important ingredient of the offence "criminal conspiracy" is the agreement between two or more persons to do an illegal act or an act not illegal by illegal means. (Refer: **Kehar Singh Vs. State (Delhi Administration), (1988) 3 SCC 609).** The offence of conspiracy is complete when two or more conspirators have agreed to do or cause to be done an act which is itself an offence, in which case no overt act need be established. In **Noor Mohammad Mohd. Yusuf Momin Vs. State of Maharashtra, 1971 AIR 885,** the Supreme Court considered and laid down the distinction between Section 34, Section 109 and Section 120B I.P.C. Section 34 embodies the joint liability in doing a criminal act, the essence of the act being the existence of common intention, participation in the commission of the offence in furtherance of the common intention invites its application. On the other hand Section 109 may be attracted even if the abettor is not present when the offence abetted is committed provided that he has instigated the commission of the offence or has engaged one or more persons in a conspiracy to commit an offence and pursuant to that conspiracy some act or illegal omission takes place or has intentionally aided the commission of an offence by an act or illegal omission.

23. Turning to charge under Section 120B I.P.C., criminal conspiracy postulates an agreement between two or more persons to do or cause to be done an illegal act or an act which is not illegal, by illegal means. It differs from the other offences in that mere agreement is made an offence even if no step is taken to carry out the agreement. A conspiracy from its very nature is generally hatched in secret. It is, therefore, extremely rare that direct evidence in proof of conspiracy can be forthcoming. But like other offences criminal conspiracy can be proved by circumstantial evidence. In deed, in most cases proof of conspiracy is largely inferential though the inference must be founded on solid facts, surrounding circumstances and antecedent and subsequent conduct, amongst other factors, constituting relevant material. The agreement of understanding may be proved by necessary implication to do an unlawful act by unlawful means.

24. It is settled principle of law that at the stage of framing of charge, in

proceedings under Section 482 Cr.P.C., it is not open for the Court to enter into the sufficiency of the evidence in order to appreciate the documents and the statements in support of the charge. **(Vide Mohd. Akbar Dar vs. State of Jammu & Kashmir, AIR 1981 SC 1548 & Radhey Shyam vs. Kunj Behari & others AIR 1990 SC 121)**

25. It is not a case where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused. Further, the criminal proceedings is not manifestly attended with mala fide and/or the proceedings maliciously instituted with an ulterior motive against the applicant merely performing appellate power in the backdrop of the allegations and evidences.

26. It is well established proposition of law that a criminal prosecution, if otherwise justifiable and based upon adequate evidence does not suffer on account of mala fide or vendetta of the complainant. (Refer: **State of Haryana and others vs. Ch. Bhajan Lal and others 1992 AIR 604)**

27. Having regard to the facts and circumstances and the material placed on record, I am of the opinion that there is prima facie evidence in support of the charges. The submission of the learned counsel for the applicant that the criminal prosecution does not constitute the ingredients of the offence against the applicant, lacks substance.

28. Learned counsel for the applicant failed to point out any illegality, infirmity or jurisdictional error in the impugned order.

29. The petition being devoid of merit is, accordingly, dismissed.

30. Learned trial court to proceed in accordance with law without being influenced by any observations made in the order.

(2020)12ILR A206
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.12.2020

BEFORE

THE HON'BLE RAVI NATH TILHARI, J.

Application U/S 482 No. 14973 of 2020

Rajesh Kumar & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Sri Sharique Ahmed

Counsel for the Opp. Parties:
A.G.A., Sri Ashish Dubey, Sri Rakesh Dubey, Sri Saiyad Iqbal Ahmed

Criminal Law - Code of Criminal Procedure, 1973- Section 482- Inherent power possessed by the High Court is of wide plenitude, with no statutory restrictions. The limitations imposed on exercise of such power are the self imposed restrictions. Any provision of the Code cannot limit or affect the inherent powers of the High Court. But, this power, being extraordinary, is required to be exercised sparingly, carefully, with caution, and circumspection and only when such exercise is justified by the tests specifically laid down in Section 482 Cr.P.C.

No provisions of the Cr.Pc restrict the inherent powers of the High Court but the said powers are to be exercised sparingly and with caution for securing the ends of justice and for preventing the abuse of the Court.

Criminal Law- Code of Criminal Procedure, 1973- Section 482- Section 320- Section 320 Cr.P.C. does not come in the way of exercise of inherent power of the High Court for quashment of criminal

proceeding. The power of the High Court for quashment of the criminal proceeding is distinct and different from the power given to a criminal Court for compounding the offences under Section 320 of the Code. The proceedings of the offences which are non-compoundable can also be quashed by the High Court in exercise of inherent jurisdiction, on the well settled principles, but sparingly and with caution, forming an opinion, on either of the two objectives of securing the ends of justice and to prevent abuse of the process of any Court. This bar of Section 320 Cr.P.C. is attracted only before the Criminal Court, where the prayer for compounding is made. There, only those offences which have been made compoundable, can be compounded and the offences which are non-compoundable cannot be compounded in view of Sub-Section (9) of Section 320 Cr.P.C.

Section 320 of the Code is not a bar for the exercise of the inherent powers of the High Court. The provisions of Section 320 (9) of the Code operate as a bar only before the trial court where the prayer for compounding of the offences is made.

Criminal Law - Code of Criminal Procedure, 1973- Section 482- Indian Penal Code- Section 376, Section 392- Quashing of proceedings on basis of compromise- In respect of serious offences like murder, rape, dacoity, etc., or other offences of mental depravity under IPC or offences of moral turpitude under special statutes, like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity, the settlement between the offender and the victim can have no legal sanction at all. Any compromise between the victim and the offender in relation to such offences, cannot provide for any basis for quashing the criminal proceedings- Such offences are not private in nature and have a serious impact on society- The offences under Sections 376 and 392 IPC fall in the category of serious and heinous offences. They are treated as crime against the society and not against individual alone and therefore, the criminal proceeding for the offences under these sections having a serious impact on the society, cannot be quashed in exercise of power under Section 482 of the Code on the ground that the parties have resolved their entire dispute among themselves through compromise/settlement- The offences being of "Rape' and "Dacoity' the most heinous offences, the proceedings cannot be quashed on the basis of compromise, irrespective of the stage at which the compromise has been entered, also considering its impact on the society. The stage of entering into compromise is a relevant consideration in proceedings other than those involving serious or heinous offences- It is not in every case where the complainant has entered into a compromise with the accused, there may not be any conviction. In a given case, it may happen that the prosecution still can prove the guilt by leading cogent evidence.

Heinous offences , like murder, rape and dacoity, are not private in nature but are crimes against the society and have a serious impact on the society and therefore the criminal proceedings in such cases cannot be quashed on the basis of compromise between the offender and the victim notwithstanding the stage at which the said compromise has been entered into and it cannot be said that the prosecution cannot prove the guilt of the accused despite the said compromise.

Criminal Application rejected. (Para 21, 36, 48, 49) (E-3)

Judgements / Case law Cited/ relied upon:-

1. B. S. Joshi & ors. Vs St. of Har. & anr., (2003) 4 SCC 67

2. Dimpey Gujral & ors. Vs Union Territory & ors., (2013) 11 SCC 497

3. Gian Singh Vs St. of Punj. & anr., (2012) 10 SCC 303

4. Rahul Vs St. of UK & ors., Crl Misc. Appl. No.249 of 2020, dec. on 20.02.2020

5. Manga Singh Vs St. of Punj. & ors., Crl. Misc. No. M-19131 of 2016, dec. on 01.05.2018, High Court of Punj. & Har.

6. Deepak Vs St. of Har. & ors. CRM-M No. 31825 of 2017, dec. on 19.01.2018, High Court of Punj. & Har.

7. Yogesh Soni Vs St. of Har. & anr., C.R.M.-M No.17999 of 2015, dec. on 05.11.2015, High Court of Punj. & Har.

8. Shubham Shankarlal Tolwan Vs St. of Maha. & ors., Crl. Appl. No. 298 of 2020, dec. on 21.07.2020, High Court of Bombay, Nagpur Bench.

9. Pushpendra Kushwaha Vs St. of U.P. and 2 ors., Appl. u/S 482 No.2095 of 2019, dec. on 24.01.2019

10. Narinder Singh & ors. Vs St. of Punj. & anr., (2014) 6 SCC 466

11. St. of M.P Vs Laxmi Narayan & ors., (2019) 5 SCC 688

12. Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur & ors. Vs St. of Guj. & anr. (2017) 9 SCC 641

13. Social Action Forum For Manav Adhikar & anr. Vs U.O.I & Ors. (2018) 10 SCC 443

14. St. of M.P Vs Dhuruv Gurjar & anr., Crl. Appeal No. 336 of 2019, arising from SLP(Criminal) No.9859 of 2013, dec. on 22.02.2019

15. Shyam Narain Vs State (NCT of Delhi), (2013) 7 SCC 77

16. Shimbhu Vs St. of Har., (2014) 13 SCC 318

17. St. of M.P Vs Madan Lal", (2015) 7 SCC 681

(Delivered by Hon'ble Ravi Nath Tilhari, J.)

1. Heard Sri Sharique Ahmed, learned counsel for the applicants, Sri Ashish Dubey, learned counsel for the opposite party no.2 and Sri Pankaj Sexena, learned AGA appearing for the State and perused the material brought on record.

2. The applicants have filed the present application under Section 482 Code of Criminal Procedure (Code/Cr.P.C.) with the following main prayers:-

"(i) Quash the criminal proceeding of Criminal Complaint Case No.105 of 2017 (Shobha Devi Vs. Veerpal and others), under Sections 392, 504, 506, 376, IPC in respect of applicant no.3 and under Sections 392, 504, 506, IPC in respect of applicant nos. 1, 2 & 4, Police Station-Gursahayganj, District Kannauj, pending before the Additional District Judge, Court No.2, Kannauj, in terms of compromise entered between the parties on 01.02.2020.

(ii) Quash the summoning order dated 27.07.2018 passed by the learned Special Judge (D.A.A.)/Additional Sessions Judge, Court No.2, Kannauj, in Criminal Complaint Case No.105 of 2017 (Shobha Devi Vs. Veerpal and others), under Sections 392, 504, 506, 376, IPC in respect of applicant no.3 and under Sections 392, 504, 506, IPC in respect of applicant nos. 1, 2 & 4, Police Station-Gursahayganj, District Kannauj, in terms of compromise entered between the parties on 01.02.2020."

3. Facts of the case are that the alleged incident took place on 29.05.2017 and again on 04.06.2017 with respect to which the complainant opposite party no.2 filed an application under Section 156(3) Cr.P.C. on 07.06.2017, registered as a Complaint Case No.105 of 2017, under Sections 392, 504, 506, 376, IPC, Police Station Gursahaiganj, District Kannauj, in the Court of learned 4th Additional District & Session Judge/ Special Judge Dacoiti, Kannauj, inter alia on the averments that the applicant nos. 1, 2 and 3 are known criminals, and for last several months the applicant no.3 Veerpal was trying to outrage her modesty and tried to commit rape on her. The applicant nos.1, 2 and 3 forcibly entered in the house of the complainant on 29.05.2017 around 6.00

P.M. and committed 'marpeet' with her husband, and also assaulted the son of the complainant by knife. They received injuries. The applicants threatened the complainant that in case she did not compromise the pending matters, she and her entire family would be killed. On 04.06.2017 the applicants again entered forcibly in the house of the complainant having country made pistol in their hand; they started abusing her; committed loot in her house and the applicant no.3 committed rape upon her and also snatched jewelry and tried to strangulate the complainant's neck.

4. The Magistrate proceeded with the complaint, recorded the statement of the complainant/opposite party no.2 under Section 200 Cr.P.C. and of her witnesses Ram Prakash and Shiva Yadav under Section 202 Cr.P.C. The Magistrate took cognizance on 27.08.2017 and passed the summoning order, whereby the applicant nos. 1, 2 and 4 were summoned under Sections 392, 504, 506, IPC and the applicant no.3 was summoned under Sections 392, 504, 506, and 376, IPC, to face the trial.

5. The applicants have further submitted that on 29.05.2017 the complainant/opposite party no.2 and her family members committed marpeet with the mother of the applicants in which she received injuries. After the incident, one NCR was lodged by the mother of the applicant nos. 1, 2 and 3 on 29.05.2017 itself. The opposite party no.2 and her family members again committed incident dated 30.07.2017 with respect to which the applicant no.4 filed a complaint under Sections 427, 452, 323, 504, 506, 395, 354, 376, IPC, against the opposite party no.2 and her family members registered as Complaint Case No.156 of 2017 (Smt. Renu Vs. Sarvesh and others), in which the statements of the complainant under Section 200 Cr.P.C. and of the witnesses under Section 202 Cr.P.C. were recorded and the matter was pending at the stage of summoning.

6. Earlier, the applicants approached this Court in Criminal Misc. Application under Section 482 No.32985 of 2018(Veerpal and 3 others Vs. State of U.P. and another), for quashing of the entire proceedings of the same Complaint Case No.105 of 2017, aforesaid, on merits, but this prayer for quashment of proceedings was refused by this Court by order dated 20.09.2018.

7. Learned counsel for the applicants submits that during pendency of the proceedings of the complaint case, due to intervention of some respectable members of the society and family members, the parties have entered into compromise on 01.02.2020, which was duly notarized on 13.02.2020, Annexure No.-5; whereby it has been settled between the parties that three cases pending in different Courts at Kannauj, shall be withdrawn/all possible help would be extended to withdraw those cases, and for quashment of the proceedings thereof. The details of those case are as under:-

"(1) S.T. No.105 of 2017, under Section 392, 504, 506, 376, IPC, Police Station Gursahayganj, District Kannauj (Present Case) filed by the opposite party no.2 against the applicants.

(2) Complaint Case No.156 of 2017, under Sections 427, 452, 323, 504, 506, 395, 354, 376, IPC, Police Station Gursahayganj, District Kannauj, filed by the applicant no.4 against the husband and

other family members of opposite party no.2.

(3) NCR No.0184 of 2017, under Sections 323, 504, IPC, Police Station Gursahayganj, District Kannauj, in which police had submitted charge sheet in the court of C.J.M., Kannauj."

8. Sri Sharique Ahmed, learned counsel for the applicants has submitted that as both the parties have amicably settled all their disputes, under no fraud, fear, influence, coercion or force or compulsion, the proceedings of the Complaint Case No.105 of 2017, mentioned above, be quashed, by this Court under Section 482 Cr.P.C. He has submitted that the offences are private/personal in nature and would not disturb the public at large nor are against the State. The settlement has been arrived at the initial stage i.e. the stage of summoning and in view thereof the chances of conviction of the applicants are also remote, as no witness would be coming forward to depose against the applicants.

9. Learned counsel for the applicants has placed reliance on the judgment of the Hon'ble Supreme Court in the case of **"B. S. Joshi and others Vs. State of Haryana and another",** (2003) 4 SCC 67; **"Dimpey Gujral and others Vs. Union Territory and others"**, (2013) 11 SCC 497; **"Gian Singh Vs. State of Panjab and another"**, (2012) 10 SCC 303; in support his contention, that, to prevent the abuse of the process of the Court, the proceedings of the complaint case filed against the applicants deserve to be quashed, in the exercise of inherent jurisdiction to secure the ends of justice.

10. Sri Sharique Ahmed, learned counsel for the applicants has further submitted that the proceedings of the criminal cases in respect of the offences under Sections 376 and 392 IPC can also be quashed on the basis of settlement between the parties. He has placed reliance upon the judgment of this Court, in the case of **"Pushpendra Kushwaha Vs. State of U.P. and 2 others"** Application under Section 482 No.2095 of 2019, decided on 24.01.2019, and has contended that in the said case the proceedings of sessions trial, under Sections 363, 366, 376, IPC and Section 3/4 of Protection of Children from Sexual Offences Act, were quashed by this Court on the basis of compromise/settlement.

11. Reliance has also been placed on the judgments of different High Courts, in the cases of **"Rahul Vs. State of Uttarakhand and others",** Criminal Misc. Application No.249 of 2020, decided on 20.02.2020, by the High Court of Uttarakhand; **"Manga Singh Vs. State of Panjab and others"**, Criminal Misc. No. M-19131 of 2016, decided on 01.05.2018, by the High Court of Punjab and Haryana at Chandigarh; **"Deepak Vs. State of Haryana and others"** CRM-M No. 31825 of 2017, decided on 19.01.2018, by the High Court of Punjab and Haryana at Chandigarh; **"Yogesh Soni Vs. State of Haryana and another"**, C.R.M.-M No.17999 of 2015, decided on 05.11.2015, by the High Court of Punjab and Haryana at Chandigarh; and **"Shubham Shankarlal Tolwan Vs. State of Maharastra and others"**, Criminal Application No. 298 of 2020, decided on 21.07.2020, by the High Court of Bombay, Nagpur Bench, Nagpur; where, the proceedings were also with respect to offence under Section 376 IPC, but the same were quashed, on the basis of the compromise/settlement arrived at by the parties.

12. Sri Ashish Dubey, learned counsel for the opposite party no.2 has submitted that the compromise dated 01.02.2020 was entered into which was notarized on 13.02.2020, by which the parties have amicably settled all their dispute, out of their free will, without any force and as such the proceedings of the complaint case be quashed by this Court, on the basis of the compromise.

13. Learned counsel for both the parties submit that as the proceedings of the criminal case can be quashed, the compromise may be sent to the court of learned magistrate where the complaint case is pending for its verification.

14. Sri Pankaj Sexena, learned AGA appearing for the State has opposed the prayer for quashing of the proceedings of the complaint case on the basis of the compromise. He submits that some of the offences, are non- compoundable and heinous as well; they are not private/personal in nature, affecting only the individuals but they have impact on the society; they are wrong to the society and as such neither the offences can be compounded nor the proceedings can be quashed on the basis of compromise. Learned AGA has placed reliance on the judgments of Hon'ble the Supreme Court in the cases of **"Gian Singh Vs. State of Panjab and another"**, (2012) 10 SCC 303; **"Narinder Singh and others Vs. State of Panjab and another"**, (2014) 6 SCC 466", and **"State of Madhya Pradesh Vs. Laxmi Narayan and others"**, 2019 (5) SCC 688.

15. I have considered the submissions advanced by the learned counsel for the parties and also perused the material on record.

16. The short question which requires consideration is, whether in the exercise of jurisdiction under Section 482 Cr.P.C. the proceedings of the complaint case involving an offence of Rape punishable under Section 376 and Dacoity punishable under Section 392, IPC can be quashed in view of the compromise entered into by the parties ? and if the answer to this question is in affirmative, Whether the proceedings of the complaint case in question, deserve to be quashed, in the exercise of inherent jurisdiction, on the considerations which have been well settled ?

17. Section 482 Cr.P.C. which provides for saving of inherent powers of High Court, reads as under:- "Saving of inherent powers of High Court. Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

18. The inherent power of the Courts set up by the Constitution is a power that inheres in such Courts being Court of record. This power is vested by the Constitution itself, inter-alia, under Article 215 of the Constitution of India. Every High Court has inherent power to act ex-debito justitiae to do real and substantial justice, for the administration of which alone it exists or to prevent the abuse of the process of the Court. Section 482 Cr.P.C. saves inherent powers of the High Court and it starts with non-obstante clause "Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary." The inherent power can be exercised under Section 482 Cr.P.C. (i) to

give effect to an order under the Code; (ii) to prevent abuse of the process of Court; and (iii) to otherwise secure the ends of justice.

19. This inherent power possessed by the High Court is of wide plenitude, with no statutory restrictions. The limitations imposed on exercise of such power are the self imposed restrictions. Any provision of the Code cannot limit or affect the inherent powers of the High Court. But, this power, being extraordinary, is required to be exercised sparingly, carefully, with caution, and circumspection and only when such exercise is justified by the tests specifically laid down in Section 482 Cr.P.C. If there is any specific provision in the statute for redressal of grievance, the High Court, ordinarily, refuses to invoke the extraordinary powers, and also, in a situation with respect to the matter where there is a specific bar of law engrafted in the statute. The paramount consideration to the exercise of this power is to prevent the abuse of the process of the Court. If any abuse of the process leading to injustice is brought to the notice of the Court, then the Court would be justified in preventing injustice by invoking inherent powers in absence of any specific provision in the statute.

20. Section 320 (1) of the Code provides for compounding of certain offences punishable under Indian Penal Code (IPC) specified in first two columns of the Table, given there under, by the persons mentioned in the third Column of the table. Sub-Section (2) of Section 320 of the Code, further provides for compounding of certain offences punishable under Indian Penal Code specified in the first two columns by the persons specified in the third column of the table given under Sub-section (2), with the permission of the Court before which any prosecution for such offence is pending. Subsection (9) of Section 320, specifically provides that, "No offence shall be compounded except as provided by this Section" i.e. Section 320 of the Code.

21. Section 320 Cr.P.C. does not come in the way of exercise of inherent power of the High Court for quashment of criminal proceeding. The power of the High Court for quashment of the criminal proceeding is distinct and different from the power given to a criminal Court for compounding the offences under Section 320 of the Code. The inherent power of the High Court is neither restricted nor controlled by Section 320 of the Code. The proceedings of the offences which are non-compoundable can also be quashed by the High Court in exercise of inherent jurisdiction, on the well settled principles, but sparingly and with caution, forming an opinion, on either of the two objectives of securing the ends of justice and to prevent abuse of the process of any Court. This bar of Section 320 Cr.P.C. is attracted only before the Criminal Court, where the prayer for compounding is made. There, only those offences which have been made compoundable, can be compounded and the offences which are non-compoundable cannot be compounded in view of Sub-Section (9) of Section 320 Cr.P.C.

22. In **B.S. Joshi & Ors. Vs. State of Haryana & Another, "***(2003) 4 SCC 675"* the Hon'ble Supreme Court has held that if for the purpose of securing the ends of justice, quashing of F.I.R becomes necessary, section 320 Cr.P.C. would not be a Bar to the exercise of power of quashing. It is, however, a different matter depending on facts and circumstances of each case,

whether to exercise or not, such a power. The High Court in exercise of its inherent powers can quash criminal proceedings or F.I.R or complaint and Section 320 Cr.P.C. does not limit or affect the powers under Section 482 Cr.P.C. Paragraph nos. 8, 10, 11 and 15 of **B. S. Joshi (Supra)** case are being reproduced as under:-.

"8. It is, thus, clear that Madhu Limaye case [(1977) 4 SCC 551 : 1978 SCC (Cri) 10] does not lay down any general proposition limiting power of quashing the criminal proceedings or FIR or complaint as vested in Section 482 of the Code or extraordinary power under Article 226 of the Constitution of India. We are, therefore, of the view that if for the purpose of securing the ends of justice, quashing of FIR becomes necessary, Section 320 would not be a bar to the exercise of power of quashing. It is, however, a different matter depending upon the facts and circumstances of each case whether to exercise or not such a power.

10. In State of Karnataka v. L. Muniswamy [(1977) 2 SCC 699 : 1977 SCC (Cri) 404] considering the scope of inherent power of quashing under Section 482, this Court held that in the exercise of this wholesome power, the High Court is entitled to quash proceedings if it comes to the conclusion that the ends of justice so require. It was observed that in a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice and that the ends of justice are higher than the ends of mere law though justice had got to be administered according to laws made by the legislature. This Court said that the compelling necessity for making these observations is that without a proper realization of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction. On facts, it was also noticed that there was no reasonable likelihood of the accused being convicted of the offence. What would happen to the trial of the case where the wife does not support the imputations made in the FIR of the type in question. As earlier noticed, now she has filed an affidavit that the FIR was registered at her instance due to temperamental differences and implied imputations. There may be many reasons for not supporting the imputations. It may be either for the reason that she has resolved disputes with her husband and his other family members and as a result thereof she has again started living with her husband with whom she earlier had differences or she has willingly parted company and is living happily on her own or has married someone else on the earlier marriage having been dissolved by divorce on consent of parties or fails to support the prosecution on some other similar grounds. In such eventuality, there would almost be no chance of conviction. Would it then be proper to decline to exercise power of quashing on the ground that it would be permitting the parties to compound non-compoundable offences? The answer clearly has to be in the "negative". It would, however, be a different matter if the High Court on facts declines the prayer for quashing for any valid reasons including lack of bona fides.

11. In Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre [(1988) 1 SCC 692 : 1988 SCC (Cri) 234] it was held that while exercising inherent power of quashing under Section

482, it is for the High Court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. Where, in the opinion of the court, chances of an ultimate conviction are bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may, while taking into consideration the special facts of a case, also quash the proceedings.

15. In view of the above discussion, we hold that the High Court in exercise of its inherent powers can quash criminal proceedings or FIR or complaint and Section 320 of the Code does not limit or affect the powers under Section 482 of the Code."

23. In **"Gian Singh Vs. State of Punjab and Another (2012) 10 SCC 303",** the Constitution Bench of the Hon'ble Supreme Court has held as under, in paragraph nos. 51, 52, 53, 54, 55, 56, 57 and 58, which are being reproduced.

"51. Section 320 of the Code articulates public policy with regard to the compounding of offences. It catalogues the offences punishable under IPC which may be compounded by the parties without permission of the court and the composition of certain offences with the permission of the court. The offences punishable under the special statutes are not covered by Section 320. When an offence is compoundable under Section 320, abatement of such offence or an attempt to commit such offence or where the accused is liable under Section 34 or 149 IPC can also be compounded in the same manner. A person who is under 18 years of age or is an idiot or a lunatic is not competent to contract compounding of offence but the same can be done on his behalf with the permission of the court. If a person is otherwise competent to compound an offence is dead, his legal representatives may also compound the offence with the permission of the court. Where the accused has been committed for trial or he has been convicted and the appeal is pending, composition can only be done with the leave of the court to which he has been committed or with the leave of the appeal court, as the case may be. The Revisional Court is also competent to allow any person to compound any offence who is competent to compound. The consequence of the composition of an offence is acquittal of the accused. Sub-section (9) of Section 320 mandates that no offence shall be compounded except as provided by this section. Obviously, in view thereof the composition of an offence has to be in accord with Section 320 and in no other manner.

52. The question is with regard to the inherent power of the High Court in quashing the criminal proceedings against an offender who has settled his dispute with the victim of the crime but the crime in which he is allegedly involved is not compoundable under Section 320 of the Code.

53. Section 482 of the Code, as its very language suggests, saves the inherent power of the High Court which it has by virtue of it being a superior court to prevent abuse of the process of any court or otherwise to secure the ends of justice. It begins with the words, "nothing in this Code" which means that the provision is an overriding provision. These words leave no manner of doubt that none of the provisions of the Code limits or restricts the inherent power. The guideline for exercise of such power is provided in Section 482 itself i.e. to prevent abuse of the process of any court

or otherwise to secure the ends of justice. As has been repeatedly stated that Section 482 confers no new powers on the High Court; it merely safeguards existing inherent powers possessed by the High Court necessary to prevent abuse of the process of any court or to secure the ends of justice. It is equally well settled that the power is not to be resorted to if there is specific provision in the Code for the redress of the grievance of an aggrieved party. It should be exercised very sparingly and it should not be exercised as against the express bar of law engrafted in any other provision of the Code.

54. In different situations, the inherent power may be exercised in different ways to achieve its ultimate objective. Formation of opinion by the High Court before it exercises inherent power under Section 482 on either of the twin objectives, (i) to prevent abuse of the process of any court, or (ii) to secure the ends of justice, is a sine qua non.

55. In the very nature of its constitution, it is the judicial obligation of the High Court to undo a wrong in course of administration of justice or to prevent continuation of unnecessary judicial process. This is founded on the legal maxim quando lex aliquid alicui concedit, conceditur et id sine qua res ipsa esse non potest. The full import of which is whenever anything is authorised, and especially if, as a matter of duty, required to be done by law, it is found impossible to do that thing unless something else not authorised in express terms be also done, may also be done, then that something else will be supplied by necessary intendment. Ex debito justitiae is inbuilt in such exercise; the whole idea is to do real, complete and substantial justice for which it exists. The power possessed by the High Court under Section 482 of the Code is of wide amplitude but requires exercise with great caution and circumspection.

56. It needs no emphasis that exercise of inherent power by the High Court would entirely depend on the facts and circumstances of each case. It is neither permissible nor proper for the court to provide a straitjacket formula regulating the exercise of inherent powers under Section 482. No precise and inflexible guidelines can also be provided.

57. Quashing of offence or criminal proceedings on the ground of settlement between an offender and victim is not the same thing as compounding of offence. They are different and not interchangeable. Strictly speaking, the power of compounding of offences given to a court under Section 320 is materially different from the quashing of criminal proceedings by the High Court in exercise of its inherent jurisdiction. In compounding of offences, power of a criminal court is circumscribed by the provisions contained in Section 320 and the court is guided solely and squarely thereby while, on the other hand, the formation of opinion by the High Court for quashing a criminal offence or criminal proceeding or criminal complaint is guided by the material on record as to whether the ends of justice would justify such exercise of power although the ultimate consequence may be acquittal or dismissal of indictment.

58. Where the High Court quashes a criminal proceeding having regard to the fact that the dispute between the offender and the victim has been settled although the offences are not compoundable, it does so as in its opinion, continuation of criminal proceedings will be an exercise in futility and justice in the case demands that the dispute between the parties is put to an end and peace is restored; securing the ends of justice being the ultimate guiding factor. No doubt, crimes are acts which have harmful effect on the public

and consist in wrongdoing that seriously endangers and threatens the well-being of the society and it is not safe to leave the crime-doer only because he and the victim have settled the dispute amicably or that the victim has been paid compensation, yet certain crimes have been made compoundable in law, with or without the permission of the court. In respect of serious offences like murder, rape, dacoity, etc., or other offences of mental depravity under IPC or offences of moral turpitude under special statutes, like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity, the settlement between the offender and the victim can have no legal sanction at all. However, certain offences which overwhelmingly and predominantly bear civil flavour having arisen out of civil, mercantile, commercial, financial, partnership or such like transactions or the offences arising out of matrimony, particularly relating to dowry, etc. or the family dispute, where the wrong is basically to the victim and the offender and the victim have settled all disputes between them amicably, irrespective of the fact that such offences have not been made compoundable, the High Court may within the framework of its inherent power, quash the criminal proceeding or criminal complaint or FIR if it is satisfied that on the face of such settlement, there is hardly any likelihood of the offender being convicted and by not quashing the criminal proceedings, justice shall be casualty and ends of justice shall be defeated. The above list is illustrative and not exhaustive. Each case will depend on its own facts and no hard-and-fast category can be prescribed."

24. In **Gian Singh(Supra)** the Hon'ble Supreme Court summed up the position in para no. 61, as under:-

"61.The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz.: (i) to secure the ends of justice, or (ii) to prevent abuse of the process of any court. In what cases power to quash the criminal proceeding or complaint or FIR may be exercised where the offender and the victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have a serious impact on society. Similarly, any compromise between the victim and the offender in relation to the offences under special statutes like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity, etc.; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and predominatingly civil flavour stand on a different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically

private or personal in nature and the parties have resolved their entire dispute. In this category of cases, the High Court may quash the criminal proceedings if in its view, because of the compromise between the offender and the victim, the possibility of conviction is remote and bleak and continuation of the criminal case would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and the wrongdoer and whether to secure the ends of justice, it is appropriate that the criminal case is put to an end and if the answer to the above question(s) is in the affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding."

25. In **"Narinder Singh and Others Vs. State of Punjab and Another (2014) 6 SCC 466",** the Ho'nble Supreme Court discussed in detail as to under what circumstances the High Court should accept the settlement between the parties and quash the proceedings and under what circumstances it should refrain from doing so. This judgment laid down certain principles for guidance of the High Court in giving adequate treatment to the settlement between the parties and in exercising its inherent powers under section 482 of the Code. Paragraph no. 29 of the judgment reads as under:-

"29. In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:

29.1. Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.

29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:

(i) ends of justice, or

(ii) to prevent abuse of the process of any court.

While exercising the power the High Court is to form an opinion on either of the aforesaid two objectives.

29.3. Such a power is not to be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for the offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.

29.4. On the other hand, those criminal cases having overwhelmingly and predominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore are to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delicate parts of the body, nature of weapons used, etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the latter case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge-sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come to a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already

been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime."

26. In **"Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and others Vs. State of Gujrat and another"** (2017) 9 SCC 641 the Hon'ble Apex Court again summarised and laid down principles which emerged from the precedents on the subject, in paragraph no.16 of the judgment, which is as follows:-

"16. The broad principles which emerge from the precedents on the subject, may be summarised in the following propositions :

16.1 Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court;

16.2 The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

16.3 In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

16.4 While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

16.5 The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

16.6 In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

16.7 As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

16.8 Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

16.9 In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

16.10 There is yet an exception to the principle set out in propositions 16.8 and 16.9, above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

27. In **"Parbatbhai Aahir (Supra)**, the Hon'ble Supreme Court held that the High Court was justified in declining to entertain the application for quashing the FIR in exercise of its inherent jurisdiction, as the case involved extortion, forgery, conspiracy, fabrication of documents, utilization of fabricated documents to effectuate transfers of title before the registering authorities and deprivation of the complainant therein of his interest in land on the basis of a fabricated power of attorney, and consequently it was not in the interest of the society to quash the FIR on the ground that a settlement had been arrived at with the complainant. Such offences could not be construed to be merely private or civil disputes but implicated the societal interest in prosecuting serious crime.

28. In **"Social Action Forum For Manav Adhikar and Another Vs. Union of India and Others"** 2018 (10) SCC 443, the Hon'ble Supreme Court reiterated that a criminal proceeding with respect to offence which is non-compoundable can be quashed by the High Court under section 482 Cr.P.C. When settlements take place, then both the parties can file a Petition under section 482 Cr.P.C and the High Court, considering bona-fide of the Petition shall dispose of the same, keeping in view the law laid down in Gian Singh (Supra).

29. In **"State of Madhya Pradesh Vs. Laxmi Narayan and others"**, reported in 2019 (5) SCC 688, the Hon'ble Supreme Court, again held that the power to quash the criminal proceedings in exercise of power under Section 482 of the Code is not to be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Paragraph 15 of **Laxmi Narayan (Supra)** is being reproduced as under:-

"15. Considering the law on the point and the other decisions of this Court on the point, referred to hereinabove, it is observed and held as under:-

15.1) That the power conferred under Section 482 of the Code to quash the criminal proceedings for the non-compoundable offences under Section 320 of the Code can be exercised having overwhelmingly and predominantly the civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes and when the parties have resolved the entire dispute amongst themselves;

15.2) Such power is not to be exercised in those prosecutions which

involved heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society;

15.3) Similarly, such power is not to be exercised for the offences under the special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender;

15.4) Offences under Section 307 IPC and the Arms Act etc. would fall in the category of heinous and serious offences and therefore are to be treated as crime against the society and not against the individual alone, and therefore, the criminal proceedings for the offence under Section 307 IPC and/or the Arms Act etc. which have a serious impact on the society cannot be quashed in exercise of powers under Section 482 of the Code, on the ground that the parties have resolved their entire dispute amongst themselves. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to framing the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delicate parts of the body, nature of weapons used etc. However, such an exercise by the High Court would be permissible only after the evidence is collected after investigation and the charge sheet is filed/charge is framed and/or during the trial. Such exercise is not permissible when the matter is still under investigation. Therefore, the ultimate conclusion in paragraphs 29.6 and 29.7 of the decision of this Court in the case of Narinder Singh (supra) should be read harmoniously and to be read as a whole and in the circumstances stated hereinabove;

15.5) While exercising the power underSection 482 of the Code to quash the criminal proceedings in respect of non-compoundable offences, which are private in nature and do not have a serious impart on society, on the ground that there is a settlement/compromise between the victim and the offender, the High Court is required to consider the antecedents of the accused; the conduct of the accused, namely, whether the accused was absconding and why he was absconding, how he had managed with the complainant to enter into a compromise etc.

30. In **Laxmi Narayan(Supra),** the High Court had quashed the criminal proceedings for the offences under Section 307 and 34 IPC on the basis of settlement machanically and even when the investigation was under process and some how, the accused managed to enter into a compromise with the complainant and sought quashing of the FIR on the basis of a settlement. In was held that the allegations were serious in nature. Fire arms was used in the commission of the offence. Considereing the gravity of the offence and the conduct of the accused his antecedents, queshment of the FIR on the basis of settlement was held as not sustainable in the eye of law.

31. In **"State of Madhya Pradesh Vs. Dhuruv Gurjar and another"** Criminal Appeal No. 336 of 2019, arising from SLP(Criminal) No.9859 of 2013,

decided on 22.02.2019, the FIR was for the offences under Sections 307, 294, 34 IPC and Section 394 IPC, 11/13 of M.P.D.V.P.K. Act and Section 25/27 of the Arms Act, it was held by the Hon'ble Supreme Court that the offence under Section 307 IPC was not compoundable and was also not a private dispute between the parties interse but was a crime against society and quashing of the proceedings on the basis of the compromise was not permissble. It was further held that it is not in every case where the complainant has entered into a compromise with the accused, there may not be any conviction. In a given case, it may happen that the prosecution still can prove the guilt by leading cogent evidence and examining the other witnesses and the relevant evidence/material, more particularly when the dispute is not a commercial transaction and/or of a civil nature and/or is not a private wrong.

32. Rape is the most morally and physically reprehensible crime in a society, as it is an assault on the body, mind and privacy of the victim. While a murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female. Rape reduces a woman to an animal, as it shakes the very core of her life. Rape is a crime against the entire society and violates the human rights of the victim. Being the most hated crime, rape tantamounts to a serious blow to the supreme honour of a woman, and offends both, her esteem and dignity. It causes psychological and physical harm to the victim, leaving upon her indelible marks.

33. In **"Shyam Narain Vs. State (NCT of Delhi)",** (2013) 7 SCC 77, the Hon'ble Supreme Court observed that respect or reputation of a women in society shows the basic civility of a civilized society. No member of society can afford to conceive the idea that he can create a hallow in the honour of a women. It should be paramount in everyone's mind that, on one hand, the society as a whole cannot preach from the pulpit about social, economic and political equality of the sexes and, on the other, some pervert members of the same society dehumanize the woman by attacking her body and ruining her chastity. It is an assault on the individuality and inherent dignity of a woman with the mindset that she should be elegantly servile to men. Rape is a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a woman and the soul of the society.

34. In **"Shimbhu Vs. State of Haryana"**, (2014) 13 SCC 318, the Hon'ble Supreme Court held that rape is a non compoundable offence and it is an offence against the society and is not a matter to be left for the parties to compromise and settle. Since the Court cannot always be assured that the consent given by the victim in compromising the case is a genuine consent, there is every chance that she might have been pressurized by the convicts or the trauma undergone by her all the years might have compelled her to opt for a compromise. Infact, accepting this proposition will put an additional burden on the victim. The accused may use all his influence to pressurize her for compromise. So, in the interest of justice and to avoid unnecessary pressure/harassment to the victim, it would not be safe in considering the compromise arrived at between the parties in rape cases to be a ground for the court to exercise the discretonery power under proviso to Section 376(2) IPC.

35. In **"State of Madhya Pradesh Vs. Madan Lal"**, (2015) 7 SCC 681, the

Hon'ble Supreme Court held that rape or attempt to rape are crimes against the body of a women which is her own temple. These are the offences which suffocate the breath of life and sully the reputation. Reputation is the richest jewel one can conecive of in life. No one can allow it to be extuiguished. When a human frame is defiled, the "Purest Treasure" is lost. Dignity of a woman is a part of her non-perishable and immortal self and no one should ever think of painting it in clay. There cannot be a compromise or settlement as it would be against her honour which matters the most. Sometimes solace is given that the perpetrator of the crime has acceded to enter into wedlock with her which is nothing but putting pressure in an adroit manner. The Apex Court emphasised that, the Courts are to remain absolutely away from this subterfuge to adopt a soft approach to the case, for any kind of liberal approach has to be put in the compartment of spectacular error. Or to put it differently, it would be in the realm of a sanctuary of error.

36. Thus, it is very well settled that in respect of serious offences like murder, rape, dacoity, etc., or other offences of mental depravity under IPC or offences of moral turpitude under special statutes, like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity, the settlement between the offender and the victim can have no legal sanction at all. Any compromise between the victim and the offender in relation to such offences, cannot provide for any basis for quashing the criminal proceedings. The inherent power is not to be exercised in those prosecutions which involve heinous and serious offences. Such offences are not private in nature and have a serious impact on society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences. The offences under Sections 376 and 392 IPC fall in the category of serious and heinous offences. They are treated as crime against the society and not against individual alone and therefore, the criminal proceeding for the offences under these sections having a serious impact on the society, cannot be quashed in exercise of power under Section 482 of the Code on the ground that the parties have resolved their entire dispute among themselves through compromise/settlement.

37. Rape is an offences against the society. It is not a matter to be left for the parties to compromise and settle. At the cost of repetition, in a case of rape or attempt to rape, the concept of compromise, under no circumstances, can be thought of. The dignity of a woman is a part of her non-perishable and immortal self and no one should ever think of painting it in clay. There cannot be a compromise or settlement against the honour and dignity of a woman which matters the most.

38. Now I proceed to consider the judgments upon which reliance has been placed by learned counsel for the applicants, other than those which have already been considered above.

39. In **Dimpey Gujral (Supra)** the proceedings of criminal case which were quashed on the basis of compromise did not involve any heinous offence under Section 376 IPC. It would be so evident from para-8 of the judgment, which is being reproduced as under:-

"In light of the above observations of this court in Gian Singh,

we feel that this is a case where the continuation of criminal proceedings would tantamount to abuse of process of law because the alleged offences are not heinous offences showing extreme depravity nor are they against the society. They are offences of a personal nature and burying them would bring about peace and amity between the two sides. In the circumstances of the case, FIR No.163 dated 26/10/2006 registered under Section 147, 148, 149, 323, 307, 452 and 506 of the IPC at Police Station Sector 3, Chandigarh and all consequential proceedings arising therefrom including the final report presented under Section 173 of the Code and charges framed by the trial court are hereby quashed."

40. In '**Pushpendra Kushwaha**' (supra), the judgment of this Court, the facts were that the prosecutrix and the accused, initially had love affair, they ran away from their house and solemnized marriage. Later, the prosecutrix implicated the accused in her statement under Section 164 Cr.P.C. and hence he was put to trail. The parties, thereafter entered into compromise outside the court. Under those circumstances it was held that, the dispute between the parties had nothing to do with the public law and order. Such dispute was purely of personal nature and there, the compromise was accepted and the proceedings were quashed. The present is not a case of that nature.

41. In **Rahul (Supra)**, the High Court of Uttarakhand quashed the criminal proceedings, in the interest of the victim, and looking from the angle of her welfare who by that time married the accused The judgment in the case of **Rahul (Supra)**, does not show consideration of the judgment of Hon'ble Supreme Court in the cases of **Shimbhu (Supra)**, and **Madan Lal (Supra)**, in which, it has been clearly held that 'in the cases of rape a compromise cannot be thought of' as well as that "some times solace is given that the perpetrator of the crime has acceded to enter into wedlock with the prosecutrix which is nothing but putting pressure in an adroit manner; and we say with emphasis that the courts are to remain absolutely away from this subterfuge to adopt a soft approach to the case".

42. On facts also this Court finds that in **Rahul(Supra**), the prosecutrix therein had been in consensual physical relationship with the accused who were adult and the FIR was lodged when the accused therein refused to marry the ptosecutrix. Under the said circumstances, it was held that the consensual physical relationship would not constitute an offence under Section 376 IPC, as there was a clear distinction between rape and consensual physical relationship when the parties who were major had married. The present is not a case of consensual sexual relationship between adults', prosecutrix and the accused.

43. In '**Manga Singh**'(supra), the proceedings were quashed on the basis of compromise, keeping in view the peculiar facts of that case, in which the prosecutrix who was major, had solemnized marriage with the accused prior to the registration of the FIR and they were blessed with a son and were living in the matrimonial home in peace and harmony. The complainant, mother of the victim, had accepted that matrimonial alliance. The Punjab & Haryana, High Court considered it just and expedient to allow that petition "without delving on the issue of maintainability of a petition for quashing of an FIR for

offfences punishable under Sections 363, 366-A and 376 IPC on the basis of a compromise".

44. In **'Deepak'** (supra), the High Court of Punjab & Haryana, although held that the offence under Section 376 IPC is a grievous offence and also against the society at large, and that such matters should not be compromised, still it quashed the proceedings of the criminal case on the basis of the compromise, as the settlement was arrived at immediately after the alleged commission of the offence, taking the view that liberal approach should be adopted in accepting the settlement, to quash the criminal proceedings. This Court is of the view that merely because the parties have arrived at a settlement at the initial stages, the criminal proceedings with respect to heinous offences, like rape etc cannot be quashed. Such a consideration is a relevant consideration for quashment of the proceedings which may be quashed on the basis of compromise in exercise of inherent jurisdiction. This Court, with respect, is not in agreement with the judgment in the case of **'Deepak'** (supra), in view of what has been discussed above.

45. The case of **'Shubham Shankarlal Tolwan'** (supra), is not a case under Section 376 IPC or 392 IPC. Besides, no proposition of law has been laid down therein.

46. In **'Yogesh Soni'** (supra) also, the facts were different. There, the accused had solemnized marriage with the prosecutrix, which was registered with the Registrar of Marriages.

47. Thus the cases on which reliance has been placed by learned counsel for the applicants are of no help to the applicants.

48. The submission of the learned counsel for the applicants that, as the settlement has been arrived at the initial stage, at the stage of summoning, and therefore, it should be accepted in view of the guidelines laid down by Hon'ble the Supreme Court in the case of **'Narendra Singh'(Supra),** is misconceived and deserves rejection, in as much as in the present case the offences being of "Rape' and "Dacoity' the most heinous offences, the proceedings cannot be quashed on the basis of compromise, irrespective of the stage at which the compromise has been entered, also considering its impact on the society. The stage of entering into compromise is a relevant consideration in proceedings other than those involving serious or heinous offences. The question of stage of the compromise, i.e. the initial stage, looses significance in proceedings involving heinous offences.

49. The submission of learned counsel for the applicants that there are no chances of conviction or such chances are remote and bleak, as no witness would be coming forward to depose against the applicants in view of the compromise, also deserves rejection, in as much, as in the case of **''Dhuruv Gurjar'(Supra),** the Hon'ble Supreme Court has held that it is not in every case where the complainant has entered into a compromise with the accused, there may not be any conviction. In a given case, it may happen that the prosecution still can prove the guilt by leading cogent evidence and examining the other witnesses and the relevant evidence/material, more particularly when the dispute is not a commercial transaction and/or of a civil nature and/or is not a private wrong. If the offences against the applicants are not proved in trial, they would be acquitted, but it cannot be said, at

this stage, that the prosecution cannot prove the quilt or there may not be any conviction.

50. Further, this Court finds that the application under Section 482 No.32985 of 2018 (Veerpal and 3 others Vs. State of U.P. and another), for quashing of the entire proceedings of the same Criminal Complaint Case No.105 of 2017 (Shobha Devi Vs. Veerpal and others), was dismissed on merits by this Court, vide judgment dated 20.09.2018, and it was thereafter that the compromise has been entered into. As such, the submission that the compromise has taken place at the initial stage cannot be accepted.

51. Any compromise or settlement with respect to the offence of rape, against the honour of a woman, which shakes the very core of her life and tantamounts to a serious blow to her supreme honour, offending both, her esteem and dignity, is not acceptable to this Court.

52. This application/petition under Section 482, for quashment of the proceedings of the complaint case in view of the compromise, deserves to be rejected. It is accordingly, rejected.

53. Learned court below is directed to proceed expeditiously with the said complaint case, in accordance with law, if there is no other legal impediment.

54. No orders as to costs.

55. Let a copy of this judgment be sent to the learned District & Session Judge, Kannauj as well as the court concerned, forthwith.

(2020)12ILR A226
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.11.2020

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 No. 16027 of 2020

Dr. Anju Goswami ....Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Ashutosh Sharma, Sri Rajiv Lochan Shukla

Counsel for the Opp. Parties:
A.G.A.

Criminal Law - Pre-Conception & Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994- This Act was passed under National Policy for maintaining sex ratio and prohibiting misuse of diagnostic techniques for pre-natal sex determination, resulting female foeticide.

The purpose and object of the Act was to prohibit the misuse of pre-natal diagnostic techniques resulting in female foeticide and to make the same a punishable offence.

Criminal Law - Code of Criminal Procedure, 1973- Section 482- This Court in exercise of inherent jurisdiction under Section 482 Cr.P.C. is not to embark upon factual matrix. Rather the same is to be seen by the trial court.

Under the exercise of its inherent powers u/s 482 of the Cr.Pc the Court cannot enter into the factual aspects of the case as the same are to be appreciated only during the course of the trial while leading evidence.

Criminal Law - Code of Criminal Procedure, 1973- Section 190- Anyone can set the criminal law in motion by filing a

complaint before a Magistrate entitled to take cognizance under section 190 and unless any statutory provision prescribes any special qualification or eligibility criteria for putting the criminal law in motion, no Court can decline to take cognizance on the sole ground that the complainant was not competent to file the complaint. But where any special statute prescribes offences and makes any special provision for taking cognizance of such offence under the Statute, the complainant requesting the Magistrate to take cognizance of the offence must satisfy the eligibility criterion prescribed by the statute i.e. the complainant has to satisfy the Magistrate that he is with ability to file the complaint and in case in hand this ability has been given in the first paragraph of the complaint itself. The complainant is Additional Chief Medical Officer/ Nodal Officer, P.C.P.N.D.T., Mathura, duly authorised to file the complaint.

It is settled law that although there are no restrictions in the Cr.Pc on any person to set the wheels of criminal prosecution in motion, but where a special statute prescribes certain provisions regarding the eligibility of the complainant to file a complaint, then the complainant has to satisfy the Magistrate about his eligibility to file such complaint.

Criminal Application rejected. (E-3)

Case law/ judgements relied upon:-

1. St. of A.P Vs Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844

2. Hamida Vs Rashid, (2008) 1 SCC 474

3. Monica Kumar Vs St. of U.P, (2008) 8 SCC 781

4. Popular Muthiah Vs St., Rep.by Inspr. of Police, (2006) 7 SCC 296

5. Dhanlakshmi Vs R. Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494

6. St. of Bih. Vs Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1

7. Vishwa Mitter Vs O.P. Poddar & ors., 1983(20) ACC 367 (SC)

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This application under section 482 Cr.P.C. has been filed by Dr. Anju Goswami against State of U.P. and Dr. Devendra Agarwal, Additional Chief Medical Officer/ Nodal Officer, P.C.P.N.D.T., Mathura, with a prayer for quashing impugned summoning order dated 15.2.2020 as well as entire proceedings of Complaint Case No. 294 of 2020, titled as Dr. Devendra Agarwal Vs. Dr. Upendra Goswami and others, P.S. Kosikalan, District Mathura, pending in the court of C.J.M., Mathura.

2. Learned counsel for applicant argued that a complaint under section 28 of the P.C.P.N.D.T. Act was filed in the Court of C.J.M., Mathura, by Dr. Devendra Agarwal, Additional Chief Medical Officer/ Nodal Officer, P.C.P.N.D.T., Mathura, against Dr. Upendra Goswami, Dr. Anju Goswami and Karmveer @ Rajveer, for offences punishable u/s 3A, 4, 5, 6, 23 and 29 of the P.C.P.N.D.T. Act, P.S. Kosikalan, District Mathura, whereas entire accusation was said to be a raid conducted by Civil Surgeon, Palwal, Haryana, and his team, which was with no jurisdiction to make any such raid of Ultrasound Centre in Mathura, i.e. within the territory of State of U.P. Learned Presiding Judge failed to appreciate this fact that the contention made in the complaint was not of any constitution of offence, as above. The document filed with complaint was Ultrasonography of one Sushma, whereas it was said to be of one Kamla and the same was of one Sushma, whereas no P.C.P.N.D.T. was made by the applicant. Offence against the applicant was not made out. In the like circumstance, in a proceeding u/s 482 Cr.P.C. No. 13522 of 2020

filed by Dr. Upendra Goswami, a coordinate Bench of this court has stayed the further proceedings of the case against Dr. Upendra Goswami till disposal of the application. The matter with regard to present criminal case regarding Dr. Upendra Goswami is pending before this court in above previously instituted proceeding u/s 482 Cr.P.C. and order of the Court has been annexed with the paper book. The notification issued by the State of Haryana constituting a committee of appropriate authority was with a specific mention that the jurisdiction is for the territory of State of Haryana and not for the State of U.P., whereas this complaint was filed by the Additional Chief Medical Officer/ Nodal Officer, P.C.P.N.D.T., Mathura, but no such raid was conducted by any appropriate authority authorised by the State of U.P. for conducting this raid at Mathura. The factual contention was not making out any offence against the applicant. The witnesses are pet witnesses, who have previously taken part in another proceeding of raid under P.C.P.N.D.T. Act. The Apex Court in ***PUCL Vs. Union of India, (1997) 1 SCC 301*** as well as in ***K.S. Puttaswamy Vs. Union of India, (2017) 10 SCC 1*** has propounded that if any procedure is prescribed and given then that is to be determined and allowing defiance of the same will dehorse the fundamental rights, in the administration of criminal law, the ends would justify the means would amount to declaring the Government authorities may violate any directions of the Supreme Court or mandatory statutory rules in order to secure evidence against the citizens. It would lead to manifest arbitrariness and would promote the scant regard to the procedure and fundamental rights of the citizens, and law laid down by the Apex Court. Accordingly, this case be heard on merits after obtaining reply from the State of U.P. along with previously instituted application u/s 482 Cr.P.C. by Dr. Upendra Goswami. Meanwhile protection may be given to the applicant, as has been given in the case of Dr. Upendra Goswami.

3. Learned AGA vehemently opposed.

4. Having heard learned counsel for both sides and gone through the material placed on record, it is apparent that this complaint was filed by Dr. Devendra Agarwal, Additional Chief Medical Officer/ Nodal Officer, P.C.P.N.D.T., Mathura, against Dr. Upendra Goswami, Dr. Anju Goswami and Karmveer @ Rajveer, with specific contention that the complainant is an authorised authority under the P.C.P.N.D.T. Act for filing complaint, as above, and the complaint has been filed in exercise of above authority. It has specifically been stated in paragraph no. 6 of the complaint that while preparation of this raid was made by appropriate authority of Palwal, Haryana, an adjacent district to present place of occurrence, the Sub Divisional Magistrate, Mathura, Sri Krishnanand Tiwari was present as duty Magistrate before this raid and it has further been written in paragraph no. 16 of the complaint that this complainant had rushed at the above place of occurrence, after having information of such commission of offence under the P.C.P.N.D.T. Act, instantly and property along with Ultrasonography Machine, etc. were taken in custody. Meaning thereby the Magistrate of Mathura and this complainant were present at the time of occurrence at the spot. Hence territorial jurisdiction, being vehemently argued, is of no effect on above facts.

5. Moreso, this Court in exercise of inherent jurisdiction under Section 482 Cr.P.C. is not to embark upon factual matrix. Rather the same is to be seen by the trial court.

6. Saving of inherent power of High Court, as given under Section 482 Cr.P.C,

provides that nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. Meaning thereby this inherent power is with High Court (I) to make such order as may be necessary to give effect to any other order under this Code (II) to prevent abuse of the process of any Court (III) or otherwise to secure the ends of justice. But Apex Court in ***State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844*** *has propounded that "While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court". In another subsequent* ***Hamida v. Rashid, (2008) 1 SCC 474,*** *hon'ble Apex Court propounded that "Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice". In again another subsequent* ***Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781,*** *the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." While interpreting this jurisdiction of High Court Apex Court in* ***Popular Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296*** *has propounded "High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings".*

7. Regarding prevention of abuse of process of Court, Apex Court in ***Dhanlakshmi v. R. Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494*** *has propounded "To prevent abuse of the process of the Court, High Court in exercise of its inherent powers under section 482 could quash the proceedings but there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive" as well as in* ***State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1****, Apex Court propounded "In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not".*

8. Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above.

9. From the contention written in the complaint as well as in the summoning order, it is apparent that the above Hospital was registered in the names of Dr. Upendra Goswami and Dr. Anju Goswami, but the

alleged offence was committed by Dr. Anju Goswami. Now the accusation is against the applicant Dr. Anju Goswami for making pre-natal determination of sex. Hence the interim relief granted in above mentioned Application u/s 482 Cr.P.C. in favour of Dr. Upendra Goswami is on different fact than the present applicant Dr. Anju Goswami.

10. The purpose for enactment of this Central Act of the Pre-Conception & Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 was that, in the recent past pre-natal diagnostic centers sprang up in the urban areas of the country using pre-natal diagnostic techniques for determination of sex of the foetus. Such centres became very popular and their growth was tremendous as the female child is not welcomed with open arms in most of the Indian families. The result was that such centres become centres of female focticide. Such abuse of the technique was against the female sex and affects the dignity and status of women. Various organizations working for the welfare and uplift to the women raised their heads against such an abuse. It was considered necessary to bring out a legislation to regulate the use of, and to provide deterrent punishment to stop the misuse of, such techniques. The matter was discussed in Parliament and the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Bill, 1991 was introduced in the Lok Sabha. The Lok Sabha after discussions adopted a motion for reference of the said Bill to a Joint Committee of both the Houses of Parliament and ultimately this enactment was passed as Act No. 57 of 1994 with an object The Preamble of the Act provides that "it is an Act to provide for the prohibition of sex selection, before or after conception and regulation of the use of pre-natal diagnostic techniques for the purpose of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex linked disorders and for the prevention of their misuse for sex determination leading to female foeticide and for matters connected therewith or incidental thereto." This Act was passed with above motion under National Policy for maintaining sex ratio and prohibiting misuse of diagnostic techniques for pre-natal sex determination, resulting female foeticide.

11. The complaint has been filed by the Additional Chief Medical Officer/ Nodal Officer, P.C.P.N.D.T., Mathura. The offence is committed inside chamber of a medical practitioner by misuse of diagnostic techniques and this raid was conducted by an appropriate authority authorised for the State of Haryana, but the authorised officers of Mathura took part in this raid. A Magistrate along with complainant had participated in this proceedings.

12. Apex Court in ***Vishwa Mitter Vs. O.P. Poddar and others, 1983(20) ACC 367 (SC)*** has propounded that it is crystal clear that any one can set the criminal law in motion by filing a complaint before a Magistrate entitled to take cognizance under section 190 and unless any statutory provision prescribes any special qualification or eligibility criteria for putting the criminal law in motion, no Court can decline to take cognizance on the sole ground that the complainant was not competent to file the complaint. Section 190 of the Code of Criminal Procedure clearly indicates that the qualification of the complainant to file a complaint is not relevant. But where any special statute prescribes offences and makes any special

provision for taking cognizance of such offence under the Statute, the complainant requesting the Magistrate to take cognizance of the offence must satisfy the eligibility criterion prescribed by the statute i.e. the complainant has to satisfy the Magistrate that he is with ability to file the complaint and in case in hand this ability has been given in the first paragraph of the complaint itself. The complainant is Additional Chief Medical Officer/ Nodal Officer, P.C.P.N.D.T., Mathura, duly authorised to file the complaint.

13. Hence, under all above facts and circumstances, there is no misuse or abuse of process of law. Accordingly, this application merits its dismissal.

14. **Dismissed** as such.

(2020)12ILR A231
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.11.2020

BEFORE

THE HON'BLE SUNEET KUMAR, J.

Application U/S 482 No. 37166 of 2010

Atul Kumar Singh Tomar & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Sri S.K. Rao, Sri O.P. Singh, Sri Indrajeet Singh

Counsel for the Opp. Parties:
A.G.A., Sri K.M. Tripathi, Sri Sunil Kumar Sharma

A. Code of Criminal Procedure, 1973- Section 482 & Indian Penal Code, 1860- Section-420, 467, 468, 471, 448- application- quashing of entire proceeding-the purchase of the property by the third applicant in government auction, transferring it to the Degree college, do not constitute the offence of forgery-the nature of cheating or forgery is not spelled out by the witnesses nor there is evidence to that effect-it is only after mutation, complaint was filed seeking injunction against the applicants- the nature of the plot alleged to have been trespassed is a house-offence u/s 420, 467, 468, 471 and the trial shall proceed for offence u/s 448. (Para 4 to 30)

The application is partly allowed. (E-6)

List of Cases cited: -

1. St. of Haryana & Ors. Vs Bhajan Lal & Ors, (1992) Supp (1) SCC 335

2. St. of Karnataka Vs L. Muniswamy & Ors, (1977) 2 SCC 699

3. St. of Karnataka Vs M. Devenderappa & Anr., (2002) 3 SCC 89

4. Vineet Kumar & Ors. Vs St. of U.P. & Anr., (2017) 13 SCC 369

5. Ahmad Ali Quraishi & Ors. Vs St. of U.P. & Ors., (2020) AIR SC 788

6. Anil Mahajan Vs Bhor Industries Ltd. & Ors., (2005) 10 SCC 228

7. Md. Ibrahim & Ors. Vs St. of Bih. & Ors., (2009) 8 SCC 751

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

1. Heard Sri O.P. Singh, learned Senior Advocate, assisted by Sri Indrajeet Singh, learned counsels for applicants, and learned A.G.A. appearing for the State. The learned counsel for the opposite party no. 2 has not put in appearance in the revised call.

2. Applicants, four in number, by means of the instant petition under Section 482 of Code of Criminal Procedure, 1973 (for short "Cr.P.C."), seek the following reliefs:

"It is, therefore, most respectfully prayed that this Hon'ble Court may graciously be pleased to allow the present application and to quash the prosecution of the applicants in Case Crime No. 5 of 2009, U.Sec. 420, 467, 468, 471 & 448 I.P.C. P.S. Naubasta District Kanpur Nagar in pursuance of the Charge Sheet No. 300 of 2009 of dated 1.8.2009 which has been numbered as Crl. Case No. 10342 of 2009 : State Vs. Atul Kumar Singh Tomar & others pending in the Court of 1st ACMM, Kanpur Nagar i.e. (Annexure 2 to the accompanying affidavit).

It is further prayed that this Hon'ble Court may be pleased to quash the entire further proceedings of the Cri. Case No. 10342 of 2009 : State Vs. Atul Kumar Singh Tomar & others U.Sec 420, 467, 468, 471 & 448 I.P.C. in Case Crime No. 5 of 2009 U. Sec. 420, 467. 468, 471 & 448 I.P.C., P.S. Naubasta, District Kanpur Nagar pending in the Court of 1st ACMM, Kanpur Nagar.

It is further prayed that his Hon'ble Court may be pleased to quash the order of cognizance dated 29.9.2009 passed by 1st ACMM, Kanpur Nagar mentioned in the Charge Sheet No. 300 of 2009 of dated 1.8.2009 in Case Crime No. 5 of 2009 U. Sec. 420, 467, 468, 471 & 448 I.P.C. P.S. Naubasta District Kanpur Nagar and quoted in para 12 of the affidavit.

It is further prayed that this Hon'ble Court may be pleased to stay the entire further proceedings of the Cri. Case No. 10342 of 2009 : State Vs. Atul Kumar Singh Tomar & others U. Sec 420, 467, 468, 471 & 448 I.P.C. in Case Crime No. 5 of 2009 P.S. Naubasta, District Kanpur Nagar pending in the Court of 1st ACMM, Kanpur Nagar during the pendency of the aforesaid case and/or be pleased to pass such other and further order which this Hon'ble Court may deem fit and proper under the circumstances of the case."

3. The applicants are assailing the charge-sheet, cognizance order and consequential trial pursuant thereof.

4. F.I.R. was lodged on 07.01.2009 alleging that complainant is owner and in possession of Plots No. 239 and 240, Naubasta, Kanpur Nagar, admeasuring 780 sq. meters. It is further alleged that the office bearers of Rooprani Sukhnandan Singh Mahavidyalaya (in short "Degree College") on 30.06.2008 trespassed the plots of the complainant after breaking 90 ft.x10 ft. wall. On 13.12.2008, the complainant approached the revenue authorities; Naib-Tehsildar in report dated 26.12.2008 was of the opinion that the Degree College has encroached upon the plots belonging to the complainant. Applicants are not named in the F.I.R.

5. The first applicant is Manager of the Degree College, second applicant is President of the Degree College, third applicant is father of first applicant and former member of Legislative Council (M.L.C.), and, fourth applicant is Principal of Degree College.

6. It is urged by the counsel for the applicants that on 21.02.1991, the third applicant purchased plots no. 280 and 282, Naubasta, Kanpur Nagar, in a government auction. The sale was confirmed on 14.10.1991 in favour of highest bidder by Commissioner, Kanpur Division, Kanpur. Pursuant thereof, Additional District Magistrate (F&R), Kanpur Nagar, executed sale-deed of the said plots on behalf of the State. The name of third applicant was mutated in the revenue record on 16.12.2002. Thereafter, third applicant executed sale-deed dated 11.06.2003 of part of plots no. 280 and 282 (410 and 450 sq. meters respectively) in favour of the

Degree College. By a subsequent sale-deed dated 14.09.2004 the remaining part of the said plots was transferred in favour of the Degree College. The name of the Degree College came to be mutated in Khatauni vide order dated 21.07.2007. It is further submitted that the boundary wall of 90 ft.x10 ft. was not constructed on 30.06.2008, as alleged in the F.I.R., but it was constructed by the Degree College eight years back on the plots separating the the plots of the complainant, i.e., plots. no. 239 and 240, which are adjacent to plots no. 280 and 282 of Degree College.

7. It is further submitted that the allegations in the F.I.R. is false and malicious; applicants have no concern with the affairs of the Degree College and have not encroached upon any portion of plots no. 239 and 240, as alleged. At the most it is a case of demarcation on the spot; the boundary wall was constructed eight years back without the complainant raising any objection. It is further contended that it is not disclosed in the F.I.R. or the statements recorded under Section 161 Cr.P.C. as to which part of plots no. 239 and 240 has been occupied forcefully; the dispute raised by the complainant is purely of civil nature and several suits inter-se parties are pending much before lodging of F.I.R. The details of suits are as follows:

(i) Original Suit No. 843 of 2007 (Smt. Manorama Devi Vs. Lal Singh Tomar) in respect of plot no. 239, Naubasta, Kanpur Nagar in the Court of Civil Judge (Senior Division), Kanpur Nagar, seeking permanent injunction,

(ii) Original Suit No. 844 of 2007 (Vijay Kumar Shukla Vs. Lal Singh Tomar) in respect of Plot No. 239, Naubasta, Kanpur Nagar in the Court of Civil Judge (Senior Division), Kanpur Nagar, seeking permanent injunction,

(iii) Original Suit No. 845 of 2007 (Sankatha Prasad Tiwari Vs. Lal Singh Tomar) in respect of Plot No. 239 and 240, Naubasta, Kanpur Nagar in the Court of Civil Judge (Senior Division), Kanpur Nagar, seeking permanent inunction,

(iv) Original Suit No. 1674 of 2008 (Sameer Mehrotra Vs. Rooprani Sukh Nandan Singh Mahavidyalaya) in respect of Plots No. 239 and 240, Naubasta, Kanpur Nagar, a declaratory suit seeking declaration as owner and landlord,

(v) Original Suit No. 1880 of 2008 (Rooprani Sukh Nandan Singh Mahavidyalaya Vs. Sameer Mehrotra and others), filed by third applicant against complainant and prosecution witnesses i.e. Sankatha Prasad, Smt. Manorama Devi and Vijay Kumar, seeking permanent injunction restraining them from causing any obstruction or creating any nuisance in the peaceful possession and running of Degree College pertaining to Plots No. 280 and 282, Naubasta, Kanpur Nagar.

8. The F.I.R. came to be lodged subsequently in January' 2009 on same allegations which is subject matter of dispute in the pending suits inter-se parties instituted in 2007-08.

9. The allegation in the F.I.R. is that complainant filed an application on *Thana Divas* on 26.07.2008 alleging encroachment and trespass on plots no. 239 and 240, upon enquiry the concerned Police authority submitted report that civil dispute is pending between the parties and Naib-Tehsildar has also submitted a report to that effect but opined that trespass has been made in the plots.

10. The State has not filed any objection. The opposite party no. 2/

complainant, has filed counter affidavit, wherein it is admitted that Degree College is situated on plots no. 280 and 282; whereas complainant is owner of plots no. 239 and 240M. i.e. part of the plot. It is further alleged that under the garb of the alleged sale-deed encroachment/trespass was made by the officials of the Degree College on other plots including that of the complainant. It is further alleged that applicants on the strength of muscle power and forged documents have encroached upon the plots of complainant which is situated on the south of plot no. 282.

11. I have considered the rival submissions and perused the material brought on record.

12. The Supreme Court in **State of Haryana and others Vs. Bhajan Lal and others1,** has elaborately considered the scope and ambit of Section 482 Cr.P.C. Paragraph 102 enumerates 7 categories of cases, by way of illustration, where power can be exercised under Section 482 Cr.P.C. The relevant category for the purposes of the instant application is extracted hereinbelow:

"(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) xxx

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) xxx

(5) xxx

(6) xxx

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

13. The inherent power given to the High Court under Section 482 Cr.P.C. is with the purpose and object of advancement of justice. In case the process of Court is sought to be abused by a person with some oblique motive, the Court has to thwart the attempt at the very threshold.

14. A three-Judge Bench of this Court in **State of Karnataka Vs. L. Muniswamy and others2,** held that the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. (Refer: **State of Karnataka Vs. M. Devenderappa and another 3).**

15. The principles enumerated in **Bhajan Lal and others (supra)** was considered and reiterated by Supreme Court in **Vineet Kumar and others Vs. State of U.P. and another4 and Ahmad Ali Quraishi and others Vs. State of U.P. and others 5.**

16. The substance of the allegations constituting the ingredients of the offence is relevant and must be asserted in the complaint. Merely applying the expression "fraud', "forged' or "forgery' is not enough to constitute the offence.

17. In **Anil Mahajan Vs. Bhor Industries Ltd. and others6,** the Supreme Court observed as under:

"The substance of the complaint is to be seen. Mere use of the expression "cheating" in the complaint is of no consequence."

18. Applying the law on the facts of the case in hand, the allegation in the F.I.R. primarily is of trespass on the strength of forged revenue records. The statement recorded by the Investigating Officer (for short "I.O.') under Section 161 Cr.P.C. of owners, they have stated that their plots were trespassed by the Degree College. There is no evidence of forgery or the nature of forgery committed by the applicants. Mere assertion of forgery is not sufficient, substance of forgery is missing. Admittedly, suits on allegations and counter allegations of trespass have been filed by the parties, either seeking injunction or declaration. The question of ownership and possession on the spot by the respective parties is purely of civil nature and can be determined either by civil court or by revenue authorities upon demarcation on the spot. It appears that under the garb of civil suits, present prosecution was lodged to create pressure upon applicants to either free the plots from the alleged trespass/ encroachment or not to encroach the plot of the complainant and/or of the applicants.

19. It would be appropriate to first consider whether the complaint averments even assuming to be true make out the ingredients of the offences punishable either under Section 467, Section 468 or Section 471 of IPC. Section 467 (in so far as it is relevant to this case) provides that whoever forges a document which purports to be a valuable security, shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine. Section 468 provides that whoever commits forgery, intending that the document shall be used for the purpose of cheating. Section 471, relevant to our purpose, provides that whoever fraudulently or dishonestly uses as genuine any document which he knows or has reason to believe to be a forged document, shall be punished in the same manner as if he had forged such document. Section 470 defines a forged document as a false document made by forgery.

20. The term "forgery" used in these sections is defined in Section 463. Whoever makes any false documents with intent to cause damage or injury to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into express or implied contract, or with intent to commit fraud or that the fraud may be committed, commits forgery. Section 464 defines "making a false document".

21. The condition precedent for an offence under Sections 467, 468 and 471 is forgery. The condition precedent for forgery is making a false document. This case does not relate to any false electronic record. Therefore, the question is whether the third applicant, in executing and registering the two sale deeds purporting to sell a property, duly purchased in government auction, can be said to have made and executed false documents, in collusion with the other applicants.

22. An analysis of Section 464 IPC shows that it divides false documents into three categories:

(i) The first is where a person dishonestly or fraudulently makes or executes a document with the intention of causing it to be believed that such

document was made or executed by some other person, or by the authority of some other person, by whom or by whose authority he knows it was not made or executed.

(ii) The second is where a person dishonestly or fraudulently, by cancellation or otherwise, alters a document in any material part, without lawful authority, after it has been made or executed by either himself or any other person.

(iii) The third is where a person dishonestly or fraudulently causes any person to sign, execute or alter a document knowing that such person could not by reason of (a) unsoundness of mind; or (b) intoxication; or (c) deception practised upon him, know the contents of the document or the nature of the alteration.

23. In short, a person is said to have made a `false document', if (i) he made or executed a document claiming to be someone else or authorised by someone else; or (ii) he altered or tampered a document; or (iii) he obtained a document by practicing deception, or from a person not in control of his senses.

24. The sale deeds executed by third applicant, clearly and obviously do not fall under any of the categories of `false documents'. There is a fundamental difference between a person executing a sale deed claiming that the property conveyed is his property, and a person executing a sale deed by impersonating the owner or falsely claiming to be authorised or empowered by the owner, to execute the deed on owner's behalf. When a document is executed by a person claiming a property which is not his, he is not claiming that he is someone else nor is he claiming that he is authorised by someone else. Therefore, execution of such document (purporting to convey some property of which he is not the owner) is not execution of a false document as defined under Section 464 of the IPC. If what is executed is not a false document, there is no forgery. If there is no forgery, then neither Section 467 nor Section 471 of the IPC are attracted. (Refer: **Md. Ibrahim and others Vs. State of Bihar and others7).**

25. The next question that arises is whether the ingredients of an offence of cheating are made out. The essential ingredients of the offence of "cheating" are as follows: (i) deception of a person either by making a false or misleading representation or by dishonest concealment or by any other act or omission; (ii) fraudulent or dishonest inducement of that person to either deliver any property or to consent to the retention thereof by any person or to intentionally induce that person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived; and (iii) such act or omission causing or is likely to cause damage or harm to that person in body, mind, reputation or property. To constitute an offence under Section 420, there should not only be cheating, but as a consequence of such cheating, the accused should have dishonestly induced the person deceived (i) to deliver any property to any person, or (ii) to make, alter or destroy wholly or in part a valuable security (or anything signed or sealed and which is capable of being converted into a valuable security).

26. When a sale deed is executed conveying a property claiming ownership thereto, it may be possible for the purchaser under such sale deed, to allege that the vendor has cheated him by making a false representation of ownership and fraudulently induced him to part with the sale consideration. But in this case the complaint is not by the purchaser. It is not the case of the complainant

that any of the accused tried to deceive him either by making a false or misleading representation or by any other action or omission, nor is it his case that they offered him any fraudulent or dishonest inducement to deliver any property or to consent to the retention thereof by any person or to intentionally induce him to do or omit to do anything which he would not do or omit if he were not so deceived. Therefore, it cannot be said that the third applicant by the act of executing sale deeds in favour of the Degree College deceived the complainant in any manner. The purchase of the property by the third applicant in government auction and thereafter transferring it to the Degree College, do not constitute the ingredients of the offence of forgery.

27. Insofar as the criminal prosecution with regard to the offence under Sections 420, 467, 468, 471 I.P.C. is not made out on taking the allegations and the evidence in support thereof on face value. The respective parties agree that they are owners and in possession of their respective plots. The nature of cheating or forgery is not spelled out by the witnesses nor there is evidence to that effect. The prosecution of the applicant for the offence under the abovenoted sections if continued is abuse of the process of the court, accordingly unsustainable.

28. The allegations of the offence under Section 448 I.P.C. is based on the statements recorded by I.O. under Section 161 Cr.P. C. and report of Naib-Tehsildar, would prima facie make out a case against the applicants. The plots no. 280 and 282 purchased in public auction was finally transferred to the Degree College in 2004, until then no suit or complaint was filed alleging trespass. It is only after mutation in 2007, the suits came to be filed on the complainants side seeking injunction against the applicants. A complaint was filed on Thana Divas alleging trespass on plots no. 239 and 240 by the Degree College. The nature of the plot/premises alleged to have been trespassed/encroached upon is a "house' or not is a subject matter of evidence and cannot be gone into in proceedings under Section 482 Cr.P.C.

29. The criminal prosecution insofar it relates to offence under Sections 420, 467, 478 and 471 I.P.C. is quashed. Accordingly charge framed under those Sections are also quashed. The trial shall proceed against the applicants for offence under Section 448 I.P.C., in accordance with law.

30. The application is accordingly allowed in part.

31. The party shall file computer generated copy of this order downloaded from the official website of High Court Allahabad.

32. The computer generated copy of the order shall be self attested by the counsel of the party concerned.

33. The concerned Court/Authority/Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

(2020)12ILR A237
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.11.2020

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 No. 46964 of 2013

Munnanul Haq & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Sri Rizwan Ahmad Qureshi, Sri Braham Singh, Sri Syed Mehmood

Counsel for the Opp. Parties:
A.G.A., Sri Ashfaq Ahmed Ansari, Sri Krishna Datt Tiwari

A. Code of Criminal Procedure, 1973-Section 482 & Indian Penal Code, 1860-Sections 308/34, 323/34, 324/34, 504, 506-application-cross-case-challenge to-framing of charges-assault was with regard to dispute of landed property-assault was made by lathi, danda and tabbal-both injured sustained wound over skull-opinion of medical officer also supported that the injuries could be fatal-seat and size of injuries was of kind that one injured person was unconscious-hence, at the time of framing of charge, the evidences brought by prosecution on record, is to be taken into consideration-the court in exercise of inherent jurisdiction is not expected to make comment upon factual aspects because the same remains within the domain of trial.(Para 2 to 7)

The application is dismissed. (E-6)

List of Cases cited:-

1. Bechan Vs St. of U.P., (1991) A.L.J. 568

2. Palwinder Singh Vs Balwinder Singh & Ors., (2009) AIR SC 887

3. Sheoraj Singh Ahlawat & Ors, (2013) AIR SC 52

4. Sayra Bano Vs St. of Mah., (2007) Cri. L.J 1457 SC

5. St. of A.P. Vs Gaurishetty Mahesh, JT (2010) 6 SC 588: (2010) 6 SCALE 767: 2010 Cr L. J 3844,

6. Hamida Vs Rashid (2008) 1 SCC 474

7. Monica Kumar Vs St. of U.P. (2008) 8 SCC 781

8. Popular Muthiah Vs St. Represented by Inspector of Police, (2006) 7 SCC 296

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This application under Section 482 of Cr.P.C. has been filed by Munnanul Haq, Asif, Arif and Ataur Rahman, with a prayer for quashing of impugned order dated 10.12.2013, passed in Sessions Trial No. 251 of 2013, arising out of Case Crime No. 194 of 2012, under Sections 308/34, 323/34, 324/34, 504, 506 IPC, Police Station Kanth, District Moradabad.

2. Learned counsel for the applicants argued that vide impugned order, learned trial Court of Additional District and Sessions Judge, Court No. 3, Moradabad, in Sessions trial No. 251 of 2013, has framed charge for offences punishable under Sections 308/34, 323/34, 324/34, 504, 506 IPC, with a direction for trial of applicants for above charge. Whereas, no grievous hurt, likely to cause death, or of nature to cause death in all probability was there. Rather, injuries were held to be of simple in X-ray examination and supplementary report of medical examination of Javed Khan. Whereas, no supplementary report with regard to Sahamat is there. Medical Officer opined that the injuries could be sufficient to cause death in the ordinary course of nature. But injuries were held to be of simple in nature. Hence, no offence, punishable under Section 308 IPC was made out. Even then, charge for the same was got framed. Whereas, this Court in a precedent, reported at **1980 A.L.J. 816, Bechan vs State of U.P., 1991 A.L.J. 568** and in an **Application under Section 482 No. 28115 of 2010,** decided on **10.11.2010**, has held that injuries, if not of fatal in nature, will not amount for offence punishable under

Section 308 IPC. Hence, impugned order of learned trial Court is under abuse of process of law. Hence, this application with above prayer.

3. Learned AGA as well as learned counsel for the informant has vehemently opposed, with this contention that it was a cross case, wherein, FIR was instantly got lodged as case crime number 194 of 2012, under Sections 308/34, 323/34, 324/34, 504, 506 IPC, P.S. Kanth, District Moradabad, on 10.7.2012, at 9.:40 A.M. The cross version by Mohd. Arif was also got registered for offence punishable under Sections 323 and 504 IPC, on the same date of 10.7.2012 at 10:15 A.M. The injured Javed Khan and Sahamat were instantly taken for medical treatment by police personnel and they were instantly taken medically examined, wherein, Javed Khan was having injury:- (1) Incised wound of 5.0cm X 1.0cm, deep bone over skull, anteriorly, 7.5cm above medial end of left eyebrow. At the time of examination patient was unconscious with blood pressure of 110/60 mmHg, pulse rate 90bpm. (2) Tenderness was present over left side of chest wall, though no mark of injury was there. (3) Tenderness was also present over left side of abdomen and in lumbar region. Injury No. (1) is caused by some sharp edged object and injury Nos. (2) and (3) by hard and blunt object. All injuries are fresh in duration and kept under observation. Patient was refereed to District Hospital for admission & X-ray [CT skull and chest & USG Abdomen]. Sahamat was also medically examined and he was having injuries:- (1) Incised wound of 5.5cm X 1.0cm above deep over right side of skull, laterally 9.0cm above roof of left pinna. Patient was conscious. (2) Traumatic swelling of size 3.5cm X 2.5cm over left wrist dorsally. (3) An abrasion of size 1.0cm X 1.0cm over left palm. Injury No. 1 is caused by sharp edged object and injury Nos. 2 and 3 were caused by hard and blunt object. All injuries were fresh in duration. Injury No. 3 is simple in nature and injury Nos. 1 and 2 are kept under observation and advised for X-ray and CT scan and patient was referred for hospital for his admission and further management. Though supplementary report of Javeda Khan is with no abnormalcy, but patient was admitted for a long time for his treatment and seat and size of injury was over skull. Hence, offence punishable under Section 308 IPC was very well there. Accordingly, charge was framed.

4. Having heard learned counsel for the both sides and gone through the material placed on record, it is apparent that on the same day of occurrence, FIR, by both sides, were got registered at police station Kanth, Moradabad. Injured of present case Javed Khan and Sahamat was taken to hospital, where, they were medico legally examined and were having injuries, written as above. They were referred for their specialized treatment. Seat and size of injuries were on skull of both injured and these injuries were of incised nature, caused by sharp edged weapon. Accusation was that assault was made by four accused persons, in furtherance of their joint mensrea, by lathi, danda and tabbal (a sharp edged weapon like spade). This assault was with regard to dispute of landed property in between. Meaning thereby, assault was made by hard and blunt object as well as by sharp edged object, over both of injured persons and they have sustained injuries of sharp edged weapon's incised wound over skull and Medical Officer, while preparing supplementary report of Javed Khan, has specifically mentioned that injury No. 1 could be fatal. Hence, at the stage of

framing of charge, meticulous analysis of evidence, in accordance with hair splitting in nature, is not needed. Rather, at the time of framing of charge, the evidences brought by prosecution on record, is to be taken into consideration and Hon'ble Apex Court in **Palwinder Singh Vs. Balwinder Singh and others AIR 2009 SC 887** as well as in **Sheoraj Singh Ahlawat & Ors, AIR 2013 SC 52,** has propounded that jurisdiction of the learned Sessions Judge while exercising power under Section 227 of the Code of Criminal Procedure is limited. Charges can be framed also on the basis of strong suspicion. Marshalling and appreciation of evidence is not in the domain of the Court at that point of time. The facts of present case reveals that injuries of sharp edged weapon over skull of both of injured is there and seat and size of injuries was of this kind that at the time of medical examination Javed Khan was unconscious and his blood pressure was, as above. Medical Officer in his opinion was of the view that this injury could be fatal. Hence, at the time of framing of charge, above aspect is to be taken into consideration and on the basis of this, charges were framed, as above.

5. With regard to precedent, argued as above, it is apparent that in a criminal trial, each case remains with its own facts and the same is to be taken in view of fact of above particular case. Moreso, at the time of framing of charge, precedent or something decided by Apex Court or by this Court in final adjudication is not of material effect. Rather, ground for framing of charge is to be seen and it was very well there. Apex Court in **Sayra Bano Vs. State of Maharashtra, 2007 Cri.L.J. 1457 SC**, has propounded that criminal cases are decided on facts and evidences led in that particular case, not on the basis of precedent, having other facts and circumstances. Hence, on the basis of those facts and circumstances, the impugned framing of charge was in accordance with evidence on record till that point of time.

6. Moreso, this Court in exercise of inherent jurisdiction under Section 482 of Cr.P.C. is not expected to make comment upon factual aspects because the same remains within the domain of trial, as has been propounded by Apex Court in ***State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844 , Hamida v. Rashid, (2008) 1 SCC 474, Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781, as well as in Popular Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296.*** Accordingly, this application merits its dismissal.

7. Hence, **dismissed.**

8. Interim order, if any, stands vacated.

(2020)12ILR A240
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.11.2020

BEFORE
THE HON'BLE ATTAU RAHMAN MASOODI, J.

Bail No. 5384 of 2020
alongwith
Bail No. 5756 of 2020

Abhishek Srivastava ...Applicant
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Pranjal Krishna, Pooja Mishra, Shivam Pandey

Counsel for the Opp. Party:

G.A.

Accused after arrest was taken in judicial custody with passing of remand order from time to time-last remand was extended for fourteen days and nationwide lockdown happened-period of 90 days expired during lockdown and accused is in jail in the absence of any remand order-right of default bail accrued on 29.04.2020-right was alive when charge sheet was filed and survived thereafter.

Bail Granted. (E-9)

(Delivered by Hon'ble Attau Rahman Masoodi, J.)

1. Heard Sri Pranjal Krishna, learned counsel for the applicant in Bail No. 5384 of 2020, Sri Sushil Kumar Singh, learned counsel for the applicant in Bail No. 5756 of 2020 and learned AGA for the State. Perused the record.

2. These two bail applications involve an identical question of law. In both the applications, the right of personal liberty embodied under Article 21 of the Constitution of India is pressed on the ground of default on the part of the prosecution to file the charge sheet within the statutory period as provided under Section 167(2) of Code of Criminal Procedure (Cr.P.C.).

3. Learned counsel for the applicants would contend that personal liberty of a citizen is fundamental and the same cannot be curtailed without following due procedure prescribed under law.

4. In the case of Abhishek Srivastava i.e. in Bail Application No. 5384 of 2020, the accused after arrest by the police was taken in judicial custody with the passing of remand order on 16.1.2020 whereafter the judicial custody continued from time to time and lastly the remand was extended on 11/12.3.2020 for a period of fourteen days i.e. upto 25.3.2020. Before the said date, nationwide lock-down was imposed and the functioning of the Courts stood obstructed rather completely closed except for the urgent work regulated as per the directives issued by Hon'ble the Chief Justice from time to time.

5. Due to closure of courts from 24.3.2020, the first/fresh remand cases were done and no remand orders could be passed from 25.3.2020 to 26.6.2020. This position was brought to the notice of this Court by the District Judge, Lucknow on 29.9.2020 pursuant to an order passed by this Court on 18.9.2020 which reads as under:

"This matter was heard at considerable length.

Having heard the learned counsel for the parties, it is desirable that a report may be called for from the District Judge, Lucknow clarifying the position of remand in case crime no. 368 of 2018 from 11/12.3.2020 to 16.6.2020.

The District Judge, Lucknow is expected to forward a clear report within ten days for the reason that the matter pertains to the freedom of life and personal liberty of the accused applicant.

List for further hearing on 30.9.2020."

6. The effect of lock-down was equally harsh on the litigants or detenues in jail who could not assert their rights of personal liberty through the process of law. The period of 90 days in Bail Application No. 5756 of 2020 expired on 14.4.2020 and in absence of any remand order since 25.3.2020, the applicant (Abhishek

Srivastava) continued in jail till the filing of charge sheet on 1.5.2020 and thereafter until the rejection of default bail on 18.6.2020. The personal liberty of the accused applicant oscillated without any attention either by prosecution or the guardian of justice i.e. courts. The duty on the part of the State to set the applicant free by apprising the court was given a complete go by to legitimize the default. Non performance of the judicial duty also owes its failure to the nationwide lock-down due to Pandemic Covid-19.

7. The magistrate notwithstanding the filing of charge sheet beyond the period of limitation, has nevertheless rejected the bail application treating the right of default bail to have extinguished on filing of the charge sheet and this position is evident from the order passed by the magistrate on 18.6.2020.

8. In the connected matter i.e. Bail Application No. 5384 of 2020, the initial remand order was passed on 31.1.2020 and the period of limitation for filing of charge sheet lapsed on 29.4.2020 whereafter the police report was filed on 5.5.2020. The order sheet merely endorsed "remand' on several dates and lastly on 29.4.2020. The default bail application was filed in the month of June which was rejected on 20.6.2020. In the counter affidavit filed by the State, a plea has been taken that the police report was ready on 29.4.2020 but the same could not be filed before the deadline i.e. 29.4.2020 due to the closure of court on account of lock-down.

9. The argument put forth by learned counsel for the applicants in both the cases is that the indefeasible right of default bail could not be denied to them by the State once the limitation for filing the police report ran out, therefore, irrespective of the fact whether the prayer for release was made or not, the duty had shifted upon the magistrate who ought to have streamlined and secured the personal liberty of the applicants in accordance with the mandate of Article 21 of the Constitution of India on suitable conditions as were necessary in the criminal administration of justice. It is also submitted that the personal liberty of the applicants could not be weighed any less than those cases where accused persons on executing personal bonds were enlarged on bail pursuant to the general directions issued by the apex court in suo motu case. Moreover, even the imposition of lock-down on account of which the courts were closed, cannot be allowed to legitimize the judicial custody in contravention of Article 21 of the Constitution of India read with the procedure prescribed in Section 167(2) Cr.P.C.

10. To buttress the submission put forth by learned counsel for the applicants, they have placed reliance upon a catena of judgements taken note of hereinafter.

11. Per contra, learned AGA who has appeared on behalf of the State has submitted that the right claimed by the applicants though guaranteed under Article 21 of the Constitution of India, can be curtailed by following due procedure of law and drawing support from the judgment rendered by the apex court in the case of ***Sanjay Dutt v. State through CBI, Bombay*** reported in ***(1994) 5 SCC 410***, it is argued that upon filing of the police report before the court concerned, the right of default bail stands eclipsed and thus, the order passed by the trial court is wholly tenable in the eye of law and does not suffer from any illegality.

12. It is also submitted that the magistrate in the present case, had no occasion to offer the accused any suitable

conditions for being set free on bail during the lock-down period when the court was closed, therefore, there is no lapse on the part of the magistrate to grant default bail particularly when the police report in one of the present cases was ready on the deadline i.e. 29.4.2020 but could not be filed in the court due to closure.

13. **The larger question that arises for consideration before this Court is as to the sanctity of the right of personal liberty and whether such a right guaranteed under Article 21 of the Constitution of India would stand eclipsed under the lock-down directives issued by the Government or any directives issued by the High Court applicable on holidays contrary to the mandate embodied under Section 167(2) Cr.P.C.**

14. Before coming to the merits of the case, it would be apt to refer to the report of District Judge, Lucknow which was called for in Bail Application No. 5384 of 2020 so as to clarify the position of remand in relation to one of the applicants and the same is extracted below:

"..... In this regard, I called report from learned Special Chief Judicial Magistrate, Lucknow who has submitted report dated 24.09.2020 apprising the first remand of accused Abhishek Srivastava was granted on 16.01.2020 and thereafter same was extended on 29.01.2020, 12.02.2020, 26.02.2020 fixing 11.03.2020 but under Administrative Order of the District Judge, 11.03.2020 was declared holiday hence, the accused persons whose remands were due on 11.03.2020 were brought before the learned Magistrate on 12.03.2020 and on said date i.e. 12.03.2020, said accused was remanded up to 25.03.2020 and that is why on the last remand, date 11/12.03.2020 was written.

From 25.03.2020 onwards, there was complete lock-down throughout India consequently, Courts remained closed and due to above, no remand order could be passed till 16.06.2020. Meanwhile, on 01.05.2020, police submitted chargesheet before the Remand Magistrate.

It is worth to mention that Hon'ble High Court issued notice dated 25.03.2020 communicating the order of his lordship Hon'ble the Chief justice of High Court of Judicature at Allahabad informing that all the Courts subordinate to the Hon'ble High Court, Commercial Courts, Motor Accidental Claims Tribunals and Land Acquisition Rehabilitation and Resettlement Authoriteis across the State of Uttar Pradesh shall remain closed till further orders and remand and bails of accused persons shall be done as per holiday practice.

The said notice dated 25.03.2020 was followed by letter of Hon'ble Court bearing No. PS(RG)/52/2020: Allahabad dated May 02, 2020 referring notice dated 25.03.2020 apprising that Hon'ble Court has reiterated its previous Order dated 25.03.2020.

It is further submitted that as per holiday practice only first/fresh remand use to be done and that is why further remand of accused person Abhishek Srivastava could not carried out till 16.06.2020.....…"

15. The District Judge in his report has submitted that the last remand order was passed on 11/12.3.2020 and there was no remand from 25.3.2020 to 16.6.2020 due to closure of the courts pursuant to

complete lock-down order of the government. It is secondly mentioned that the charge sheet was filed on 1.5.2020 before the remand magistrate. It is thirdly mentioned that the courts were closed till further orders, therefore, remand and bails of accused persons were directed to be done as per holiday practice. It is lastly mentioned that as per holiday practice only first/fresh remand used to be done.

16. In view of the report extracted above, it is desirable to understand the holiday practice for dealing with the remand and bail matters. A direction was issued by the High Court, Allahabad on 25.3.2020 and the same is extracted below:

"As resolved by the Administrative Committee (telephonically), in supersession of all administrative notifications, circular etc., issued earlier, the Court work in the Allahabad High Court shall remain suspended with immediate effect till further orders. However, imminently emergent and urgent cases would be heard by the designated Division Bench/single Judge with prior approval of the Chief Justice. For Lucknow Bench, necessary approval for hearing of urgent cases shall be obtained from Hon'ble Senior Judge, Lucknow.

All the courts subordinate to the High Court to the High Court of Judicature at Allahabad and all commercial courts, Motor Accident Claims Tribunal and Land Acquisition Rehabilitation and Resettlement Authorities across the State of U.P. shall also remain closed till further orders. ***The remands and bails of arrested person shall be done as per holiday practice.****"*

17. The procedure on holidays is further gathered from Rule-186 of the General Rules (Criminal), 1977 as well as from a circular of the High Court, Allahabad i.e. C.L. No. 102/VIIb-47 dated 5th August, 1975 and the same are reproduced below:

"186. Work on holiday.

On a holiday a criminal court may dispose of such work of urgent nature like granting of bail or remand or do such other work that may with propriety be done out of court and it will not be proper to refuse to do any act or make any order urgently required merely on the ground of the day being a gazetted holiday."

"Circular No. 102/VIIb-47 dated 5th August, 1975

"I am directed to say that the Judicial Magistrates who are detained on duty for granting bails and remands and for the disposal of other urgent matters during holiday or on Sundays may kindly be asked to do this work in court at a fixed time duly notified and intimated to all concerned, including the Public Prosecutor. This will not only ensure the presence of the Public Prosecutor at the time of the orders are passed but will also facilitate the work of Judicial Magistrates concerned."

18. What is surprising is that the whole procedure seems to have been misinterpreted and misunderstood by the District-Session Judges/magistrates in the matter of remand and bail. The directive issued by the High Court on 25.3.2020 as reproduced above was clear enough, yet the Session Judges/magistrates do not appear to have proceeded as per the mandate of Rule-186 or the earlier circular issued on 5.8.1975 whereby the procedure applicable on holidays was succinctly defined. The District Judges were under a bounden duty to assign the remand duty to the courts of

magistrate/Session Judge during the lock-down period and irrespective of the fact that the courts were closed, the remand matters were bound to be taken up and wherever the indefeasible right of personal liberty accrued to an accused incarcerated in jail, he ought to have been offered default bail in the manner prescribed under Section 167(2) of the Cr.P.C.

19. Personal liberty of a person is an indefeasible right and this is what the apex court has opined in the case of ***Sanjay Dutt*** (supra) in paragraph 48 of the judgement. The rider which the apex court read was that the accused must avail the right before it stood eclipsed by filing of the police report. As per the apex court judgement, once the charge sheet was filed, Section 167 Cr.P.C. would become inapplicable and the accused who failed to avail the right would stand deprived of claiming the benefit of default.

20. The apex court yet in another decision reported in ***(2001) 5 SCC 453 (Uday Mohanlal Acharya v. State of Maharashtra)***, further propounded that once the application was filed by the accused in jail for the grant of default bail, mere filing of the police report would not frustrate the right and the ground of default would remain available for release. This judgement, however, reiterated the requirement of filing an application consequent upon the accrual of indefeasible right before the charge sheet was filed. The apex court in the case reported in ***(2017) 15 SCC 67 (Rakesh Kumar Paul v. State of Assam)*** dealing with the earlier decisions has further enlarged the scope of default bail in paragraph 40 as under:

"40. In the present case, it was also argued by learned counsel for the State (1996) 1 SCC 722 that the petitioner did not apply for "default bail' on or after 4th January, 2017 till 24th January, 2017 on which date his indefeasible right got extinguished on the filing of the charge sheet. Strictly speaking this is correct since the petitioner applied for regular bail on 11th January, 2017 in the Gauhati High Court - he made no specific application for grant of "default bail'. However, the application for regular bail filed by the accused on 11th January, 2017 did advert to the statutory period for filing a charge sheet having expired and that perhaps no charge sheet had in fact being filed. In any event, this issue was argued by learned counsel for the petitioner in the High Court and it was considered but not accepted by the High Court. The High Court did not reject the submission on the ground of maintainability but on merits. Therefore it is not as if the petitioner did not make any application for default bail - such an application was definitely made (if not in writing) then at least orally before the High Court. In our opinion, in matters of personal liberty, we cannot and should not be too technical and must lean in favour of personal liberty. Consequently, whether the accused makes a written application for "default bail' or an oral application for "default bail' is of no consequence. The concerned court must deal with such an application by considering the statutory requirements namely, whether the statutory period for filing a charge sheet or challan has expired, whether the charge sheet or challan has been filed and whether the accused is prepared to and does furnish bail."

21. The position of law is reiterated by the apex court in the case of ***M. Ravindran v. Intelligence Officer, Directorate of Revenue, 2020 SCC***

OnLine SC 867. The apex court in ***S. Kasi v. State through the Inspector of Police, 2020 SCC OnLine SC 529***, taking note of the lock-down situation during Pandemic Covid-19 has made certain observations in paragraphs 25 and 26 which may profitably be extracted as under:

"25. We, thus, are of the clear opinion that the learned Single Judge in the impugned judgment erred in holding that the lockdown announced by the Government of India is akin to the proclamation of Emergency. The view of the learned Single Judge that the restrictions, which have been imposed during period of lockdown by the Government of India should not give right to an accused to pray for grant of default bail even though charge sheet has not been filed within the time prescribed under Section 167(2) of the Code of Criminal Procedure, is clearly erroneous and not in accordance with law.

26. We, thus, are of the view that neither this Court in its order dated 23.03.2020 can be held to have eclipsed the time prescribed under Section 167(2) of Cr.P.C. nor the restrictions which have been imposed during the lockdown announced by the Government shall operate as any restriction on the rights of an accused as protected by Section 167(2) regarding his indefeasible right to get a default bail on non-submission of charge sheet within the time prescribed. The learned Single Judge committed serious error in reading such restriction in the order of this Court dated 23.03.2020."

22. This Court may also take note of a judgement rendered by the Delhi High Court in the case of ***Subhash Bahadur @ Upender vs The State (NCT Of Delhi)*** decided on 6 November, 2020 where the position of law has elaborately been considered and it is observed that the duty of the courts to offer default bail does not stand mitigated even when a regular bail application is under consideration.

23. In the light of decisions noted above, it is clear that the right of personal liberty is an indefeasible right which for the purposes of its enforcement remained unaffected during the lock-down period and the courts of law on account of closure pursuant to the directives issued by the Government or the High Court were nevertheless duty bound to deal with the remand matters as per the provisions of General Rules (Criminal), 1977 or circulars regulating holiday practice.

24. This Court is constrained to observe that non performance of duty owing to holidays is firstly a serious dereliction of duty on the part of the Session Judges/magistrates and secondly the remand matters could not be ignored selectively by attaching preference or priority to fresh/first remand cases in derogation of the procedure applicable on holidays. The report forwarded by the District Judge, Lucknow, extracted above, is alarming and the selective role which the courts have played from **25.3.2020** to **16.6.2020** deserves to be condemned.

25. There is a famous saying that injustice anywhere is a threat to justice everywhere. It is for this reason that the civil liberty movement worldwide changed the very ethos of the concept of justice to secure the right of personal liberty. The saying seeks to liberate the personal liberty of a citizen clamped in isolation and pain. It appeals and awakens the justice delivery system for the cause of freedom of life and personal liberty. A mass disaster or

Pandemic may severely obstruct our life and governing systems in many ways but the doors of the courts of law must remain open for the protection of Article 21 of the Constitution of India.

26. In order to serve the civil rights of the citizens, the Indian Parliament enacted two important legislations in the year 1981 and 1987 viz. Essential Services Maintenance Act, 1981 and Legal Services Authority Act, 1987. This Court may note that these legislations were made in the pursuit of objects embodied under Article 39 and 39A of the Constitution of India. The policy of the State having trammelled into law is binding upon the State and must offer adequate safeguards. Section 12(e) and 13(1) of the Legal Services Authority Act being relevant are reproduced below:

*"**12. Criteria for giving legal services**.--Every person who has to file or defend a case shall be entitled to legal services under this Act if that person, is--*

(a) .....;

(b) .....;

(c) .....

(d) .....

(e) a person under circumstances of undeserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster;"

*"**Section 13. Entitlement to Legal Services***

(1) Persons who satisfy all or any of the criteria specified in Section 12 shall be entitled to receive legal services provided that the concerned Authority is satisfied that such person has a prima-facie case to prosecute or to defend."

27. It is unfortunate to note that the legal services which the law contemplates as an essential service for victims was rendered inadequately by the State as well as by the legal services authorities during the Pandemic Covid-19. In absence of the services of legal practitioners, the State was under a bounden duty to activate legal aid authorities to deal with the situation and the benefit of default bail accruing anywhere ought to have been effectively taken up before the courts. The protection of rights within the ambit of Article 21 of the Constitution of India fully fell within the scope of Section 12(e) of the Act, therefore, no discrimination could be practiced between the accused persons entitled to be released on default bail as compared to the other accused persons released on personal bonds keeping in view the general directions of the apex court coupled with the satisfaction of the State. It is immaterial whether such persons during the lock-down period had applied for help under Section 13(2) of the Legal Services Authority Act or not.

28. It is also true that the default bail may at times become a futile plea when an accused is involved in more than one or a series of offences, yet he may claim the benefit of default in one case but the actual release for his involvement in some other offence may not bring, such a person, the benefit of setting him free.

29. The above situation is also experienced invariably besides the fact of delayed justice. This Court has no hesitation to put on record that the right under Article 21 of the Constitution of India is an enjoyable right for which the plea of default bail unfettered by procedure must yield immediate release. The procedural law has left a grey area which deserves to be dealt with in appropriate cases. However, the question framed in the

present case for the reasons recorded above, obliges the courts to guard the rights embodied under Article 21 of the Constitution of India in all circumstances.

30. Now coming to the two cases at hand, there is a clear dereliction of duty in Bail Application No. 5384 of 2020 (Abhishek Srivastava v. State of U.P.) and the position is amply evident from the report of the District Judge extracted above, hence a case for default bail is made out. The court of magistrate is accordingly directed to release the applicant **Abhishek Srivastava involved in Crime No. 0368 of 2018, under Section 420, 467, 468 and 471 IPC, Police Station Aliganj, Lucknow**, on furnishing bail bonds to the satisfaction of the court and it shall be open to the prosecution to act in accordance with law, provided the filing of charge warrants the accused applicant to be detained in judicial custody. The magistrate shall also satisfy himself that the plea of default bail was enforceable prior to the date of filing the charge sheet and being available is enforceable on the date of release which in the present case seems doubtless.

31. In the other Bail Application No. 5756 of 2020 (Sanjeev Yadav v. State), the prosecution has adopted a peculiar stand to justify the default. It is stated that the closure of court prevented them to file the charge sheet before the deadline i.e. 29.4.2020. The prosecution has taken a bald plea without showing any steps having been taken to file the charge sheet by approaching the court or through online service. The plea advanced is misleading and cannot be accepted particularly when the date of filing itself is shown during the lock-down period i.e. 5.5.2020. Moreover, as per the periodic guidelines during Pandemic, the courts were open for filing the reports under Section 173 Cr.P.C. The position emerging as a result of failure to sanction prosecution, in absence whereof cognizance cannot be taken, has been clarified in the case reported in ***(2013) 3 SCC 77 (Suresh Kumar Bhikamchand Jain v. State of Maharashtra and another)***, wherein failure to file the charge sheet has been laid down as the rule for default bail.

32. It is well settled that investigation is complete with the filing of charge sheet, therefore, the limitation embodied under Section 167(2) must be seen on the date of filing of the charge sheet in the court and any other date suggesting completion of investigation is irrelevant and does not satisfy the requirement of law. The right of default bail which undoubtedly accrued to the applicant became enforceable on 29.4.2020. This right was very much alive when the charge sheet was filed in the court on 5.5.2020 and survived thereafter. The applicant Sanjeev Yadav is thus entitled to be enlarged on bail at par with the case of Abhishek Srivastava.

33. Let the applicant **Sanjeev Yadav involved in Case Crime No. 78 of 2020, under Section 406, 409, 419, 420, 467, 468, 471 IPC, Section 67 Information Technology Act and Section 7/13(1)(c) Prevention of Corruption Act, Police Station Gola, District Lakhimpur Kheri**, be enlarged on bail on the same conditions and satisfaction of the court concerned as provided in the case of Abhishek Srivastava.

34. Since the mass disaster of Pandemic Covid-19 covered the meaning of Section 2(d) of the Disaster Management Act, 2005 is not over, therefore, it is desirable to issue notice to the National

Legal Service Authority as well as the State Legal Services Authority through their Member Secretaries who may apprise the Court as to how the applicants or like victims of mass disaster were or are being helped during Pandemic Covid-19. The Member Secretary, U.P. State Legal Services Authority shall appear before this Court in person on the next date of listing with all relevant details from the respective districts. Before any further order is passed on the dereliction of duty on the part of respective magistrates/Session Judges, the Senior Registrar of this Court, in the light of report forwarded to this Court on 29.9.2020 by the District Judge, Lucknow, is hereby directed to obtain the relevant details of magistrates/Session Judges from district Lucknow/Hardoi who have failed to pass remand orders from 25.3.2020 to 16.6.2020. The Senior Registrar of this Court shall also remain present in the Court when the case is listed next.

35. List on 10.12.2020.

(2020)12ILR A249

ORIGINAL JURISDICTION

CRIMINAL SIDE

DATED: LUCKNOW 03.12.2020

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Bail No. 6873 of 2018

Dr. Naimish Trivedi (Second Bail) ...Applicant

Versus

State of U.P. ...Opp. Party

Counsel for the Applicant:

Rajendra Kumar Dwivedi, Abhishek Pathak, Amrendra Nath Tripathi, Devika Singh, Gopal Narayan Mishra, Harish Pandey, Samidha, Stuti Mittal

Counsel for the Opp. Party:

G.A., Arun Sinha

For filing second Bail Application-fresh ground or event-all the grounds taken in the second bail-already been considered while rejecting first bail application-ground of long period in jail-not tenable.

Bail Rejected. (E-9)

List of Cases cited: -

1. Kalyan Chandra Sarkar Vs Rajesh Ranjan @ Pappu Yadav & anr. delivered in Appeal (Crl.) 1129 of 2004.03

2. Anees Miya Vs St. of U.P, Criminal Appeal No.3495 of 2009

3. Pramod Kumar Saxena Vs U.O.I. & ors. reported in 2008 (63) ACC 115

4. St. of M.P. Vs Kajad vide judgment dated 06.09.2001 in Appeal (Crl.) 907 of 2001

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Ms. Samidha, learned counsel for the applicant, the learned Additional Government Advocate for the State and Sri Arun Sinha, learned counsel for the complainant.

2. This is the second bail application filed by the applicant (Dr. Naimish Trivedi), who is languishing in jail since 02.03.2016 in Case Crime No.0001 of 2016. under Sections 302, 34, 120-B and 420 of I.P.C., Police Station-Mahanagar, District-Lucknow.

3. The first bail application of the present applicant bearing Bail Application No.6874 of 2016 has been rejected by this Court on merits on 07.10.206. For convenience, the order dated 07.10.2016 is being reproduced here-in-below:-

"Rejoinder affidavit filed on behalf of the applicant today in Court is taken on record.

Heard Shri Kunwar Mirdul Rakesh, learned Senior Advocate assisted by Shri Santosh Kumar, the learned counsel for the applicant, Shri Arun Sinha, learned counsel for the complainant and the learned A.G.A. for the State as well as perused the record.

The applicant- Dr. Naimish Trivedi has sought bail in Crime No. 01 of 2016, under Sections 302/34, 120-BIPC, relating to Police Station Mahanagar, District Lucknow.

It has been contended by the learned Senior Advocate that the applicant is not named in the FIR. During the course of investigation the applicant was made accused in this case on the ground that prior to the alleged occurrence, the applicant had agreed to sell his house to the deceased for a sum of Rs. 7.5 Crores and had received more than one crore as advance. A deed of agreement was also executed between the applicant and the deceased. It is said that since the applicant did not execute the sale deed and the deceased was pressurizing him to receive the balance amount of sale consideration and execute sale deed, the applicant in order to get rid of the deceased, engaged shooters and got him murdered. The submission of the learned Senior advocate is that the motive as alleged by the prosecution is not sufficient to cause death of any person. Even if it is believed to be true that the applicant had agreed to sell his house and had also received advance money, the dispute was purely of civil nature and the applicant could not get benefit by the death of the deceased. With regard to the telephonic conversation and call details record, the submission of the learned Senior Advocate is that the said call record and telephonic conversation placed on record by the complainant with the counter affidavit, is not an authentic document and cannot be made basis of presumption that the applicant had conspired to kill the deceased. The applicant is a renouned Dental Surgeon having his clinic in Mahanagar and it cannot be presumed that he would conspire to kill the deceased. The learned Senior Advocate has referred to the statement of the witnesses, who have been interrogated during the investigation and has submitted that it has come in evidence that the complainant, who is the daughter of the deceased, had relation with Haseeb @ Asif and he was following the car in which the deceased and the complainant were traveling soon before the occurrence. There is every possibility that Haseeb might have conspired to kill the deceased because being Muslim, his relation and affair with complainant was objected by the deceased. It is also a submission on behalf of the applicant that the only evidence against the applicant is the statement of co-accused and as per the provision of the Indian Evidence Act, the statement of the co-accused cannot be read in evidence against the applicant. It has lastly been submitted that co-accused Adnan has already been granted bail by this Court vide order dated 16.6.2016.

The learned counsel for the complainant as well as the learned Additional Government Advocate, both have vehemently opposed the prayer for bail on the ground that it is admitted that the applicant had agreed to sell his house situated at Mahanagar, Lucknow to the deceased for a sum of Rs. 7.5 Crores and had also received 1.5 Crore as advance. The deceased was the owner of the Ritz Hotel and he had been continuously requesting the applicant to receive the

balance amount and execute the sale deed but since the applicant had no intention to sell his house, therefore out of advance money, he spent Rs. 5,00,000/- (Five Lakhs) to engage shooters and got the deceased killed so that he may get rid of the deceased. The learned counsel for the complainant has taken the court to the call details record and the telephonic conversation annexed with the counter affidavit and has submitted that it has come in evidence that one Subhash Yadav was acting as mediator and on the instructions of the applicant, he arranged the shooters, namely, Adnan Ahmad and Wasif @ Saif. It has also come in evidence that co-accused Adnan provided his firearum and the co-accused Wasif @ Saif using that firearm, killed the deceased. The co-accused Adnan was granted bail on the ground that the only allegation against him was that he provided his gun to the actual shooter but so far as the case of the present applicant is concerned, he is master mind of the crime and the call detail record as well as telephonic conversation, clearly reveal that he had engaged shooters to execute the crime. With regard to call detail records and the telephonic conversation, the submission of Shri Arun Sinha is that the investigation of this case was conducted by Special Task Force and the voice call as well as the call detail record was sent to the expert from where the same were verified. It has also been submitted by the learned counsel for the complainant that during the course of investigation the Investigating Officer of STF sought permission of the Court to take the sample of voice of the applicant in order to tally the telephonic conversation but the applicant refused to give the sample of his voice and this circumstance should be treated as adverse to the applicant. The learned counsel for the complainant has also pointed out that prior to the occurrence, one Pappu was contacted for commission of crime but after the crime was committed and he came to know that work was done by some one else, he started negotiations with the applicant and demanded money because he had suffered a loss on account of crime being committed by some one else. The conversation between Pappu and the present applicant is on record and has also been verified. With regard to the affair of the complainant with Haseeb, the submission on behalf of the learned counsel for the complainant is that even if it is found that the complainant was having affairs with some Muslim Boy, there is no evidence to the effect that he had planned to kill the deceased and he could have benefited by the death of the deceased.

After having heard learned counsel for the parties and after having gone through the material on record but without expressing any opinion on merit of the case, I find that on the basis of evidence on record, the applicant has no case for bail at this stage, hence his bail application is rejected."

4. The instant second bail application has been filed on 20.06.2018.

5. This second bail application has been filed mainly on the ground that PW-1 the daughter of the deceased, who is informant, and PW-2, wife of the deceased, have not supported the prosecution case while recording their chief statement and the cross-examination. Further, the motive suggested by the prosecution is so week inasmuch as the present applicant shall not be gaining anything to eliminate the deceased on account of alleged agreement to sale entered into between the present applicant and the deceased along with his wife.

6. Ms. Samidha, learned counsel for the applicant has submitted that the material relating to the telephonic calls and the conversation are not authentic documents, therefore, those documents cannot be made the basis of presumption. It has also been submitted that the agreement to sale appears to be fictitious on the face of it inasmuch as neither the proper signatures have been made thereon nor the dates have correctly been indicated. Admittedly, the said agreement is subject matter of one civil suit wherein the original deed has been filed before the court concerned.

7. On 02.09.2019, one supplementary affidavit has been filed on behalf of the accused-applicant reiterating the grounds taken in the second bail application. It has been submitted by Ms. Samidha referring the supplementary affidavit that there was one person namely Haseeb, who was having relation with the informant, who is daughter of the deceased, was chasing the vehicle of the deceased when the deceased was returning back to his home from his hotel at about 11:00 p.m. (night) on 01.01.2016 i.e. the date of incident. As per the statement recorded under Section 161 Cr.P.C. the Haseeb has admitted that he was having relation with the informant and on the date of incident the informant was willing to meet him. They met for sometime but in the meantime on account of another engagement of Haseeb, he told the informant that they shall meet another day. However, after sometime on the same day at about 10:45 p.m. Haseeb again rang the informant to meet her but she told that she was returning back to home with her father, therefore, she was unable to meet and told that if he was behind the car of the informant would not overtake as his father is with her. Thereafter, Haseeb returned back to his home.

8. Referring the aforesaid statement, learned counsel for the applicant has submitted that Haseeb might have conspired to kill the deceased for the reason that father of the informant was not happy for the relation of the informant with the Haseeb. Therefore, he should have been made either accused or one of the witnesses but nothing was done for the reason best know to the prosecution.

9. Ms. Samidha, learned counsel for the applicant has referred para-32 of the supplementary affidavit wherein it has been indicated that all the private witnesses have been examined and only the police officials are left to be examined, as such, the present applicant may be granted bail as he would not be in a position to affect the trial in any manner whatsoever.

10. Ms. Samidha, learned counsel for the applicant has lastly contended that the present applicant is in jail since 02.03.2016 i.e. almost about four years and nine months period have passed, therefore, he may be enlarged on bail on the ground of long period of incarceration in the jail.

11. Per contra, learned Additional Government Advocate has opposed the second bail application by submitting that since no fresh grounds after rejection of the first bail application have been taken, therefore, the present applicant may not be granted bail. He has also submitted that the bail may not be granted on the grounds so raised by the learned counsel for the applicant that all the material witnesses including eye witness have been examined and there is no possibility of winning over or tampering the prosecution witnesses, for the reason that in the present case the eye witness has not turned hostile and all other witnesses have supported the prosecution

case and considering the allegations made against the present applicant that he hired professional killers to eliminate the father of the informant (now deceased), therefore, the applicant may not be granted bail. He has also submitted that the relevant material e.g. the telephonic calls and the conversations of present applicant with the accused-persons have been filed before the trial court, therefore, those material evidence shall be examined by the learned trial court strictly in accordance with law.

12. Learned Additional Government Advocate has also submitted that without the actual change in the circumstances after rejection of the first bail application, the second bail application would be deemed to be seeking review of the earlier order, which is not permissible under law. He has also submitted that it has been the view of Hon'ble Supreme Court as well as this Court that mere long period of incarceration in jail by itself will not make out a case for grant of any indulgence, therefore, taking into consideration the facts and circumstances of the present case and gravity of the offence, the present applicant may not be enlarged on bail on the ground of long period of incarceration in jail.

13. Sri Arun Sinha, learned counsel for the complainant has vehemently opposed the second bail application by submitting that golden rule for maintaining the second bail application is that it can only be entertained when some fresh grounds or events have come up after the disposal of the first bail application. The hearing of the second bail application is not the review of the order which was passed on merit. He has further submitted that the law is settled that if the second bail application is entertained on the grounds which were already existed, it will create no ending process and even, the day if the bail application is rejected, the second bail application will be moved and in that case the precious time of the court will unnecessarily be wasted. He has drawn attention of this Court towards the order dated 07.10.2016, the rejection order of first bail application, whereby almost all the grounds so taken by the learned counsel for the applicant by filing the second bail application have been considered thoroughly e.g. the factum of agreement to sale; motive; role of Haseeb; statement of the co-accused; call details/ record and telephonic conversation etc. Even the charge-sheet was filed on 27.05.2016 and the first bail application has been rejected thereafter on 07.10.2016. Therefore, as submitted by Sri Sinha, in the absence of raising fresh grounds or events those might have been emerged after disposal of the first bail application, this second bail application may not be entertained and may therefore be rejected.

14. Sri Arun Sinha, learned counsel for the complainant has drawn attention of this Court towards Annexure No.CA-1 to the counter affidavit, which is a deed i.e. agreement to sale. The internal page 3 of agreement to sale indicates that one cheque worth Rs.51:00 lacs vide Cheque No.792599 dated 11.04.2015 has been paid as advance to the present applicant by the deceased in consideration to the property in question which was to be purchased in worthy Rs.7:50 crores. Thereafter, he has drawn attention of this Court towards Annexure No.-CA-18 to the counter affidavit, which is a bank details of the deceased, which indicates that the same cheque worth Rs.51:00 lacs was debited from the account of the deceased for the present applicant. Not only the above,

another cheque of Rs.25:00 lacs was given to the present applicant and the said amount of Rs.25:00 lacs was also debited from the account of the deceased for the present applicant.

15. Sri Sinha has further submitted that besides the aforesaid amount, Rs.8:00 lacs, Rs.4:00 lacs, Rs.10:00 lacs, Rs.15:00 lacs, Rs.10:00 lacs and Rs.10:00 lacs respectively have been given to the present applicant by the deceased through cash from time to time. Those receipts have been enclosed with the counter affidavit.

16. Sri Sinha has therefore submitted that the total Rs.1:33 crores was paid to the present applicant by the deceased. As per Sri Sinha, after sometime, as soon as the deceased managed the remaining considering amount, he asked the present applicant to execute the sale-deed in his favour pursuant to the agreement to sale but the present applicant refused to execute the sale-deed by apprising that value of the house property in question is much more than Rs.7:50 crores.

17. Sri Sinha has submitted that having malafide intention and ulterior motives in his mind to usurp the amount, which was paid to the present applicant through cash, he approached the sharp shooter for eliminating the deceased. There is no doubt that Rs.76:00 lacs was given to the present applicant through cheques and remaining Rs.57:00 lacs was given by cash. The present applicant was willing to usurp the said amount which was paid by the deceased through cash. Not only the above, during the concurrence of agreement to sale the present applicant came to know that the value of his property is more than Rs.8:00 crores, therefore, he was not willing to execute the sale-deed in favour of the deceased. Hence, the motives of the present applicant was clear as submitted by Sri Sinha.

18. Sri Sinha, learned counsel for the complainant has drawn attention of this Court towards other material which was filed with the counter affidavit however the said material was available before the Court at the time of disposal of the first bail application e.g. conversation details of Pappu Yadav, whereby the said Pappu Yadav had talked with the present applicant. Besides, so as to verify the voice of the present applicant with the calls/ conversations filed before the Court in the form of CD the voice sample of the present applicant was required and firstly he agreed to provide his voice sample but later on, he refused, therefore, the factum of such refusal would be considered against the present applicant, as the adverse inference would be drawn against the present applicant. Since all these materials have been considered by this Court while rejecting the first bail application on 07.10.2026, therefore, there is no need to discuss those things in detail again.

19. Sri Arun Singh, learned counsel for the complainant has submitted that the accused-applicant is delaying the trial for for no cogent reasons inasmuch as the chief statement of the informant was recorded on 01.08.2017 and cross-examination has been completed by the counsel on 27.08.2018. Thereafter, the trial court had closed the opportunity of cross-examination of the accused two times, however, the application was moved from the side of the present applicant under Section 311 Cr.P.C., which was allowed by the trial court. Further, the chief statement of PW-1 Mrs. Usha Khanna was recorded on 25.09.2017 and after taking adjournment by

the accused, the cross-examination of the said witness was completed on 06.01.2018. He has also submitted that five witnesses including the eye witness have been examined and all the witnesses have supported the prosecution story.

20. Sri Arun Sinha, learned counsel for the complainant has referred the judgment of Hon'ble Supreme Court dated 18.01.2005 in **re:- *Kalyan Chandra Sarkar vs. Rajesh Ranjan @ Pappu Yadav & Anr. delivered in Appeal (Crl.) 1129 of 2004,*** whereby the Hon'ble Supreme Court has held that the second bail application can only be entertained if there are fresh grounds or events which have been emerged after disposal of the first bail application. The Hon'ble Supreme Court has turned down the plea of the period of long incarceration in jail by observing that ***"this Court held since the above factors go to the root of the right of the accused to seek bail, non consideration of the same and grant of bail solely on the ground of long incarceration vitiated the order of the High Court granting bail."***

21. The Division Bench of this Court in ***Criminal Appeal No.3495 of 2009; Anees Miya vs. State of U.P***. has turned down the plea of long incarceration in jail. In the case of ***Anees Miya (supra)***, the appellant was in jail since 17.07.2007 and at the time of final disposal of the aforesaid case by the Division Bench of this Court vide order dated 25.04.2018, about 11 years period had lapsed but this Court referring the various dictums of Hon'ble Supreme Court and this Court has held that mere long detention in jail does not entitle a convict of bail pending appeal.

In the case of ***Anees Miya (supra)***, the Division Bench of this Court has held that ***"however, the fact remains that the Hon'ble Supreme Court in a number of cases has taken a consistant view that ignoring the facts and circumstances of the case mere long period of incarceration in jail by itself will not make out a case for grant of any indulgence."*** Referring the judgment of Hon'ble Supreme Court in re: ***Rajesh Ranjan Yadav vs. CBI through its Director reported in 2007 (1) SCC 70***; some portion thereof has been narrated as under:-

"..... None of the decisions cited can be said to have laid down any absolute and unconditional rule about when bail should be granted by the Court and when it should not. It all depends on the facts and circumstances of each case and it cannot be said there is any absolute rule that the mere fact that the accused has undergone a long period of incarceration by itself would entitle him to be enlarged on bail."

In the case of ***Anees Miya (supra)***, the judgment of Hon'ble Supreme Court in re: ***Pramod Kumar Saxena vs. Union of India and others reported in 2008 (63) ACC 115*** has been quoted whereby the Hon'ble Supreme Court has held that ***"mere long period of incarceration in jail would not be per se illegal. If the accused has committed an offence, he has to remain behind bars. Such detention in jail even as an under trial prisoner would not be violative of Article 21 of the Constitution."***

22. The Hon'ble Supreme Court in re: ***State of Madhya Pradesh vs. Kajad vide judgment dated 06.09.2001 in Appeal (Crl.) 907 of 2001*** has held as under:-

"It has further to be noted that the factum of the rejection of his earlier bail application bearing Misc. Case No.2052 of

2000 on 05.06.2000 has not been denied by the respondent. It is true that successive bail applications are permissible under the changed circumstances. But without the change in the circumstances the second application would be deemed to be seeking review of the earlier judgment which is not permissible under criminal law as has been held by this Court in Hari Singh Mann v. Harbhajan Singh Wajwa & Anr (2001 (1) SCC 169] and various other judgments."

23. In view of the above, learned Additional Government Advocate as well as Sri Arun Sinha, learned counsel for the complainant have submitted with vehemence that since no fresh grounds or events have come up after disposal of the first bail application and none of the witnesses have turned hostile rather those witnesses have supported the prosecution case and the trial in question is reaching to complete, therefore, the present applicant may not be granted bail. They have also submitted that the submission of learned counsel for the applicant in respect of long period of incarceration in jail i.e. about four years and nine months may not be sufficient in view of the dictums of Hon'ble Supreme Court as well as of this Court as cited above, therefore, the present second bail application may be rejected.

24. Having heard learned counsel for the parties and having perused the material available on record, I am of the considered opinion that in the light of the settled proposition of law for filing second bail application, there is no merit in the submissions of learned counsel for the applicant inasmuch as no fresh grounds or events have been raised which are emerged after disposal of the first bail application. As a matter of fact, all the grounds taken in the second bail application and material shown to the Court, have already been considered by this Court while rejecting the first bail application on 07.10.2016. So far as the submission on the point of long period of incarceration in jail is concerned, I am of the view that in the light of the facts and circumstances of the issue in question such ground is not tenable in the eyes of law. It is made clear that I am not expressing my opinion on merits of the case as I have only considered the merit of the second bail application. It is clarified that my aforesaid observation shall not affect the trial proceedings in any manner whatsoever as the learned trial court shall not take any adverse inference out of my aforesaid observations while conducting and concluding the trial.

25. Since the learned counsel for the parties have submitted that all the relevant witnesses have already been examined including the eye witness and only the police officials etc. are left to be examined, therefore, I hereby direct the learned trial court to conclude the trial expeditiously, preferably within a period of six months by fixing short dates and ensuring the remaining witnesses to be examined at the earliest. While ensuring the witnesses to be examined, the coercive steps as prescribed under the law may be adopted keeping in view the guidelines issued from time to time to meet out the situation of Covid-19, if any witness deliberately avoids the trial proceedings. In any case, the trial shall be concluded by 31st of May, 2021.

26. Accordingly, the instant second bail application stands ***rejected***.

(2020)12ILR A257
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.12.2020

BEFORE

THE HON'BLE GAUTAM CHOWDHARY, J.

Crl. Misc. Bail Application No. 38347 of 2020

Mahesh Singh ...Applicant (In Jail)
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Sri Agni Pal Singh

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

10 kg 27 gm of Contraband recovered from possession of accused-sampling done on 06.-6.2020 but received by the Laboratory by delay of 1 month and 10 days-sample remained in police custody for such period-no criminal history-while considering such application-reasonable grounds for believing that accused is not guilty and records its satisfaction.
Bail Granted. (E-9)

List of Cases cited:-

1. St. of Raj. Vs Tara Singh, (2011) 11 SCC 559

2. U.O.I. Vs Shiv Shankar Keshari, (2007) 7 SCC 798

(Delivered by Hon'ble Gautam Chowdhary, J.)

1. Heard learned counsel for the applicant and learned A.G.A. for the State and perused the material brought on record.

2. The present bail application has been filed on behalf of the applicant, **Mahesh Singh**, with a prayer to release him on bail in Case Crime No. 343 of 2020, under Sections 8/20/22/23/25/60 N.D.P.S Act, Police Station- Bithoor, District- Kanpur Nagar, during pendency of trial.

3. Submission of counsel for the applicant is that the amount of the contraband (10 Kg. 27 gms. of Charas) which has been allegedly recovered from the possession of the accused is not supported by any independent witness. Other submissions showing the falsity of the prosecution story with regard to the recovery have also been made. Further contention is that the statutory provisions of Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 have not been complied with in the right manner. The counsel has also tried to demonstrate the circumstances indicating the false implication of the applicant. It is further submitted that in this case sampling was done on 6.6.2020 at the place of occurrence, which fact is evident from the Case Diary, but the sample was received by Laboratory on 17.7.2020 i.e. by delay of one month and 10 days (copy of the laboratory report dated 24.8.2020 is annexed as Annexure No. 6 to the affidavit), which shows that the sample remained in the custody of the police for more than one month as such there is every possibility of adulteration. It has been assured on behalf of the applicant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required and is also ready to accept all the conditions which the Court may deem fit to impose upon him. It has also been submitted that the applicant is in jail since 7.6.2020 having no criminal history.

4. In support of his contention learned counsel for the applicant has relied upon the judgment of the Hon'ble Supreme Court in **State of Rajasthan Vs. Tara Singh, (2011) 11 SCC 559**, in which it has been held as under:-

"1. .....

2. At the very outset, it must be understood that the provisions of Section

50 would no longer be applicable to a search such as the one made in the present case as the opium had been carried on the head in a gunny bag. A Bench of this Court in State of Himachal Pradesh v. Pawan Kumar (2005) 4 SCC 350 after examining the discrepant views rendered in various judgments of this Court has found that Section 50 of the Act would not apply to any search or seizure where the article was not being carried on the person of the accused. Admittedly, in the present case, the opium was being carried on the head in a bag. Mr. Abhishek Gupta, the learned counsel for the appellant-State, therefore, appears to be right when he contends that the observations of the High Court that the provisions of Section 50 of the Act would not be applicable was no longer correct in view of the judgment in Pawan Kumar's case. We find, however, that the second aspect on which the High Court has opined calls for no interference. As per the prosecution story the samples had been removed from the Malkhana on the 26th of February, 1998, and should have been received in the laboratory the very next day. The High Court has, accordingly observed that the prosecution had not been able to show as to in whose possession the samples had remained from 26th February, 1998 to 9th March, 1998. The High Court has also disbelieved the evidence of P.W. 6 and P.W.9, the former being the Malkhana incharge and the latter being the Constable, who had taken the samples to the Laboratory to the effect that the samples had been taken out on the 9th of March, 1998 and not on the 26th February, 1998. The Court has also found that in the absence of any reliable evidence with regard to the authenticity of the letter dated 26th February, 1998 it had to be found that the samples had remained in some unknown custody from the 26th February, 1998 to 9th March, 1998. We must emphasise that in a prosecution relating to the Act the question as to how and where the samples had been stored or as to when they had despatched or received in the laboratory is a matter of great importance on account of the huge penalty involved in these matters. The High Court was, therefore, in our view, fully justified in holding that the sanctity of the samples had been compromised which cast a doubt on the prosecution story. We, accordingly, feel that the judgment of the High Court on the second aspect calls for no interference. The appeal is, accordingly, dismissed. The respondent is on bail. His bail bonds stand discharged."

5. Learned A.G.A. has vehemently opposed the prayer for bail but could not argue the aforesaid facts.

6. The Apex Court in the Case of **Union of India vs. Shiv Shankar Keshari, (2007) 7 SCC 798** has held that the court while considering the application for bail with reference to Section 37 of the Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the court has not to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty.

7. Considering the facts of the case and keeping in mind, the ratio of the Apex Court's judgment in the case of **Union of India vs. Shiv Shankar Keshari, (2007) 7 SCC 798**, larger mandate of Article 21 of the constitution of India, the nature of

accusations, the nature of evidence in support thereof, the severity of punishment which conviction will entail, the character of the accused-applicant, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interest of the public/ State and other circumstances, but without expressing any opinion on the merits, I am of the view that it is a fit case for grant of bail.

8. Let the aforesaid applicant, be released on bail in the aforesaid case crime number on his furnishing a personal bond and two reliable sureties of the like amount to the satisfaction of the court concerned with the following conditions-

1. The applicant shall not tamper with the prosecution evidence by intimidating/ pressurizing the witnesses, during the investigation or trial.

2. The applicant shall cooperate in the trial sincerely without seeking any adjournment.

3. The applicant shall not indulge in any criminal activity or commission of any crime after being released on bail.

4. The applicant shall remain present before the trial court on each date fixed, either personally or through his counsel. In case of his absence, without sufficient cause, the trial court may proceed against him under Section 229-A of the Indian Penal Code;

5. In case, the applicant misuses the liberty of bail and in order to secure his presence proclamation under Section 82 Cr.P.C. is issued and the applicant fails to appear before the Court on the date fixed in such proclamation, then, the trial court shall initiate proceedings against him, in accordance with law, under Section 174-A of the Indian Penal Code.

6. The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court default of this condition is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of his bail and proceed against him in accordance with law.

7. In case the applicant has been enlarged on short term bail as per the order of committee constituted under the orders of Hon'ble Supreme Court his bail shall be effective after the period of short term bail comes to an end.

8. The applicant shall be enlarged on bail on execution of personal bond without sureties till normal functioning of the courts is restored. The accused will furnish sureties to the satisfaction of the court below within a month after normal functioning of the courts are restored.In case court below is functioning normally, this condition will not apply and applicant shall be enlarged on bail on execution of bail bond and two sureties to the satisfaction of the court below.

9. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad.

10. The concerned Court/Authority/Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

9. In case of breach of any of the above conditions, it shall be a ground for cancellation of bail.

(2020)12ILR A260
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.11.2020

BEFORE
THE HON'BLE SHAMIM AHMED, J.

Crl. Misc. Ist Bail Application No. 38874 of 2020

Raju Singh ...Applicant (In Jail)
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Sri Ashutosh Kumar Pandey

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

Gangster Act-claim that never worked against public peace –Bail is a rule and Jail is exception-it appears that Applicant is not a member or head of any gang-no any offence committed under chapter 16, 17 and 22.

List of Cases cited: -

1. Dataram Singh Vs St. of U.P. & anr., reported in (2018)3 SCC 22

(Delivered by Hon'ble Shamim Ahmed, J.)

1. पूरक शपथ पत्र आज दाखिल किया गया है, उसे पत्रावली पर रखा जाये।

2. वर्तमान दाण्डिक प्रकीर्ण जमानत प्रार्थना पत्र, आवेदक **राजू सिंह** की ओर से मु०अ०सं० 631 सन् 2020, अन्तर्गत धारा 3(1) उत्तर प्रदेश गिरोहबंद समाज विरोधी क्रिया कलाप(निवारण) अधिनियम 1986, थाना सराय लखन्सी, जनपद मउ में जमानत पर मुक्त करने हेतु प्रस्तुत किया गया है।

3. आवेदक के विद्वान अधिवक्ता एवं विद्वान अपर शासकीय अधिवक्ता को सुना तथा पत्रावली का परिशीलन किया।

4. आवेदक के विद्वान अधिवक्ता ने तर्क प्रस्तुत किया कि आवेदक को इस प्रकरण में रंजिशन झूठा फँसाया गया है, आवेदक आरोपित अपराध संख्या 631 वर्ष 2020, अन्तर्गत धारा 3(1) उत्तर प्रदेश गिरोहबंद एवं समाज विरोधी क्रिया कलाप (निवारण) अधिनियम थाना सराय लखन्सी, जनपद मऊ में पूर्णतया निर्दोष है, उसकी उक्त आरोपित अपराध में किसी प्रकार की सहभागिता अथवा संलिप्तता नहीं रही है, उसने आरोपित अपराध कारित नहीं किया है, उसे आरोपित अपराध में झूंठा शत्रुतावश, रंजिशन फंसाया आरोपित/नामित किया व कराया गया है। आवेदक गिरोहबंद नहीं है वह किसी गिरोह का सदस्य सरगना अथवा मुखिया भी नहीं है। आवेदक द्वारा कभी कोई संज्ञेय अथवा असंज्ञेय अपराध कारित नहीं किया गया है, उसके द्वारा गिरोहबंद के रूप में भी कभी कोई अपराध कारित नहीं किया गया है। आवेदक को दण्डित, कष्टित, प्रताडित, अपमानित, ब्लैकमेल करने के उद्देश्य से थाना सराय लखन्सी, जनपद मऊ में आरोपित अपराध पुलिस के द्वारा लिखवाई गई है।

5. आवेदक के विद्वान अधिवक्ता ने पुनः अपना तर्क प्रस्तुत करते हुऐ कहा। आवेदक पर आरोपित अपराध की प्राथिमिकी स्वतंत्र व सारवान आरोप एवं तथाकथित अपराध के आधार पर नहीं लिखाई गई है अपितु पुलिस अभिलेख व पूर्व में पंजीकृत आरोपित अपराध के आधार पर आधारित करते हुए लिखी/लिखाई गई है जो विधि विरूद्ध, स्वेच्छाचारी, अवैधानिक है। आवेदक पर आरोपित अपराध के गैंग चार्ट में 4 वाद दर्शित है जिसमें आवेदक की जमानत गुणागुण के आधार पर स्वीकार की जा चुकी है। आवेदक पर आरोपित अपराध के समर्थन व पुष्टि में आवेदक के विरूद्ध अभियोजन के पास कोई रंच मात्र विधिक, ग्राह्य व विश्वसनीय साक्षय उपलब्ध नहीं है। आवेदक द्वारा लोक व्यवस्था

अथवा सार्वजनिक शांति व्यवस्था के प्रतिकूल कभी भी कोई कार्यवाही नहीं की गयी है न तो कभी हिंसा ही की गई है। उसनें भारतीय दण्ड संहिता के अध्याय 16,17 एवं 22 में वर्णित दण्डनीय अपराध कारित नहीं किया है। उसने आर्थिक दुनियाबी भौतिक लाभार्थ कभी कोई अपराध नहीं किया है न तो किसी तथाकथित अपराध के माध्यम से अनुचित लाभ अथवा धनार्जन ही किया है। एवं आवेदक दिनांक 30.07.2020 से काराभिरक्षा में निरूद्ध चला आ रहा है।, इसलिए आवेदक को जमानत पर छोड़ दिया जाय, जमानत पर मुक्त होने के पश्चात आवेदक फरार नहीं होगा और न ही अभियोजन साक्षियों को प्रभावित करेगा।

6. विद्वान अपर शासकीय अधिवक्ता ने आवेदक के जमानत प्रार्थना पत्र का विरोध किया। तथा समर्थन मे कहा गया कि आवेदक जमानत पर रिहा होने पर पुनः अपराधिक गतिविधियों मे लिप्त हो जाएगा। जो समाज के लिये हानिकारक सिद्ध होगा। तथा प्रथम सूचना मे कही गई बातों का समर्थन करते हुऐ कहा कि आवेदक एक शातिर किस्म का अपराधी है। जो गैंग बनाकर मारपीट आगजनी धमकी और हत्या का प्रयास आदि जैसे संगीन अपराध कारित करके आर्थिक एवं भौतिक दुनियाबी लाभ अर्जित करता है। तथा इसके गैंग मे कई सक्रिय सदस्य है, जो अपराध कारित करते रहते है।

7. उभय पक्षो को सुना व पत्रावली का अवलोकन किया। जमानत प्रार्थना पत्र को निर्णित करने से पहले जमानत की विधि क्या है इसका उल्लेख करना आवश्यक है।

8. विधि का सिद्धान्त है कि "जमानत नियम और जेल अपवाद है"। जमानत न तो किसी यांत्रिक आदेश से स्वीकार या अस्वीकार ही की जा सकती है, क्योंकि यह न केवल उस व्यक्ति की स्वतंत्रता संबंधित है जिसके विरूद्ध आपराधिक कार्यवाही चल रही है, परन्तु यह दण्ड न्याय प्रणाली के हित से भी संबंधित है और यह भी सुनिश्चित करना है, कि अपराध करने वालों को न्याय में बाधा डालने का अवसर न दिया जाये।

9. जमानत के लिए आवेदन पर विचार करते समय, न्यायालय को कुछ कारकों को ध्यान में रखना चाहिए, जैसे कि अभियुक्त के खिलाफ प्रथम दृष्टया मामला का होना, आरोप की गंभीरता और प्रकृति, आरोप सिद्ध होने की स्थिति में सजा की कठोरता, अनुपूरक साक्ष्य की प्रकृति, न्यायालय की आरोप के लिये प्रथम दृष्टया संतुष्टि, आरोपी की हैसियत व पद, अभियुक्त की न्याय से भागने और अपराध को दोहराने की संभावना, साक्ष्य के साथ छेडछाड की संभावना, शिकायतकर्ता और गवाह को धमकी की आशंका और अपराधी का आपराधिक इतिहास, जमानत के लिए आवेदन पर विचार करते समय, न्यायालय को मामले के अभियोजन पक्ष के गवाहों की विश्वसनीयता व स्थिरता की गुण, दोष की जांच सघनता से नहीं करनी चाहिए। क्यों कि यह केवल परीक्षण के दौरान ही जांचा जा सकता है समता जमानत का एकमात्र आधार तो नही है, परन्तु यह उपरोक्त पहलुओं में से एक हो सकता है, जो अनिवार्य रूप से हैं। जमानत के आवेदन पर विचार करते समय आवश्यक है।

10. यह अविवादित है, कि जमानत देना या न देना, ये उस न्यायालय का विवेकाधिकार है, जो इस मामले की सुनवाई कर रहा है। हालांकि यह विवेकाधिकार निर्बाध है। परन्तु इसका उपयोग न्यायसंगत, मानवीय व सहानुभूति पूर्वक किया जाना चाहिए न कि मनमाने तरीके से। जमानत स्वीकार या अस्वीकार करने के आदेश में कारणों को प्रथम दृष्टया इंगित करना चाहिए, हालांकि गुण-दोष पर साक्ष्य की विस्तृत जांच और विस्तृत

दस्तावेजीयकरण को दर्शाने की आवश्यकता नहीं है। जमानत की शर्तें इतनी भी सख्त नहीं होनी चाहिए की उसका अनुपालन करना ही अक्षम हो जाये, जिससे ज़मानत ही काल्पनिक न हो जाये।

11. उपरोक्त तथ्यात्मक व विधिक विवरण से यह विदित है कि आवेदक को दण्डित, कष्टित, प्रताडित, हैरान व परेशान करने के उद्देश्य से उसके विरूद्ध आरोपित अपराध मे उक्त अपराध की प्राथिमिकी लिखायी गयी है। आवेदक किसी गैंग का मुखिया अथवा सदस्य नहीं है, न तो उसका कोई गिरोह ही है। तथा आवेदक द्वारा लोक व्यवस्था अथवा सार्वजनिक शांति व्यवस्था के प्रतिकूल कभी भी कोई कार्यवाही नहीं की गयी है न तो कभी हिंसा ही की गई है। उसनें भारतीय दण्ड संहिता के अध्याय 16,17 एवं 22 में वर्णित दण्डनीय अपराध कारित नही किया है। उसने आर्थिक दुनियाबी भौतिक लाभार्थ कभी कोई अपराध नहीं किया है न तो किसी तथाकथित अपराध के माध्यम से अनुचित लाभ अथवा धनार्जन ही किया है।

12. पत्रावली पर उपलब्ध सारवान तथ्यों, भारतीय संविधान के अनुच्छेद 21 एवं Dataram Singh Vs State of U.P. and another, reported in (2018)3 SCC 22 के प्रकरण में माननीय उच्चतम न्यायालय द्वारा प्रतिपादित अभ्युक्ति के दृष्टिगत, आरोपों की प्रकृति, समर्थन में सबूतों की प्रकृति, सजा की गंभीरता, आरोपित आवेदक का चरित्र, परिस्थितियों का अवलोकन मुकदमे मे अभियुक्त की उपस्थिति को सुरक्षित करने की उचित संभावना, गवाहो से छेड़छाड़ की उचित आशंका, जनता/राज्य और अन्य परिस्थितियों का बड़ा हित एवं परीक्षण मे देरी होना एवं निकट समय में इन परिस्थितियों को देखते हुए मेरा मानना है कि यह जमानत देने के लिए एक उपयुक्त मामला है।

13. तद्नुसार वाद के गुण दोष पर बिना कोई टिप्पणी किए हुए आवेदक **राजू सिंह** को उपरोक्त वर्णित अपराध मु०अ०सं० 631 सन् 2020, अन्तर्गत धारा 3(1) उत्तर प्रदेश गिरोहबंद समाज विरोधी क्रिया कलाप(निवारण) अधिनियम 1986, थाना सराय लखन्सी, जनपद मउ में संबंधित न्यायालय की सन्तुष्टि पर व्यक्तिगत बंध-पत्र एवं उसी धनराशि के दो प्रतिभू करने पर निम्नलिखित शर्तों के साथ जमानत पर छोड़ दिया जायः-

1- आवेदक विवेचना या परीक्षण के दौरान साक्षियों को डरायेगा/धमकायेगा नहीं एवं अभियोजन साक्ष्य के साथ छेड़छाड़ नहीं करेगा।

2- आवेदक परीक्षण के दौरान बिना कोई स्थगन लिए परीक्षण में ईमानदारी से सहयोग करेगा।

3- आवेदक जमानत पर रिहा होने के बाद किसी भी अपराधिक गतिविधि में लिप्त नहीं होगा न कोई अपराधिक कृत्य करेगा।

4- आवेदक को यदि माननीय उच्चतम न्यायालय के आदेशों के तहत गठित समिति के आदेश के अनुसार अल्पकालिक जमानत पर बढ़ाया गया है तो अल्पकालिक जमानत की अवधि समाप्त होने के बाद उसकी जमानत प्रभावी होगी।

5- अदालतों के सामान्य कामकाज के बहाल होने तक आवेदक को बिना किसी जमानत के निजी मुचलके पर जमानत पर बढ़ाया जाएगा। अदालत के सामान्य कामकाज बहाल होने के बाद आरोपी एक महीने के भीतर अदालत की संतुष्टि के प्रतिभुओं को प्रस्तुत करेगा।

6- पार्टी उच्च न्यायालय इलाहाबाद की आधिकारिक वेबसाइट से डाउनलोड किए गए इस तरह के आदेश की कंप्यूटर जनित प्रतिलिपि दायर करेगी।

7- संबंधित न्यायालय/प्राधिकरण/अधिकारी, उच्च न्यायालय

इलाहाबाद की आधिकारिक वेबसाइट से आदेश की ऐसी कम्पयूटरीकृत प्रति की सत्यता की पुष्टि करेगा और लिखित रूप से इस तरह के सत्यापन की घोषणा करेगा।

14. उपरोक्त शर्तों में से किसी के उल्लंघन के मामले मे, यह जमानत रद्द करने का आधार होगा।

(2020)12ILR A263
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.11.2020

BEFORE
THE HON'BLE SHAMIM AHMED, J.

Crl. Misc. Bail Application No. 38911 of 2020

Kallu @ Dinesh Rajput ...Applicant (In Jail)
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Sri Bhaskar Bhadra

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

NDPS Act-section 42 and 52 not complied-seized *Ganja* is lesser in quantity-no independent witness.

Bail Granted. (E-9)

List of Cases cited:-

1. U.O.I. Vs Shiv Shankar Keshari, (2007) 7 SCC 798

2. Dataram Singh Vs St. of U.P. & anr., reported in (2018)3 SCC 22

(Delivered by Hon'ble Shamim Ahmed, J.)

1. वर्तमान दाण्डिक प्रकीर्ण जमानत प्रार्थना पत्र, आवेदक **कल्लू@दिनेश राजपूत** की ओर से मु०अ०सं० 695 सन् 2020, अन्तर्गत धारा 8/20/29 स्वापक औषधि और मन:प्रभावी अधिनियम, 1985(एन०डी०पी०एस० ऐक्ट), थाना बारादरी, जिला बरेली में जमानत पर मुक्त करने हेतु प्रस्तुत किया गया है।

2. आवेदक के विद्वान अधिवक्ता एवं विद्वान अपर शासकीय अधिवक्ता को सुना तथा पत्रावली का परिशीलन किया।

3. आवेदक के विद्वान अधिवक्ता द्वारा जमानत प्रार्थना पत्र प्रस्तुत कर कहा गया है, कि आवेदक को झूठा फंसाया गया है। एवं आवेदक आरोपित अपराध संख्या 695 सन् 2020, अन्तर्गत धारा 8/20/29 एन०डी०पी०एस० ऐक्ट, थाना बारादरी जिला बरेली मे पूर्णतया निर्दोष है, उसकी उक्त आरोपित अपराध मे किसी प्रकार की संलिप्तता नही रही है। उसने आरोपित अपराध कारित नही किया है, उसे आरोपित अपराध मे झूठा, शत्रुतावश, रंजिशन फंसाया एवं आरोपित/नामित किया व करवाया गया है।

4. आवेदक के विद्वान अधिवक्ता द्वारा यह भी कहा गया है कि प्रथम सूचना रिपोर्ट विलम्ब से लिखायी गयी है। प्रथम सूचना रिपोर्ट में अभियुक्त का कोई कृत्य नहीं दर्शाया गया है घटना का कोई स्वतंत्र साक्षी नही है। थाना पुलिस द्वारा धारा 42 व 52 एनडीपीएस, एक्ट का अनुपालन नहीं किया गया है। अभियुक्त पर दर्शायी गयी गांजे की मात्रा अल्प मात्रा है। जिससे स्पष्ट है कि पुलिस द्वारा सारी कार्यवाही फर्जी रूप से की गयी है। पुलिस द्वारा धूपबती को चरस बताकर उक्त मुकदमा दर्ज किया गया है। अभियुक्त एक रिक्शा चालक है मेहनत मजदूरी द्वारा परिवार का पालन पोषण व घर का काम चला रहा था और मेहनत मजदूरी के कार्य हेतु घऱ से बाहर निकला तो पुलिस द्वारा गिरफतार कर लिया गया तथा इस मुकदमें में झूंठा चालान कर दिया गया। अभियुक्त अपने घर में अकेला

कमाने वाला व्यक्ति है परिवार की सारी जिम्मेदारी प्रार्थी के उपर है। प्रथम सूचना रिपोर्ट में यह भी स्पष्ट नहीं है कि प्रार्थी से बरामद माल पुलिस को किस तरह ज्ञात हुआ कि उपरोक्त माल चरस है। तथा जमानत पर रिहा होने के पश्चात जमानत का गलत प्रयोग नहीं करेगा। अन्त में प्रार्थना की गयी है कि प्रार्थी को जमानत पर रिहा करने के आदेश पारित करने की कृपा करें।

5. आवेदक के विद्वान अधिवक्ता ने पुनः तर्क प्रस्तुत किया कि आवेदक को इस प्रकरण में झूठा फँसाया गया है, उसने कथित अपराध कारित नहीं किया है, आवेदक के पास से 1435 ग्राम चरस एवं 1815 ग्राम गांजा की जो बरामदगी दिखायी गयी है वह फर्जी है, उसके पास से कोई बरामदगी नहीं हुयी है , कथित बरामदगी का कोई स्वतंत्र जनसाक्षी नहीं है, धारा 50 एन०डी०पी०एस० ऐक्ट के प्राविधानों का अनुपालन नहीं किया गया है, आवेदक का एन०डी०पी०एस० ऐक्ट का कोई पूर्व आपराधिक इतिहास नहीं है, आवेदक निर्दोष है तथा वह इस प्रकरण में दि० 25-7-2020 से कारागार मे निरूद्ध है, इसलिए आवेदक को जमानत पर छोड़ दिया जाय।

6. सह अभियुक्त शिवा की जमानत समान अपराध संख्या 695 सन् 2020 मे इस न्यायालय की अन्य पीठ द्वारा आपराधिक जमानत अर्जी संख्या-37100 सन् 2020 मे आदेश दिनांक 11.11.2020 को दी जा चुकी है अतः आवेदक को भी इसी आधार पर जमानत दी जाय। क्योकि आवेदक का कथित अपराध सह अभियुक्त के अपराध से अधिक गंभीर प्रकृति का नहीं है। एवं दोनो को उक्त अपराध मे झूठा एवं फर्जी ढ़ंग से फंसाया गया है।

7. विद्वान अपर शासकीय अधिवक्ता ने आवेदक के जमानत प्रार्थना पत्र का विरोध किया। तथा समर्थन मे कहा कि आवेदक जमानत पर रिहा होने पर पुनः आपराधिक गतिविधियों मे लिप्त हो जाएगा। जो समाज के लिए हानिकारक सिद्ध होगा। तथा प्रथम सूचना मे कही गई बातों का समर्थन किया।

8. उभय पक्षों को सुना व पत्रावली का अवलोकन किया। जमानत प्रार्थना पत्र को निर्णित करने से पहले जमानत की विधि क्या है इसका उल्लेख करना आवश्यक है।

9. विधि का सिद्धान्त है कि "जमानत नियम और जेल अपवाद है"। जमानत न तो किसी यांत्रिक आदेश से स्वीकार या अस्वीकार ही की जा सकती है, क्योंकि यह न केवल उस व्यक्ति की स्वतंत्रता संबंधित है जिसके विरूद्ध आपराधिक कार्यवाही चल रही है, परन्तु यह दण्ड न्याय प्रणाली के हित से भी संबंधित है और यह भी सुनिश्चित करना है, कि अपराध करने वालों को न्याय में बाधा डालने का अवसर न दिया जाये।

10. जमानत के लिए आवेदन पर विचार करते समय, न्यायालय को कुछ कारकों को ध्यान में रखना चाहिए, जैसे कि अभियुक्त के खिलाफ प्रथम दृष्टया मामला का होना, आरोप की गंभीरता और प्रकृति, आरोप सिद्ध होने की स्थिति में सजा की कठोरता, अनुपूरक साक्ष्य की प्रकृति, न्यायालय की आरोप के लिये प्रथम दृष्टया संतुष्टि, आरोपी की हैसियत व पद, अभियुक्त की न्याय से भागने और अपराध को दोहराने की संभावना, साक्ष्य के साथ छेडछाड की संभावना, शिकायतकर्ता और गवाह को धमकी की आशंका और अपराधी का आपराधिक इतिहास, जमानत के लिए आवेदन पर विचार करते समय, न्यायालय को मामले के अभियोजन पक्ष के गवाहों की विश्वसनीयता व स्थिरता की गुण, दोष की जांच सघनता से नहीं करनी चाहिए। क्योंकि यह केवल परीक्षण के दौरान ही जांचा जा सकता है समता जमानत का

एकमात्र आधार तो नही है, परन्तु यह उपरोक्त पहलुओं में से एक हो सकता है, जो अनिवार्य रूप से हैं। जमानत के आवेदन पर विचार करते समय आवश्यक है।

11. यह अविवादित है, कि जमानत देना या न देना, ये उस न्यायालय का विवेकाधिकार है, जो इस मामले की सुनवाई कर रहा है। हालांकि यह विवेकाधिकार निर्बाध है। परन्तु इसका उपयोग न्यायसंगत, मानवीय व सहानुभूति पूर्वक किया जाना चाहिए न कि मनमाने तरीके से। जमानत स्वीकार या अस्वीकार करने के आदेश में कारणों को प्रथम दृष्टया इंगित करना चाहिए, हालांकि गुण-दोष पर साक्ष्य की विस्तृत जांच और विस्तृत दस्तावेजीयकरण को दर्शाने की आवश्यकता नहीं है। जमानत की शर्तें इतनी भी सख्त नहीं होनी चाहिए की उसका अनुपालन करना ही अक्षम हो जाये, जिससे ज़मानत ही काल्पनिक न हो जाये।

12. उपरोक्त तथ्यात्मक व विधिक विवरण से यह विदित है कि आवेदक को दण्डित, कष्टित, प्रताडित, हैरान व परेशान करने के उद्देश्य से उसके विरूद्ध आरोपित अपराध मे उक्त अपराध की प्राथिमिकी लिखायी गयी है। आवेदक किसी गैंग का मुखिया अथवा सदस्य नहीं है, न तो उसका कोई गिरोह ही है। तथा आवेदक द्वारा लोक व्यवस्था अथवा सार्वजनिक शांति व्यवस्था के प्रतिकूल कभी भी कोई कार्यवाही नहीं की गयी है न तो कभी हिंसा ही की गई है। उसनें भारतीय दण्ड संहिता के अध्याय 16,17 एवं 22 में वर्णित दण्डनीय अपराध कारित नही किया है। उसने आर्थिक दुनियाबी भौतिक लाभार्थ कभी कोई अपराध नहीं किया है न तो किसी तथाकथित अपराध के माध्यम से अनुचित लाभ अथवा धनार्जन ही किया है।

13. मामले के तथ्यों को ध्यान में रखते हुए **Union of India vs. Shiv Shankar Keshari, (2007) 7 SCC 798** के प्रकरण में माननीय उच्चतम न्यायालय द्वारा प्रतिपादित किया गया है कि जमानत के लिए आवेदन पर विचार करते समय अदालत को अभियुक्त के दोषी होने अथवा उसके गुनाहगार होने के तथ्य पर विचार नहीं किया जाता है। यह समिति उद्देश्य के लिए अनिवार्य रूप से अभियुक्त को जमानत के लिए उचित आधार है कि अभियुक्त दोषी नही है और ऐसे आधार के अस्तित्व के बारे में अदालत अपनी संतुष्टि दर्ज करती है। लेकिन अदालत को इस मामले पर विचार नही करना है जैसे कि वह दोषमुक्त होने का फैसला सुना रही हो और दोषी नहीं होने का पता लगा रही हो।

14. पत्रावली पर उपलब्ध सारवान तथ्यों, भारतीय संविधान के अनुच्छेद 21 एवं **Dataram Singh Vs State of U.P. and another, reported in (2018)3 SCC 22** के प्रकरण में माननीय उच्चतम न्यायालय द्वारा प्रतिपादित अभ्युक्ति के दृष्टिगत, आरोपों की प्रकृति, समर्थन में सबूतों की प्रकृति, सजा की गंभीरता, आरोपित आवेदक का चरित्र, परिस्थितियों का अवलोकन मुकदमे मे अभियुक्त की उपस्थिति को सुरक्षित करने की उचित संभावना, गवाहो से छेड़छाड़ की उचित आशंका, जनता/राज्य और अन्य परिस्थितियों का बड़ा हित एवं परीक्षण मे देरी होना एवं निकट समय में इन परिस्थितियों को देखते हुए मेरा मानना है कि यह जमानत देने के लिए एक उपयुक्त मामला है।

15. तद्नुसार वाद के गुण दोष पर बिना कोई टिप्पणी किए हुए आवेदक **कल्लू@दिनेश राजपूत** को उपरोक्त वर्णित अपराध मु०अ०सं० 695 सन् 2020, अन्तर्गत धारा 8/20/29 स्वापक औषधि और मन:प्रभावी अधिनियम, 1985(एन०डी०पी०एस० ऐक्ट), थाना बारादरी, जिला बरेली में संबंधित न्यायालय की सन्तुष्टि पर व्यक्तिगत बंध-पत्र एवं उसी धनराशी के दो प्रतिभू प्रस्तुत करने पर निम्नलिखित शर्तो के साथ जमानत पर छोड़ दिया जाय:-

1- आवेदक विवेचना या परीक्षण के दौरान साक्षियों को डरायेगा/धमकायेगा नहीं एवं अभियोजन साक्ष्य के साथ छेड़छाड़ नहीं करेगा।

2- आवेदक परीक्षण के दौरान बिना कोई स्थगन लिए परीक्षण में ईमानदारी से सहयोग करेगा।

3- आवेदक जमानत पर रिहा होने के बाद किसी भी अपराधिक गतिविधि में लिप्त नहीं होगा न कोई अपराधिक कृत्य करेगा।

4- आवेदक को यदि माननीय उच्चतम न्यायालय के आदेशों के तहत गठित समिति के आदेश के अनुसार अल्पकालिक जमानत पर बढ़ाया गया है तो अल्पकालिक जमानत की अवधि समाप्त होने के बाद उसकी जमानत प्रभावी होगी।

5- अदालतों के सामान्य कामकाज के बहाल होने तक आवेदक को बिना किसी जमानत के निजी मुचलके पर जमानत पर बढ़ाया जाएगा। अदालत के सामान्य कामकाज बहाल होने के बाद आरोपी एक महीने के भीतर अदालत की संतुष्टि के प्रतिभुओं को प्रस्तुत करेगा।

6- पार्टी उच्च न्यायालय इलाहाबाद की आधिकारिक वेबसाइट से डाउनलोड किए गए इस तरह के आदेश की कंप्यूटर जनित प्रतिलिपि दायर करेगी।

7- संबंधित न्यायालय/प्राधिकरण/अधिकारी, उच्च न्यायालय इलाहाबाद की आधिकारिक वेबसाइट से आदेश की ऐसी कम्पयूटरीकृत प्रति की सत्यता की पुष्टि करेगा और लिखित रूप से इस तरह के सत्यापन की घोषणा करेगा।

16. उपरोक्त शर्तों में से किसी के उल्लंघन के मामले मे, यह जमानत रद्द करने का आधार होगा।

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APPELLATE JURISDICTION
CRIMINAL SIDE

DATED: ALLAHABAD 02.12.2020

BEFORE
THE HON'BLE SHAMIM AHMED, J.

Crl. Misc. Bail Application No. 41152 of 2020

Junaid ...Applicant (In Jail)
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Sri Devendra Saini

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

While considering application for bail-all circumstances of case-nature of evidence-period of detention already undergone-unlikelihood of early conclusion of trial-no material for possible tampering of evidence.

Bail Granted. (E-9)

List of Cases cited:-

1. Dataram Singh Vs St. of U.P. & anr., (2018) 3 SCC 22

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Supplementary affidavit filed today is taken on record.

2. Heard Sri Devendra Saini, learned counsel for the applicant as well as learned A.G.A. appearing for the State and perused the record.

3. Applicant has moved the present bail application seeking bail in Case Crime No.411 of 2020, under Section 363, 366, 376 IPC and Section 3/4 POCSO Act Police Station Gangoh District Saharanpur.

4. It is submitted by the learned counsel for the applicant that the entire

prosecution story is false and fabricated. No such incident took place. Initially the FIR was lodged under Section 366 IPC by the father of the victim, but during the course of the investigation Section 363, 376 IPC and Section 3/4 POCSO Act was inserted. As per the allegations made in the FIR, the daughter of the informant was enticed away by the applicant and his family members. The charge sheet was filed against the applicant only. Learned counsel further submits that the victim herself admitted in her statement given under Section 161 CrPC that she went with the applicant to Dehradun and no wrongful act was done by him and thereafter she returned to her house, but in the statement under Section 164 CrPC she has stated that she went with the applicant on her sweet will and she has solemnized marriage with the applicant on 25.6.2020 and she is living happily as his wife. It is further submitted that as per the FIR itself, the age of the victim was mentioned as 18 years and as per the medical report, her age was mentioned as 19 years. Learned counsel further submits that the victim has also filed an affidavit in which she has stated that she has solemnized the marriage with the applicant and she went with him on her sweet will and she is living happily as the wife of the applicant and there is danger to her life if she would go to her parents' house. From the perusal of the statement of the victim, it appears that the parties are consenting party and there is love affair between them.

5. Several other submissions in order to demonstrate the falsity of the allegations made against the applicant have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the applicant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required and is also ready to accept all the conditions which the Court may deem fit to impose upon him. It has also been pointed out that the accused is not having any criminal history and he is in jail since 3.9.2020 and that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

6. Learned A.G.A. opposed the prayer for bail.

7. After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence and the law laid down by the Hon'ble Apex Court in the case of **Dataram Singh vs. State of UP and another, (2018) 3 SCC 22**, this Court is of the view that the applicant may be enlarged on bail.

8. The prayer for bail is granted. The application is allowed.

9. Let the applicant Junaid involved in Case Crime No.411 of 2020, under Section 363, 366, 376 IPC and Section 3/4 POCSO Act Police Station Gangoh District Saharanpur be released on bail on executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions :-

(1) The applicant will not make any attempt to tamper with the prosecution evidence in any manner whatsoever.

(2) The applicant will personally appear on each and every date fixed in the court below and his personal presence shall not be exempted unless the court itself deems it fit to do so in the interest of justice.

(3) The applicant shall cooperate in the trial sincerely without seeking any adjournment.

(4) The applicant shall not indulge in any criminal activity or commission of any crime after being released on bail.

(5)The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad or certified copy issued from the Registry of the High Court, Allahabad.

(6) The concerned Court/Authority/Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing

10. It may be observed that in the event of any breach of the aforesaid conditions, the court below shall be at liberty to proceed for the cancellation of applicant's bail.

11. It is clarified that the observations, if any, made in this order are strictly confined to the disposal of the bail application and must not be construed to have any reflection on the ultimate merits of the case.

(2020)12ILR A268
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.12.2020

BEFORE

THE HON'BLE SAMIT GOPAL, J.

Crl. Misc. Ist Bail Application No. 43160 of 2020

Uday Pratap @ Dau ...Applicant (In Jail)
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Sri Satendra Singh

Counsel for the Opp. Party:
A.G.A., Sri Satya Narayan Yadav, Sri Prabhash Pandey

Case of circumstantial evidence-name of Applicant surfaced from co-accused statement-Applicant's presence at place where deceased consuming liquor-last seen together-viscera report shows poison-Bail rejected. Direction issued to courts below in the State of U.P. –to attend the issue of criminal antecedants of accused while deciding bail application and to record complete detail of cases if any.

Bail Rejected. (E-9)

(Delivered by Hon'ble Samit Gopal, J.)

1. Heard Sri Satendra Singh, learned counsel for the applicant, Sri Satya Narayan Yadav, learned counsel for the informant, Sri Prabhash Pandey, learned Brief Holder for the State and perused the material on record.

2. This bail application under Section 439 of Code of Criminal Procedure has been filed by the applicant Uday Pratap@Dau, seeking enlargement on bail during trial in connection with Case Crime No. 12 of 2020, under Sections 364, 302, 201, 120B and 34 I.P.C., registered at P.S. Phareeha, District Firozabad.

3. Learned counsel for the applicant argued that the present case is a case of circumstantial evidence. It is argued that

Pradeep Yadav@Kaloo who is the son of the first informant, went away from the house 31.1.2020 at about 7.00 P.M. and since then went missing. It is further argued that the first information report of the present case was lodged after a great delay as was lodged on 5.2.2020 by Rajveer Singh the father of Pradeep Yadav@Kaloo. Learned counsel for the applicant further argued that the applicant is not named in the F.I.R. and during the course of search the first informant sent his younger son Dinesh to know regarding whereabouts of Pradeep Yadav@Kaloo on which Dinesh came back to home and informed that Sunil Chauhan the owner of motorcycle agency, Rajveer Singh@Singhania, Tej Prakash and 2-3 other unknown persons were sitting at Honda Motorcycle Agency, Fariha, Firozabad and consuming liquor. On seeing this Dinesh came back to home but Pradeep Yadav@Kaloo did not return back. It is argued that the first informant states that he went to the police station to given information about missing of his son, in consequence of which the police went to see the C.C.T.V. footage installed near the agency where the said persons were consuming liquor and saw that his son was seen going out at about 08.08 P.M. along with Sunil Chauhan. It is argued that in the statement of the first informant recorded under Section 161Cr.P.C., copy of which has been annexed as annexure no. 2 to the affidavit filed in support of bail application, he has stated the same version as that mentioned in the First Information Report. It is argued that subsequently co-accused Tej Pratap was arrested and he gave his confessional statement to the police and also named the applicant therein. Copy of the said statement has been placed before the Court which is annexed as annexure no. 5 to the affidavit.

4. It is then argued that later on the applicant was arrested on 18.3.2020 and one knife and Rs.190/- were recovered from him. Learned counsel has placed post mortem report of the deceased and has argued that the doctor could not ascertain the cause of death and as such viscera was preserved. The viscera was chemically examined and the report is annexed as annexure no. 10 to the affidavit, from which it transpires that it contained Organo Chloro insecticide and Ethyl Alcohol poison. Learned counsel for the applicant argued that in so far as the applicant is concerned, he is not named in the F.I.R., his implication has surfaced for the first time in the statement of co-accused persons and there is no recovery of any incriminating material either from pointing out or possession of the applicant. Learned counsel has placed para-30 of the affidavit filed in support of bail application and has argued that the applicant has no criminal history which reads as follows:-

"(30) That it is categorically submitted here that accused applicant is not having any criminal history in the record of police nor he is a previously convicted person in other words accused applicant is a man of clean antecedents and he is not indulged in any anti-social activities."

5. Per contra, learned brief holder for the State and learned counsel for the first informant vehemently opposed the prayer for bail. It is argued while placing the relevant transcript of C.C.T.V. footage that the applicant was also seen moving out from the place where the deceased and other co-accused persons were consuming liquor. The applicant was also seen together with the deceased having liquor by Dinesh, the younger brother of the deceased which is mentioned specifically in the First Information Report and in the statement of the first informant recorded under Section 161Cr.P.C. It is argued that all the accused

persons in a clandestine manner gave poisonous substance to the deceased as a result of which he died, which also gets fortified from the report of chemical analyst from which poison has been found in the viscera.

6. Learned A.G.A. while refuting the averment of criminal antecedents of the applicant, has argued that the said averment is a false averment made in the affidavit filed in support of bail application. He has argued that the applicant is involved in seven other criminal cases and even history sheet has been opened. The details of involvement of the applicant in seven other criminal cases have been placed before the Court which are as follows:

(i) Case Crime No. 1072 of 2015, under Sections 147, 148, 149, 307, 332, 353, 334 I.P.C. and 336 Public Representative Act, P.S.- Narkhi, District Firozabad,

(ii) Case Crime No. 917 of 2017, under Sections 60 Excise Act and 420 I.P.C., P.S.- Narkhi,District Firozabad,

(iii) Case Crime No. 472 of 2018, under Sections 8/20 N.D.P.S. Act, P.S.- Narkhi,District Firozabad,

(iv) Case Crime No. 616 of 2018, under Sections 147, 148, 149, 307, 323, 324, 504, 506, 323 I.P.C., P.S. Narkhi, District Firozabad,

(v) Case Crime No. 651 of 2018, under Sections 147, 148, 149, 307, 323, 324, 504, 506, 326 I.P.C., P.s.- Narkhi, District Firozabad,

(vi) Case Crime No. 140 of 2020, under Section 2/3 Gangster Act, P.S. Fariha, District Firozabad and

(vii) Case Crime No. 196 of 2020, under Sections 4/25 Arms Act, P.S.- Aitmadaula, District Agra.

7. After having heard learned counsels for the parties and perusing the records it is apparent that criminal antecedents of the applicant have not been disclosed. The affidavit in support of bail application is of no one else but Sauraj Singh, who claims himself to be the brother of the applicant. The C.C.T.V. as has been seen and a transcript has been drawn in the case diary is a piece of evidence which cannot be manufactured. The presence of the applicant at the place where the deceased was consuming liquor with the applicant and other co-accused persons shows conclusively they being last seen together. The report of Forensic Lab even shows that the viscera had Organo Chloro insecticide and Ethyl Alcohol poison.

8. Looking to the facts and circumstances of the case, the nature of evidence and gravity of offence and specially keeping in view of the fact that in the viscera report presence of Organo Chloro insecticide and Ethyl Alcohol poison was found and long criminal antecedents of the applicant, I do not think it to be a fit case to release the applicant on bail.

9. The bail application is rejected.

10. On the point of criminal history, this Court has perused the free copy of the order dated 24.9.2020 passed by the Additional Sessions Judge, Court No. 6, Firozabad in Bail Application No. 1403 of 2020, CNR No. UPFD03867-2020, Uday Pratap urf Dau vs. State of U.P. by which the bail application of the applicant has been rejected by the court below. The same is annexed as annexure no. 11 to the affidavit. The said order does not attend about the criminal history of the applicant. In the said order while mentioning the arguments as raised on behalf of the applicant, it has specifically been

mentioned that the applicant is "not a previous convict." There is no discussion by the court about the said argument in the order rejecting bail of the applicant.

11. Not only in this case but in many other cases it is seen that there is an averment made that the applicant/accused is not involved in any other criminal case before this Court. The order rejecting bail by the courts below is silent about the criminal antecedents of the applicant/accused but on the basis of instructions of learned Additional Government Advocate of this Court or on the basis of instruction of learned counsels for the first informant, it transpires that the applicant/accused has previous criminal history. When the learned counsels are countered with the same it becomes embarrassing for them and is also an impediment in deciding the said bail application due to the non-disclosure of the criminal history of the accused. Although the criminal antecedents of the accused are not the sole and decisive factor for decision of bail applications but the same needs to be considered while deciding an application for bail under Section 439 Cr.P.C. as per the legislative mandate of Section 437 Cr.P.C.

12. This Court directs the courts below in the State of Uttar Pradesh to attend the issue of criminal antecedent(s) of accused persons while deciding bail applications under Section 439 Cr.P.C. and give a complete detail of the criminal antecedent(s), if any, of the applicant(s)/accused before them or record the fact that there are no criminal antecedent(s) of the said person(s) if there are none.

13. The Registrar General of this Court is directed to communicate this order to all the District and Sessions Judges of the State, who shall ensure the immediate implementation of this order by the courts in their jurisdiction.

14. The Registrar General shall ensure compliance of this order in its true spirit and submit a report of compliance before this Court by 29.1.2021.

15. List this case on 29.1.2021 for further orders.

16. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad.

17. The computer generated copy of such order shall be self attested by the counsel of the party concerned.

18.The concerned Court/Authority/Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

(2020)12ILR A271
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.11.2020

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE AJAY BHANOT, J.

Criminal Appeal No. 2 of 1987

Indar ...Appellant (In Jail)
Versus
State of U.P. ...Opp. Party

Counsel for the Appellant:
Sri Krishna Deo Mishra, Sri Trilok Sharma, Sri Birendra Kumar Pandey, Sri Rajesh Chandra Gupta, Sri S.P.S. Raghav, Sri V.K. Ojha

Counsel for the Opp. Party:
Sri Arun Kumar Singh, A.G.A.

Criminal Law – Indian Penal Code,1860 - Sections 302 and 201 -This criminal appeal has been filed against conviction under section 302 and 201 I.P.C.

Motive: - Prosecution witnesses could not prove illicit relations between accused and wife of deceased – motive of the crime has completely failed. (Para 98)

Last Seen with the accused - Governed by the rule of evidence embodied in Section 106 of the Indian Evidence Act, 1872. (Para 100)

Burden of proving fact especially within knowledge (106)— When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

[Ref: The meaning of the word **"specially"** in the Oxford English Dictionary is "**in particular**"]. (Para 101)

Prosecution had failed to prove any incriminating link in the chain of circumstance - The prosecution theory of "last seen together", cannot rescue its failing case. **(Para 129)**

Major Discrepancies in the investigation and repeated violations of police regulations. (Para 130)

The prosecution failed has failed to prove the guilt of the accused appellant beyond reasonable doubt.

Appeal allowed. (E-2)

List of Cases cited: -

1. Balwinder Singh Vs St. of Punj., reported at 1996 SCC (Cri) 59:

2. Sharad Birdhichand Sarda Vs St. of Mah., reported at AIR 1984 SC 1622,

3. Mukesh & anr. Vs State (NCT of Delhi), reported at (2017) 6 SCC 1

4. Rajjan @ Yogesh Kumar Vs St. of U.P., reported at (2020) 110 ACC 16

5. Ram Bharosey Vs Emperor, reported at AIR 1936 All 833

6. St. of Raj.Vs Kashi Ram, reported at (2006) 12 SCC 254

7. St. of U.P. Vs Satish, reported at 2005 (51) ACC 941 8. Mohibur Rahman Vs St. of Assam, reported at 2002 (45) ACC 687,

(Delivered by Hon'ble Ajay Bhanot, J.)

1. This criminal appeal arises out of the judgment dated 23.12.1986 rendered by the learned Additional Sessions Judge-VI, Bulandshahr, in Sessions Trial No. 08 of 1986, State Vs. Indar and others, convicting the appellant for offences under Section 302 and Section 201 of the I.P.C., and imposing punishments of life imprisonment and rigorous imprisonment of two years for the respective offences.

2. The prosecution case originated in an F.I.R. lodged on 13.01.1985, at Police Station Dankaur, District Bulandshahr, as Case Crime No.8 of 1985.

3. The Investigation Officer made his investigation and on 11.03.1985 submitted a chargesheet in court against the accused persons.

4. The case was registered as Sessions Trial No. 08 of 1986, State Vs. Indar and Others. The learned Additional Sessions Judge-VI, Bulandshahr, on 11.04.1986 charged the accused as follows:

"Istly that you on 9.1.1985 some time after 5.30 P.M. in the Jungle of village Banjhar Pur within police circle Dankaur District Bulandshahr in furtherance of the

common object of you all did commit the murder of Ganga Ram by intentionally causing his death and you thereby committed an offence punishable under section 302 read with section 34 I.P.C. and within by cognizance.

IIndly that you on the same date time and place knowing that the murder of Gangaram has been committed to threw the dead body of said Gangaram in canal for concealing the evidence of the murder of screening yourself from legal punishment and thereby committed an offence, punishable under section 201 I.P.C. within my cognizance.

And I hereby direct that you be tried by this court on the said charge."

5. The accused pleaded not guilty and the case then went to trial.

6. The narrative will be structured in the following framework:

I	Outline of documentary evidence adduced by prosecution: **i.** F.I.R. **ii.** Recovery of articles **iii.** Inquest Report **iv.** Postmortem report **v.** Site Plans **vi.** Chargesheet **vii.** Witnesses
II	Arguments by counsels
III	Brief statement of FIR
IV	Testimonies of witnesses
V	Statement under Section 313 Cr.P.C.
VI	Concept of circumstantial evidence : Legal perspective
VII	Appraisal of evidence/Chain of circumstances incriminating the accused: **i.** F.I.R. **ii.** Recovery Memos **iii.** Inquest Report **iv.** Postmortem Report, Evidence of expert witness, cause and time of death. **v.** Motive **vi.** Last Seen: **a.** Legal perspective **b.** Evaluation of evidence **vii.** Investigation
VIII	Findings
IX	Analysis of trial court judgment
X	Final Directions/Result of appeal

I. <u>Outline of documentary evidence adduced by prosecution:</u>

7. The prosecution introduced both oral and documentary evidences during the trial to bring home the guilt as outlined below:

i. <u>F.I.R.</u> (details have been stated)

ii. <u>Recovery of articles</u>

8. Recovery Memos dated 14.01.1985 (marked as Exh. Ka-3 and Exh. Ka-4) depicting recovery of personal articles of deceased.

<u>iii. Inquest Report after recovery of dead body</u>

9. Inquest report dated 18.01.1985 (marked as Exh. Ka-5) prepared on the date the dead body was recovered.

<u>iv. Postmortem Report</u>

10. Postmortem report (marked as Exh.Ka-2) dated 19.01.1985.

v. <u>Site Plans and others documentations related to the crime:</u>

11. Map of the dead body, Challan of the dead body and letters addressed to Atisaar Nirikshak and Chief Medical Officer (marked as Exh. Ka 6 to Ka 9 respectively). Site plan of the place from where the dead body was recovered (marked as Exh. Ka 10). Maps of the places where Kurta and tobacco pouch, and pyjama, were recovered (marked as Exh. Ka 11 and Exh. Ka 12, respectively).

vi. <u>Charge-sheet</u>

12. Charge-sheet submitted by the Investigation Officer before the learned trial court on 11.03.1985 under Sections 302/34/201 I.P.C. against the accused persons (marked as Exh. Ka-1).

vii. <u>Witnesses</u>

13. Fourteen persons (P.W. 1 to P.W.14) testified as witnesses for the prosecution. Details of the said witnesses are extracted hereinunder in a tabular form:

Sr. No.	***Name of the prosecution witnesses***	***Nature of the prosecution witnesses***	***Documents proved***
1.	**P.W.1--** Bhikhari	(Informant - complainant)	
2.	**P.W. 2--** Mewa	(Witness of last seen)	
3.	**P.W. 3—** Nanuka	(Witness of last seen)	
4.	**P.W. 4--** Rajendra	Witness of extra judicial confession	
5.	**P.W. 5--** Rajwati	(Wife of deceased and witness of last seen)	
6.	**P.W. 6--** Badle	Witness of extra-judicial confession	
7.	**P.W. 7 –** Yadram	Witness of extra-judicial confession	
8.	**P.W.8 --** Khusi Ram	Witness of extra-judicial confession	
9.	**P.W. 9--** S.I. V. R. Sharma	I.O.	Charge-sheet
10.	**P.W.10--** Dr. N. P. Agrawal	Doctor	Postmortem report
11.	**P.W.11--** S.I. Om Prakash Khatheria	I.O.	
12.	**P.W. 12--** Constable Abdul Rehman	Took the body to hospital	
13.	**P.W.13--** Jaggan Singh	Witness to recoveries	Exh. Ka-4, Ka-3, Recovery

			Memos
14.	**P.W. 14--** Constable Ram Babu	Scribe of FIR	Rozmancha Report No. 24, (marked as Exh. Ka-13)

II. <u>Submissions of learned counsels for the parties</u>

14. Learned counsel for the petitioner Shri Krishna Dev Mishra, assailing the judgment of the learned trial court submits that this is a case of circumstantial evidence where the prosecution has failed to establish the incriminating links in the chain of circumstances by legal evidence. The arguments were directed against the FIR, recoveries, last seen evidence, motive and the investigation. The prosecution failed to prove the guilt beyond reasonable doubt.

15. Shri Arun Kumar Singh, learned A.G.A. supporting the judgment of the learned trial court contends, that the links in the incriminating circumstances were established by legal evidence. The recoveries of the personal effects of the deceased Ganga Ram, credible testimonies of witnesses who had last seen the accused and motive for murder established the guilt of the accused beyond reasonable doubt.

III. <u>Brief statement of FIR</u>

16. FIR lodged by Bhikhari the brother of Ganga Ram on 13.01.1985 was a missing report informing about the disappearance of Ganga Ram since the evening of 09.01.1985.

IV. <u>Testimonies of witnesses</u>

17. **P.W.1--Bhikari**, was the complainant of the F.I.R. He deposed before the learned trial court as follows:

18. Ganga Ram was his brother who was murdered one and a half years ago. Ganga Ram went missing nine days prior to the recovery of his dead body.

19. P.W. 1 was first informed by his son that Ganga Ram had left for Samrath's tubewell that evening but did not get home. On the next day, Smt. Rajwati wife of Ganga Ram also told him about Ganga Ram's disappearance.

20. He alongwith others went on the lookout for Ganga Ram. They enquired about his whereabouts from Samrath's sons including Indar. The search continued over the days *till* ***they found Ganga Ram's kurta and tobacco pouch stuck in a bush on the bank of the canal. By now they had knowledge about the murder of his brother. They then went to the police station to report. At the police station an unknown person scribed the complaint. The complaint was not read out to him. He was simply asked to affix his thumb impression. He deposited Ganga Ram's kurta and tobacco pouch in the police station. A day after of lodgement of the FIR, the Investigation Officer arrived at the village and went to Samrath's tubewell****(emphasis supplied)*. The tubewell room was unlocked by the Investigation Officer. Pyjama of the deceased was found in the hollow of the wall of the tubewell room under a brick. ***Yoke of plough was found on the roof of the tubewell room, but its leather belt was missing*** *(emphasis supplied).*

21. Some days later, they found Ganga Ram's body in a pit near the canal.

Later upon receiving information, the Investigation Officer came to the spot.

22. A leather belt was found tied round the neck of the body. Ganga Ram had worked intermittently as a daily wager for Samrath since the past 4-5 months. However, he had stopped going to work since 10 days prior to his disappearance. ***On the day Ganga Ram had gone to Samrath's tubewell, Indar had visited his house and called him over to take his wages. Ganga Ram expelled Indar from his house as he used to make inappropriate remarks to his wife and declined to take money from Indar****(emphasis supplied).*

23. Under cross-examination his testimony was not modified. However, additional information was elicited. ***On 11th(January, 1985) they had gone to the police station to register the F.I.R. The Daroga (SHO), declined to register the F.I.R. He rebuffed them and told them to continue search themselves****(emphasis supplied)*. At which point they made an oral complaint. They did not give written information. They did not inform the S.P. or Collector that the Daroga (SHO) had refused to lodge their complaint.

24. The testimony of P.W. 1 Bhikari was largely natural and unvarnished (except on issue related to Indar and Rajwati, and his failure to name Indar in the F.I.R.). P.W. 1 is a credible witness whose testimony is liable to be believed (apart from the excepted portions).

25. **P.W. 2--Mewa**, testified before the learned trial court that he had seen Ganga Ram and Indar sitting together, at Samrath's tubewell after 05:00 PM, ***ten days prior to the discovery of the dead body*** *(emphasis supplied)*. He asked Ganga Ram to accompany him to the village. Ganga Ram replied that he would come only after taking his money from Indar. Ganga Ram was not seen alive thereafter. ***Indar and Ganga Ram's wife had an illicit relationship*** *(emphasis supplied)*.

26. Two days prior to that he had seen Indar making inappropriate remarks to Ganga Ram's wife. He informed Ganga Ram about it, who responded by saying that he will follow Indar from today onwards.

27. Under cross-examination he stated that Ganga Ram was his nephew. Their houses are closely situated. ***There is no road from his agricultural field to tubewell. He, however, reached the tubewell. He was coming to the village by the canal route****(emphasis supplied).* Twenty days prior to the death, he had seen Indar coming to the house of Ganga Ram. ***He was suspicious of illicit relations between Indar and Rajwati (Ganga Ram's wife), since he had seen Indar visiting the Ganga Ram's house*** *(emphasis supplied).* He had not seen Ganga Ram's wife with accused at the tubewell. Apart from this, he had never seen Indar at Ganga Ram's house.

28. P.W. 2-Mewa's presence at the tubewell was perchance. He could not satisfactorily account for his presence at the tubewell. Under cross-examination he materially altered his statement made under examination-in-chief regarding the relations between Rajwati and Indar. His credit as a witness was impeached under cross examination. P.W. 2 Mewa is not a reliable witness, and his testimony is not liable to be believed.

29. **P.W. 3--Nanuka**, deposed before the learned trial court ***that on 9th he had***

gone to the field for spraying manure, when he saw Ganga Ram with the accused-Indar at the tubewell*(emphasis supplied)*. He told Ganga Ram to come home alongwith him. Ganga Ram declined and said that he would come home after taking money from Indar. Ganga Ram was wearing a black trouser and a white kurta. An Aligarh cut(style) pyjama was tied to the head of Ganga Ram, and a Khes was resting on his shoulder. Ganga Ram used to work for Indar and at times slept there. *He had heard that Indar and Ganga Ram's wife had illicit relationship (emphasis supplied)*. He had not seen Ganga Ram alive thereafter. Lastly he saw his dead body.

30. Under cross-examination he stated that ***he was able to identify the Aligarh cut/style pyjama since one leg of pyjama was hanging in full view*** *(emphasis supplied)*. Aligarh cut/style pyjama is narrow at the bottom and broad at the top.

31. In material aspects, the testimony of P.W. 3 Nanuka, stretches credulity. His version conflicts with ordinary experience and common sense. A detailed examination of his lack of reliability shall be made later.

32. Before the trial court **P.W. 4--Rajendra**, denied the statement recorded by the Investigation Officer that Dharampal and Samrath has confessed to the murder of Ganga Ram before him and urged him to get the matter compromised.

33. **P.W. 5--Rajwati** (wife of deceased Ganga Ram), deposed as under before the learned trial court:

34. ***Last time she saw her husband alive at 05:00 PM in the evening along with Indar at the tubewell*** *(emphasis supplied)*. At the time, she was alone cutting grass at some distance from the tubewell. Indar called to her inappropriately. She declined his advance. He persisted, saying why she would not come; grabbed her by her arm and tried to force himself. When he saw her husband approaching he let go of her. On her way back she told her husband about the incident. Her husband told her to go home, and said that he would recover his money from Indar and take him to task. Her husband used to work on daily wages for Indar. ***Her husband was wearing a pant, a Kurta and a Khes was wrapped round him*** *(emphasis supplied)*.

35. Her husband often had his meals at Indar's house, and at times slept there as well. That night her husband did not return home. ***10 days thereafter the body of her husband was found near the canal****(emphasis supplied).*

36. Under cross-examination while conforming to the examination-in-chief, she revealed additional information. Ganga Ram often slept and had his meals at Indar's tubewell. Hence she did not inform to her brother-in-law, that he did not return home that night. ***Prior to the incident, Indar had never made any inappropriate remarks or overtures to her****(emphasis supplied)*. On the next day at about 12 in the afternoon, when she went to cut grass she enquired about her husband's whereabouts from Indar. Indar told her that her husband had gone to Bilaspur. ***Indar did not say anything else to her*** *(emphasis supplied)*. She denied the suggestion that she had illicit relations with her brother-in-law who had murdered him. ***She did not want any harm to come to her husband, and elaborated that she had four young children****(emphasis supplied).*

37. P.W. 5 is a woman from a rural background. In her testimony, she comes across as forthright and straightforward. Her credit was not impeached. Her deposition appears to be truthful and liable to be believed.

38. **P.W. 6--Badle** S/o Chhagga, made this deposition on oath before the court below. Eight days prior to the discovery of dead body of Ganga Ram at about 8:00 PM, he was at Yadram's house. Dharampal and Samrath told them that Indar had done Ganga Ram to death. They wanted him to get the matter compromised in exchange for money. They did not state as to why Indar murdered Ganga Ram.

39. P. W. 6 Badle has an exaggerated sense of self importance. His proximity to Samrath is not established. There was no reason for Samrath and Dharampal to confide in him. Further he was not a man of such social eminence, in whom rival parties would repose faith to settle such grave issues. P.W. 6 is not corroborated by any other prosecution witness or evidence. He is not a reliable witness. His testimony is disbelieved.

40. This evaluation of the evidence of P.W. 6, Badle, is supported by the caution on evidentiary value of an extra-judicial confession stated in ***Balwinder Singh v. State of Punjab***, reported at **1996 SCC (Cri) 59:**

"10.An extrajudicial confession by its very nature is rather a weak type of evidence and requires appreciation with a great deal of care and caution. Where an extrajudicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance. The courts generally look for independent reliable corroboration before placing any reliance upon an extrajudicial confession."

41. **P.W. 7--Yadram** S/o Ram Singh, before the court below denied the statement recorded by the Investigation Officer that the accused had confessed to murder of Ganga Ram before him.

42. **P.W. 8--Khusi Ram** S/o Jassa, testified in the trial that he had seen Ganga Ram in the village some time before his death in the village, but could not recall the exact date. He was not the part of Panchayat in the village held after the murder of Ganga Ram. He could not tell how incorrect statements were attributed to him by the Investigation Officer.

43. The testimonies of PW 4, P.W.7 and P.W. 8 do not support the prosecution case.

44. **P.W. 9--V. R. Sharma**, S.I., had submitted the charge-sheet on 11.03.1985 and identified his signatures on it.

45. **P.W. 10--Dr. N. P. Agrawal**, Medical Officer District Hospital Bulandshahr, was the author of the postmortem report. P.W. 10 testified that the postmortem was conducted by him at 01:00 PM on 19.01.1985. He proved the postmortem report. P.W. 10 described the ante-mortem injuries, in conformity with the PM report.

46. Under cross-examination, P.W. 10 stated that the death happened due to asphyxiation caused by strangulation. The ante-mortem injuries on the neck could have been caused by tightening of the leather belt round the neck of the deceased. The injuries around the neck were sufficient to cause death.

47. The time of death in the opinion of the P.W. 10, could have been any time between the night of 10/11.01.1985. The variation in the time of death could be between one or two days. He could not say with certainty whether the victim died on 13.01.1985.

48. **P.W.11--Shri Om Prakash Katheria**, was the I.O., who while deposing before the learned court stated as follows:

49. On 14.01.1985 while posted as S.O., at P.S. Dankaur he was given charge of the police investigation pursuant to the F.I.R. ***He reached and inspected the site on 14.01.1985 near the canal at Jangal Gram Banzarpur, where personal effects of Ganga Ram, were reported to be lying. He found Kurta and tobacco pouch in its pocket lying under a deposit of pebbles under water near the bridge on the western bank of the canal. They were found a distance of 65 furlong from the bridge*** *(emphasis supplied).* The aforesaid recoveries were made by him on 14.01.1985 in the presence of Tej Singh and Jaggan Singh. The recovery memo (Exh. Ka-3) was prepared by him and read out to the witnesses. He and the witnesses put their signatures to it.

50. Search at the tubewell room, yielded one Aligarh cut/style pyjama also belonging to Ganga Ram. The recovery memo (marked as Exh. Ka-4) was taken down by the P.W. 11 in his hand and read out to the witnesses. All three affixed their signatures to it.

51. The dead body was found near the canal in village Sarakpur. The inquest report was prepared, in presence of five witnesses (Panchas) and read out to them. Thereafter they put their signatures to the report, (marked as Exh. Ka-5). P.W. 11 identified his signatures on the inquest report. Then he described other documentation and procedures, culminating in dispatch of the body to the hospital for postmortem.

52. Under cross-examination, ***P.W. 11 admitted that he commenced the investigation in the afternoon of 14.01.1985. However, he did not record the fact of his visit in the case diary. He could not explain the violation of police regulations during the investigations****(emphasis supplied).* The name of accused Indar had surfaced at the time of preparation of inquest report. However, name of accused Indar was not recorded in the inquest report. At that point in time, the case had not been registered and the investigation was on foot. ***He could not explain why the time of the inquest proceedings was not stated in the case diary. Nor could he account for the failure to record the names of the witnesses in the G.D. He was confronted with discrepancies in the Parchas in Case Diary and absence of dates of receipt of the same by the S.O. He could not account for or justify the same as well****(emphasis supplied).* He was also faced with the gaps and discrepancies in the statements of witnesses recorded by him and the testimonies the said witnesses gave before the court. He stood by the statements recorded in the case diary.

53. P.W. 11 admitted to lapses and violation of police regulations in the course of the investigation. He was contradicted by various prosecution witnesses on many material points. We find that on most material aspects, P.W. 11 (Om Prakash Katheria), is not a reliable witness.

54. **P.W. 12--Constable Number 908 Abdul Rahman**, testifying before the learned court below stated this. On 18.01.1985 after the preparation of the Panchnama, the body was sealed and was made over to him and Constable Shivnath. They deposited it in the mortuary. On the next date the postmortem was conducted by the doctor. The doctor sealed the clothes removed from the dead body, and handed over the bundle to them. The latter deposited it at the police station. The bundle was secured by seal and hence no tampering was possible.

55. **P.W. 13--Jaggan Singh**, testifying before the learned trial court said that Ganga Ram was missing since 09.01.1985. His dead body was discovered on 18.01.1985. ***Five days after Ganga Ram went missing, his kurta with the tobacco pouch in the pocket of the said kurta were found entangled in small pebbles in the canal. After making the recovery of the said items, the I.O. created a recovery memo to which he and one Tej Singh were witnesses****(emphasis supplied)*. The recovery memo (marked as Exh.Ka-3) was read out to them, and they put their signatures to it. He identified his signatures on Exh. Ka-3. On 14.01.1985, Ganga Ram's pyjama was recovered from the hollow in the western wall of the room of Samrath's tubewell. The I.O. prepared a recovery memo(marked as Exh. Ka-4) which was also read out to them and they put their signatures to it. He identified his signatures on Exh.Ka-4.

56. The witness could not withstand the cross-examination, and materially changed his version of the recovery. ***Under cross-examination, he stated that on 13.01.1985 he alongwith some other persons went to the police station with Ganga Ram's kurta and tobacco pouch. They reached the police station at about 6-7 PM. (He clarified that they did not take Ganga Ram's pyjama to the police station, but only his kurta and the tobacco pouch). They deposited the kurta and the tobacco pouch at the police station, but no recovery memo was prepared. The next day (14.01.1985) the I.O. reached the village, and prepared the recovery memo. However, he did not bring the kurta and tobacco pouch from the police station****(emphasis supplied).*

57. P.W.13-Jaggan Singh, was an independent prosecution witness of the recovery of the kurta and the pyjama of Ganga Ram. Under cross-examination he resiled from his statement in the examination-in-chief, and contradicted the recovery of kurta made by the Investigation Officer (P.W. 11) and also the recitals in the Recovery Memo (Exh. Ka-3).

58. **P.W. 14--Constable Clerk Ram Babu**, deposed thus before the trial court. He made an entry in the Rojmancha on the foot of a complaint submitted by Bhikhari on 13.1.1985 at the police station, reporting the disappearance of his brother Ganga Ram. He identified his signature and handwriting on the Rozmancha Report No. 24, (marked as Exh. Ka-13). The original complaint submitted by the complainant on 13.01.1985, was sent with the General Rozmancha at the Record Room of Police Office for purposes of the BSR. ***He did not produce the original complaint submitted by the complainant. He could not explain the absence of the original complaint from the record books****(emphasis supplied).*

59. Failure to produce the original complaint as we shall see, would prove fatal to the prosecution case.

V. Statement Under Section 313 Cr.P.C.

60. In proceedings under Section 313 Cr.P.C. the attention of the accused was drawn to various incriminating circumstances/evidences against him. The accused-appellant denied the same and claimed that he was falsely implicated.

VI. Concept of Circumstantial Evidence: Legal Perspective

61. There is no eye witness of the death of Ganga Ram. This is a case of circumstantial evidence. Rules of appraisal of circumstantial evidence are slightly distinct from the method of appreciating direct evidence. In a case of circumstantial evidence, prosecution brings various incriminating evidences which form links in the chain of circumstances pointing to the guilt of the accused person. Each link in the chain of circumstances, has to be proved by the prosecution by adducing legal evidence. Links in the chain of circumstances should be fully consistent with the guilt of the accused, and exclude any hypothesis of innocence. In case any link in the chain of incriminating circumstances is broken, or the prosecution fails to establish any vital link by legal evidence, the prosecution case becomes vulnerable.

62. The law on circumstantial evidence is settled by good authority. **Sharad Birdhichand Sarda Vs. State of Maharashtra**, reported at **AIR 1984 SC 1622**, was a case of circumstantial evidence, wherein the imperative of proving the links in the chain of incriminating circumstances was laid down:

"(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. ***The circumstances concerned "must or should" and not "may be" established*** *(emphasis supplied).*

(2) the facts so established should be consistent only with the ***hypothesis of the guilt of the accused***, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty *(emphasis supplied),*

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

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

[This proposition of law has been consistently reiterated over the years. [Ref: Hanumant Govind Nargundkar vs. State of M.P., reported at AIR 1952 SC 343; Padala Veera Reddy vs. State of A.P., reported at 1989 Supp (2) SCC 706; C. Chenga Reddy & Ors. vs. State of A.P., reported at (1996) 10 SCC 193; Ramreddy Rajesh Khanna Reddy vs. State of A.P., reported at (2006) 10 SCC 172; Sattatiya vs. State of Maharashtra, reported at (2008) 3 SCC 210; G. Parshwanath vs. State of Karnataka, (2010) 8 SCC 593; and Anjan Kumar Sarma and others Vs. State of Assam, (2017) 14 SCC 359].

63. Another first principle of criminal jurisprudence applicable to cases of circumstantial evidences will guide the judgement. If two views are possible on the evidence adduced in a case, one attributing guilt to the accused and the other absolving him of the charge, the view favourable to the accused should be adopted by the courts (Ref: AIR 1973 SC 2773)

VII. Appraisal of Evidence

i. F.I.R.

64. The first information report in criminal jurisprudence is a critical piece of prosecution evidence. Very often the credibility of the first information report determines the plausibility of the prosecution story. A prompt F.I.R. may be seen as a natural telling of the incident, since it could obviate the possibility of embellishments or false implication by after thought. We have the advantage of authority in point.

65. The holding of Hon'ble Supreme Court in ***Mukesh and another Vs. State (NCT of Delhi)***, reported at ***(2017) 6 SCC 1***, emphasized the importance of promptitude in lodgement of an F.I.R:

"50.Delay in setting the law into motion by lodging of complaint in court or FIR at police station is normally viewed by the courts with suspicion because there is possibility of concoction of evidence against an accused. Therefore, it becomes necessary for the prosecution to satisfactorily explain the delay. Whether the delay is so long as to throw a cloud of suspicion on the case of the prosecution would depend upon a variety of factors."

66. The FIR is the first link in the chain of incriminating circumstances in this case.

67. The F.I.R. was recorded on 13.01.1985 at 08:10 PM on the foot of a written complaint given by the informant Bhikari P.W. 1.

68. Brief contents of the F.I.R. are as follows:

"The complainant-Bhikari is the brother of Ganga Ram. Ganga Ram had gone to meet Indar in the evening of 09.1.1985 at the latter's tubewell to get his wages for labour. He has not returned home ever since. The complainant-Bhikari and others while searching for him, found his kurta and tobacco pouch. The F.I.R. also recorded details of the physical attributes of Ganga Ram and clothes he was wearing. (The F.I.R. is not in the record, and is being extracted from the judgment of the learned trial court)".

69. The testimony of P.W.1 (Bhikhari) and P.W. 14 (Constable Ram Babu), (especially the highlighted portions), would be relevant in determining the veracity of the F.I.R. and its worth as a piece of inculpatory evidence. The facts proved and conclusions drawn by us are these.

70. P.W. 1 Bhikhari became aware of Ganga Ram's death at the time the kurta of Ganga Ram was discovered. In his perception there was hostility between Ganga Ram and Indar, due to inappropriate behaviour of the latter with Rajwati. These facts were in the knowledge of P.W.1 (Bhikhari), when he lodged the F.I.R. on 13.01.1985. Despite this, Indar was not named as an accused in the FIR. This supports the defence argument that the accused was falsely implicated after much deliberations.

71. The contents of FIR were not read out to the complainant P.W.1 Bhikhari. He was simply asked to put his signatures to it. The original complaint was never produced or proved. The contents of FIR, and the written complaint were not reconciled and proved together. There is no explanation for absence of the complaint from police records. Failure of the prosecution to produce the complaint and its absence from the record remain unexplained.

72. P.W. 1 (Bhikhari) had first gone to lodge an F.I.R. at an earlier point in time. However, the SHO (Daroga) declined to register the F.I.R. P.W. 1 Bhikhari and others simply made an oral complaint, and did not submit a written complaint. The F.I.R. was finally registered on a later date.

73. The F.I.R. was not registered promptly. There is no satisfactory explanation for the delay. In the facts of this case delay in lodgement of the FIR becomes fatal to the prosecution. These evidences cast serious doubt on the authenticity of the F.I.R. We find that the FIR is not proved beyond reasonable doubt.

ii. Recovery Memos:

74. The second link in the chain of incriminating circumstances are the recoveries of the kurta (with tobacco pouch) and the pyjama of deceased Ganga Ram.

75. The recovery memo of the kurta (Exh. Ka-3) drawn up, by the Investigation Officer on 14.01.1985, essentially contains these recitals. The kurta was discovered near the bridge on the western bank of the canal. It was found at the distance of 65 furlong from the bridge lying under a deposit of small pebbles. Recoveries were made in the presence of the witnesses, Tej Singh and P.W. 13 Jaggan Singh.

76. The evidence will be evaluated on consideration of testimonies of P.W. 11, O.P. Katheria, P.W. 13 Jaggan Singh, P.W.1 Bhikhari, the recovery memo (Exh. Ka-3) and the FIR.

77. P.W. 11, Om Prakash Katheria conformed his testimony to the recitals in the recovery memo (Exh. Ka-3). The testimonies of P.W. 1 Bhikhari, and the statement of P.W. 13 Jaggan Singh and the relevant contents of the FIR squarely contradict the prosecution version of the recovery of the kurta of the deceased. The highlighted portions of the said testimonies may be referenced.

78. According to P.W.1 Bhikhari and the FIR version, the kurta and the pouch of the deceased were discovered on 13.01.1985 by the P.W. 1 Bhikhari and other villagers while searching for Ganga Ram. These articles were deposited by them in the police station on 13.01.1985. The testimonies of P.W. 1 (Bhikhari) and the corroborative testimony of P.W. 13 Jaggan Singh (under cross-examination) and recitals in the FIR in this regard are liable to be believed.

79. The recovery of the pyjama and pouch was not made on 14.01.1985, in the manner stated in the Recovery Memo (Exh. Ka-3). The testimony of P.W. 11 I.O. Shri O. P. Katheria to this effect is disbelieved. (The lack of reliability of P.W. 11 as a witness has already been discussed earlier in the judgment).

80. Consequently, we conclude that the recovery memo (marked as Exh. Ka-3) contains false recitals, and is accordingly discarded.

81. The prosecution has thus failed to prove the second important link in the chain of circumstances by legal evidence.

82. The recovery of Aligarh cut pyjama and recovery memo Exh. Ka-4, is of no avail to the prosecution case. Only PW-3 Nanuka claimed the Ganga Ram was wearing the pyjama on his head when he was last seen by the former. The statement

has been disbelieved by us. (This aspect will be elaborated later in the narrative). The recovery is not a relevant piece of evidence in this case.

iii. Dead Body and Inquest Report

83. According to the testimony of the I.O. P.W. 11, on 18.01.1985, received information that a fully clothed dead body was lying near the canal at village Sarakpur.

84. Acting on the said information he reached the canal site and found the dead body. After the identification of the dead body, the inquest report (Exh. Ka-5) was prepared at the spot on 18.01.1985.

85. Five persons, namely, Balu S/o Mewa, Vijaypal Singh S/o Giriraj Singh, Chatar Singh S/o Lekha Singh,Yashpal Singh S/o Giriraj Singh and Gangu S/o Tulli Balmiki, were the witnesses of the inquest report. The said witnesses were not produced in court.

iv. Postmortem Report

86. The relevant extracts of the postmortem report dated 19.01.1985 are as follows:

Antemortem Injuries:

87. Ligature mark measuring 14x1 inches was round the neck. Just below the thyroid cartilage the boundaries of the injury were ecchymosed and contained small clots of blood.

88. The muscle below the injury on the neck was torn. The thyroid bone on the right side was broken. The carotid blood vessels of the neck were fractured. Both lungs were red. The stomach membrane was congested.

Cause of death in the Postmortem Report:

89. Death is due to asphyxiation as a result of strangulation.

Time of death in the Postmortem Report:

90. About one week.

Discussion and Findings

91. Postmortem report materially agrees with the deposition of the P.W. 10 Dr. N. P. Agrawal before the court on the cause and time of death. The cause of death is stated in definite terms. The time of death has not been stated with pinpoint accuracy. The postmortem report drawn up on 19.01.1985, puts the time of death at one week prior to the report, i.e. on 12.01.1985. P.W. 10 under cross-examination, stated that there could be a variation of about 1-2 days in the time of death. The death could have happened on 10/11.01.1985. However, P.W.10 did not rule out 13.01.1985 as the date of death.

v. Motive

92. The evidentiary bearing of motive for the crime in a case of circumstantial evidence was discussed by a Division Bench of this Court in the case of ***Rajjan @ Yogesh Kumar Vs. State of U.P.***, reported at ***(2020) 110 ACC 162*** :

*"41. .....**Normally, prosecution should prove motive in a case based on***

circumstantial evidence. But, absence of motive in a case based on circumstantial evidence is not of much consequence when proved circumstances is so conclusive that it completes the chain in itself raising the only hypothesis that is the guilt of the accused*(emphasis supplied)."*

93. This narrative shall profit from the law laid down in ***Rajjan @ Yogesh Kumar (supra)***, as regards the issue of motive of the accused to commit the crime.

94. Illicit relations between Rajwati (W/o Ganga Ram) and accused Indar is ascribed by some prosecution witnesses as the motive for murder. P.W. 1(Bhikhari) stated that Indar used to make inappropriate remarks to Rajwati, and Ganga Ram expelled him from his house and refused to take money from him. However, we find that Ganga Ram infact went to take money from Indar. This part of the testimony of P.W. 1 Bhikhari is disbelieved. Further P.W. 5 Rajwati denied that Indar made inappropriate remarks prior to the incident on 09.01.1985. P.W. 2 Mewa was only "suspicious" of illicit relationship between Indar and Rajwati. P.W. 3 Nanuka claimed that he heard that Ganga Ram's wife and Indar had an illegitimate relationship. Evidence of P.W. 3 Nanuka is hearsay and is rejected out of hand for being inadmissible.

95. Most pertinently the testimony of P.W. 5 Rajwati, wife of Ganga Ram in this regard needs consideration. She denied the fact of illegitimate relations between her and Indar. She had in a very powerful and credible manner stated that she had four children and would not want any harm to come to her husband. Her defence of her reputation was stout and worthy of acceptance.

96. Highlighted portions of the testimonies of the said witnesses may be referenced.

97. The honour and reputation of a lady cannot be trifled with lightly so as to be tainted by unreliable testimony of a witnesse. In case aspersions are cast on the virtue and honour of a woman by a witness, the latter has to be put to strict proof of such imputations.

98. In this case the witnesses did not furnish reliable evidence of the serious charge they had made against P.W. 5 Rajwati. The prosecution witnesses could not prove illicit relations between Rajwati and accused Indar. The attempt of the prosecution to impute the character of Rajwati, with a view to supply motive to the crime, has completely failed.

vi (a). Last Seen with the accused: Legal Backdrop

99. The evidence of "last seen with the accused" is also posited as an incriminating link in the circumstantial evidence against the accused. The legal backdrop in light of which the evidence of "last seen with the accused" will be assessed is stated below.

100. The "last seen with the accused" is a crucial element in the law of circumstantial evidence. The concept of "last seen with the accused", is governed by the rule of evidence embodied in Section 106 of the Indian Evidence Act, 1872. Section 106 of the Indian Evidence Act, 1872 is extracted below:

"106. Burden of proving fact especially within knowledge.--When any fact is especially within the knowledge of

any person, the burden of proving that fact is upon him."

Applicability of the provision:-

101. The burden to prove the guilt of the accused lies upon the prosecution. The provision does not reverse the burden. The provision merely shifts the burden upon the accused for a limited purpose of proving some facts which are specially in his knowledge.

*[Ref: The meaning of the word "**specially**" in the Oxford English Dictionary is "**in particular**".*

102. The facts which are especially in the knowledge of the accused are basically those facts which are preeminently or exceptionally in the know of the accused. By the peculiar nature of the circumstances, such facts are predominantly or particularly in the knowledge of the accused, and are not in the knowledge of the public at large.

Need for the Provision:

103. Need for the provision arose with the experience that in many cases the prosecution does not and more importantly cannot have knowledge of all facts or evidence which exculpate the accused.

104. The provision is designed for exceptional cases where it is almost impossible for the prosecution, or at any rate disproportionality difficult for the prosecution to obtain such evidence. The remote possibility of the prosecution to have access to these facts is paired with the reality of the same facts being in the predominant knowledge of the accused. In such circumstances these relevant facts can be conveniently elicited from the accused for the benefit of the judicial process.

Limitations:

105. There is no easy or automatic recourse to the provisions of the Section 106 of the Indian Evidence Act, 1872. The provision does not relieve the prosecution of its responsibility to prove the guilt of the accused by legally accepted standards of evidence.

106. The provision can be applied when despite due diligence the facts elude the knowledge of the prosecution. But when after exercise of due diligence and proper investigation, such facts/evidence are equally capable of being discovered by the prosecution, those facts cannot be held to be especially within the knowledge of the accused.

107. The provision cannot be employed to supply defects in investigation or cover up for laxity in prosecution before the court.

Prerequisites:

108. Before the provision can be invoked and the accused can be saddled with the burden of proving these facts, the prosecution has to satisfy certain prerequisites. These conditions precedent form the jurisdictional foundation to invoke Section 106 of the Indian Evidence Act, 1872, and start the presumption of the facts being in the special knowledge of the accused.

109. The prosecution should discharge its burden by establishing various links of incriminating circumstances beyond reasonable doubt to the satisfaction of the court. These incriminating facts should create a reasonable inference of guilt against the accused.

110. Secondly the two events of the deceased being last seen with the accused,

and the death of the former have to be in close proximity. In case the time period between the two events is very wide, the possibility of the deceased meeting with other people prior to his death becomes strong. Then the cause of the death of the victim would not be especially within the knowledge of the accused.

Appreciation:

111. The evidence of "last seen" is a piece of evidence which has to be appreciated with the entire prosecution evidence before the court. It cannot be evaluated on a stand alone basis, or in isolation to other evidences adduced by the prosecution.

Consequences:

112. Failure to explain the facts within the special knowledge of the accused merely becomes an incriminating link in the chain of circumstantial evidence. The probative effect of the prosecution evidence is enhanced in such cases by the silence of the accused. It cannot become the sole basis of conviction, without proving other links in the chain of circumstances.

113. Application of Section 106 of the Indian Evidence Act, 1872, to the case of an accused, who was the last seen with the deceased, puts upon such accused the burden of proving facts regarding the death of the victim especially within his knowledge. The accused can discharge this burden of proof by explaining the circumstances which comport with his innocence (for example when he and the deceased parted company).

114. The propositions shall now be fortified by authorities in point.

115. A Division Bench of this Court in the case of ***Ram Bharosey Vs. Emperor,*** reported at ***AIR 1936 All 833***, observed that Section 106 has no application to cases where the fact in question capable of being known not only by the accused but also by others if they happened to be present when it took place. Section 106 cannot be invoked to make up for the inability of the prosecution to produce evidence of circumstances pointing to the guilt of the accused:

"6. ..It is perfectly clear that S. 106 contemplates facts which in their nature are such as to be within the knowledge of the accused and of nobody else: for instance, his own intention in doing an act (Illus. A) or the fact that he purchased a ticket though he was subsequently found to be without one (Illus B). It has no application to cases where the fact in question, having regard to its nature, is such as to be capable of being known not only by the accused but also by others if they happened to be present when it took place. It cannot, in my opinion, be invoked to make up for the inability of the prosecution to produce evidence of circumstances pointing to the guilt of the accused. Where facts proved by evidence give rise to the inference of guilt, unless rebutted, it is not the result of the application of S. 106, but of the probative force of such facts.

9.The learned Judge has been much influenced by the fact that the appellant has pleaded alibi and has denied that he was ever with the deceased on the night before the murder. I think where an inference adverse to an accused person can be drawn from a number of circumstances if the accused person is unable to offer any explanation which is compatible with his innocence or if it is proved that any

explanation which he offers is false that is a further circumstance from which an inference can be drawn against him, but it is unsafe to hold that an accused person is necessarily guilty because he is making a false statement. Every case must be considered on its own merits and certainly in the present case I do not think it would be at all safe to assume that the appellant must be guilty because he has denied his association with the deceased just before the murder was committed. A person who is accused of a crime especially if he is ignorant and frightened may take what seems to him to be the line of least resistance and the best defence and may foolishly make a false statement when he would be better advised to make a true one. Section 106 of the Evidence Act, obviously refers to cases where the defence of the accused depends on his proving a certain fact, that is, cases where his guilt is established on the evidence produced by the prosecution unless he is able to prove some other facts especially within his knowledge which would render the evidence for the prosecution nugatory. I am satisfied that the case against the appellant is not proved at all."

116. Hon'ble Supreme Court in the case of **State of Rajasthan Vs. Kashi Ram**, reported at **(2006) 12 SCC 254**, while appreciating the "last seen together" evidence applied Section 106 of the Indian Evidence Act, 1872, in the following manner:

"23. It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act.

In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the Court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in Re. Naina Mohd. AIR 1960 Mad 218."

117. Further this Court in **State of U.P. Vs. Satish**, reported at **2005 (51) ACC 941**, stated the caution and attending circumstances/evidences which have to be considered before applying the provisions of Section 106 of the Indian Evidence Act, 1872, and requiring the accused to establish his innocence:

"23. The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the

accused being the author of the crime becomes impossible.

It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases."

118. Similar view was taken by the Hon'ble Supreme Court in the case of **Mohibur Rahman Vs. State of Assam**, reported at **2002 (45) ACC 687**, held thus:

"11. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. There may be cases where on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own he liability for the homicide. In the present case there is no such proximity of time and place. As already noted the death body has been recovered about 14 days after the date on which the deceased was last seen in the company of the accused. The distance between the two places is about 30-40 kms. The event of the two accused persons having departed with the deceased and thus last sen together (by Lilima Rajbongshi, PW6) does not bear such close proximity with the death of victim by reference to time or place. According to Dr. Ratan Ch. Das the death occurred 5 to 10 days before 9.2.1991. The medical evidence does not establish, and there is no other evidence available to hold, that the deceased had died on 24.1.1991 or soon thereafter. So far as the accused Mohibur Rahman is concerned this is the singular piece of circumstantial evidence available against him. We have already discussed evidence as to recovery and held that he cannot be connected with any recovery. Merely because he was last seen with the deceased a few unascertainable numbers of days before his death, he cannot be held liable for the offence of having caused the death of the deceased. So far as the offence under Section 201 IPC is concerned there is no evidence worth the name available against him. He is entitled to an acquittal."

vi (b). <u>Last Seen : Appreciation of evidence</u>

119. P. W. 2 Mewa, P.W. 3 Nanuka and P.W.5 Rajwati were the witnesses who claimed to have seen the deceased Ganga Ram in the company of the accused-appellant before the former disappeared and was later found dead.

120. P.W. 2, Mewa was a chance witness at Samrath's tubewell at about 05:00 PM, when he saw the accused with the deceased Ganga Ram. A chance witness is essentially one who is present at the site or witnesses the event, due to fortuitous circumstances, and his presence is not natural. Such witness has to justify or explain his presence at the site. The evidence of such witness has to be scrutinized carefully to determine whether the presence is established or is doubtful or ruled out.

121. There is admittedly no road connecting Mewa's agricultural field with

Samrath's tubewell. Hence in the ordinary course of business P.W. 2 Mewa had no reason to be present at the tubewell at the appointed time. Only business of a specific character could have taken him to the tubewell at the time described by him. He could not state any business of exceptional or specific nature which brought him to the tubewell. His explanation for his presence at the tubewell is not satisfactory.

121.1. Further he had also asked Ganga Ram to accompany him back to his home when he saw the latter in the company of Indar/accused. This conduct was not natural. On the one hand, P.W. 2 Mewa claimed to be a close relative of Ganga Ram, and would thus be aware that Ganga Ram often slept at the tubewell. There was no reason for him to ask him to accompany him back to home. The presence of P.W. 2 Mewa at tubewell at the date and the time stated by him, is doubtful. His testimony in this regard is unreliable. We conclude that the prosecution has not been able to establish the presence of P.W.2 Mewa at the tubewell beyond reasonable doubt. In the earlier part of the narrative we have already found that P.W. 2 is not a reliable witness and his testimony is liable to be disbelieved.

122. There is another aspect to the matter. P.W. 2 Mewa had claimed that he had seen Ganga Ram and Indar at the Samrath's tubewell ten days prior to the discovery of the dead body.

123. The dead body was discovered on 18.01.1985. The deposition of P.W. 2 Mewa if taken on face value, would mean that he had seen the deceased Ganga Ram with accused Indar on 08.01.1985. However, Nanuka, P.W. 3 claims that he had seen Ganga Ram with Indar on 9th i.e. 09.01.1985. Hence P.W. 2 Mewa cannot be regarded as a witness who saw the accused with the deceased.

124. P.W.3 Nanuka claims in his testimony that he had seen Ganga Ram with Indar on 9th (09.01.1985). The witness describes in meticulous detail the clothes deceased Ganga Ram was wearing. Incidentally the description of the clothing given by P.W. 3 Nanuka fully agrees with the articles of clothing claimed to have been recovered by the Investigation Officer.

125. The part of his testimony wherein he identified the Aligarh cut/style of the pyjama tied to the head of the deceased Ganga Ram made him a "suspect witness" in the eyes of the defence team. He was specifically cross examined as to how he could make out that the pyjama was of Aligarh cut(style), when the same was tied as a headgear by Ganga Ram. He replied that one leg of the pyjama was hanging in full view. The Aligarh cut/style is narrow at the bottom and broad at the top.

125.1. This description is out of the ordinary. In the normal course, in villages when a pyjama is tied as headgear, the legs of the pyjama are used in the likeness of a turban and compactly tied. They are never left dangling or hanging in full view. Further the description by P.W. 3 of the clothes Ganga Ram was wearing is at variance with evidence of P.W.5 Rajwati on the point. The anxiety of P.W. 3 to make a statement in mirror image of the recoveries, and readiness to become an instrument of the Investigation Officer to bring home the guilt at all costs, are all too evident from the aforesaid deposition. The testimony is not worthy of belief. The P.W.

3 is clearly a tutored witness. His testimony is liable to be discarded.

126. P.W.5 Rajwati, claims that she also saw Ganga Ram with Indar ten days prior to the recovery of his dead body on 18.01.1985. However from the totality of evidence in the record, it appears that she had seen the accused in the company of the deceased, 9 days prior to the discovery of the body. P.W. 5 Rajwati last saw the deceased with accused. However, Section 106 of the Indian Evidence Act, 1872, is not applicable to the facts of this case, as the subsequent discussion will show.

127. According to the medical opinion received during trial, the death could have happened between 9th/10th. The time of death could vary from one to two days. But most importantly, P.W. 10 Dr. N.P. Agrawal, did not rule out the possibility of the victim dying on 13.01.1985. Consequently, we find that the variation in the time of death was from one and two to four days. Adopting the evidence which is favourable to the accused, the time of death of Ganga Ram would be four days after he was last sighted with the accused. This creates a wide time gap between the accused being sighted with deceased Ganga Ram, and the latter's death. There is every possibility of the deceased having met other persons in this period of four days.

128. In these facts, the cause of death of Ganga Ram was not within the special knowledge of the accused-appellant. Section 106 of the Indian Evidence Act, 1872, cannot be invoked against the accused-appellant.

129. Further, the prosecution having failed to prove any incriminating link in the chain of circumstances, cannot take the assistance of Section 106 of the Indian Evidence Act, 1872, to prove the guilt of the accused-appellant. The prosecution theory of "last seen together",cannot rescue its failing case.

vii. Investigation

130. Large scale discrepancies in the investigation and repeated violations of police regulations have been evidenced in this case. The falsity of the recovery of the Kurta and tobacco pouch in the prosecution case has been established.

131. The cumulative effect of the investigative lapses is that the zealousness of the IO to "solve" the case by framing the accused cannot be ruled out.

VIII. Findings

132. In summation we find:

I. The prosecution failed to establish any link in the chain of circumstances consistent with the guilt of the accused-appellant by legal evidence.

II. The prosecution has failed to prove the guilt of the accused-appellant beyond reasonable doubt.

III. The accused-appellant is innocent of the charge of murder of Ganga Ram and of destruction of evidence and is liable to be acquitted.

IX. Analysis of the judgment of learned trial court

133. The learned court below in the impugned judgment found that the leather belt of yoke of Samrath's plough was missing. There was a possibility that the leather belt round the neck of deceased Ganga Ram's body, was in fact the missing belt of Samrath' yoke. This finding directly incriminated the accused-appellant.

134. We are afraid that the finding is made on the foot of conjectures and the very antithesis of the first principles of criminal jurisprudence.

135. While adverting to the circumstantial evidence, the learned court below upheld the recoveries of the personal articles of deceased Ganga Ram, namely, his kurta, tobacco pouch and pyjama. These recoveries linked the accused-appellant with the crime. The accused-appellant was seen in the company of the deceased by various witnesses. But he could not offer an explanation for the death of Ganga Ram. The illicit relations between the accused Indar and Rajwati, wife of the deceased Ganga Ram, provided the motive for crime. Thus in the opinion of the learned trial court the chain of incriminating circumstances was complete. The accused (appellant) was convicted and punished. The other accused were acquitted.

136. The learned trial court clearly misdirected itself in fact, evidence and the law.

137. The judgment of the learned trial court dated 23.12.1986 is unsustainable in law and liable to be set aside.

X. The Verdict

138. In view of the preceding narrative, we hold that the accused-appellant is not guilty as charged for the murder of Ganga Ram and destruction of evidence. We acquit the accused-appellant of the aforesaid charges under Section 302/201 I.P.C., for which he was prosecuted.

139. The judgment rendered by the learned trial court/learned Additional Sessions Judge-VI, Bulandshahr, in Sessions Trial No. 08 of 1986 (State Vs. Indar and others) on 23.12.1986 is set aside.

140. Criminal Appeal is **allowed**.

141. The appellant is in jail. We direct that the appellant be released forthwith from jail, unless he is detained in any other case.

142. The office is directed to send back the lower court record along with a certified copy of this judgment for information and necessary action.

143. The compliance report be furnished to this Court through the Registrar General, High Court, Allahabad.

(2020)12ILR A292
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 10.11.2020

BEFORE

THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

Criminal Appeal No. 75 of 2002

Ram Shankar & Anr. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Jai Singh Chauhan, Dilip Pandey, Shishir Pradhan

Counsel for the Respondent:
Govt. Advocate

Criminal Law –Indian Penal Code,1860 - Sections 498-A, 304B, 120B - Dowry Prohibition Act,1961 – Section 3/4 - Criminal Appeal has been filed against conviction U/s 498-A, 304B, 120B I.P.C. and 3/4 D.P. Act.

Criminal Law – Indian Penal Code,1860 – Section 304-B, Section 498-A - Evidence Act, 1872 - Section 113-B - Dowry Prohibition Act,1961 - Section 2 are discussed: -

The term "soon before death" used in section 304-B I.P.C. and section 113-B of Evidence Act - does not mean just before death or immediately before death of deceased, she was subjected to torture, cruelty or harassment by her in-laws due to demand of dowry. (Para 23)

We hasten to add that this is not a correct reflection of the law. "Soon before" is not synonymous with "immediately before".

Delay in lodging the F.I.R. - depends upon facts and circumstances of each case- such delay is natural and reasonable; it cannot be treated fatal to the prosecution story. (Para 39)

The prosecution has succeeded to prove that the deceased had died within seven years of her marriage due to burn injuries inside the house of the appellant and she was subjected to cruelty and harassment by the appellant due to demand of dowry soon before her death. (Para 41) Order passed by the learned Trial Court is liable to be affirmed. (Para 45)

Appeal dismissed. (E-2)

List of Cases cited: -

1. Kans Raj Vs St. of Punj. (2000) 5 SCC 207

2. Rajindar Singh Vs St. of Punj., AIR 2015 SC1359,

3. Surindra Singh Vs St. of Har., (2014) 4 SCC 129

4. Sher Singh Vs St. of Har., (2015) 3 SCC 724

5. Dinesh Vs St. of Har., (2014) 12 SCC 532

6. Surinder Singh Vs St. of Har. (2014) 4 SCC 129,

7. Sher Singh Vs St.of Har., 2015 (1) SCALE 250

8. Trimukh Maroti Kirkan Vs St. of Mah. (2006) 10 SCC 681

9. In St. of T. N. Vs Rajendran (1999) 8 SCC 679

10. Preet Pal Singh Vs St. of U.P., AIR 2020 SC 3995

11. Tara Singh & ors. Vs St. of Punj., AIR 1991 SC 63

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

1. This appeal has been preferred against the judgment and order dated 19.01.2002 passed by Additional Sessions Judge, Fast Track Court-II, Rai Bareli in Sessions Trial No.188/95 arising out of Case Crime No.63/95 under Sections-498-A, 304B, 120B I.P.C. and Section ¾ Dowry Prohibition Act 1986 (in short D.P. Act), Police Station-Lalganj, District-Rai Bareli, whereby the appellants-Ram Shankar and Kamlesh Kumar have been convicted and sentenced for the offence under Section 304B I.P.C. for seven years rigorous imprisonment, for the offence under Section 498A I.P.C. for two years rigorous imprisonment and fine of Rs.1000/- each and for the offence under Section 4 D.P. Act for one year rigorous imprisonment and fine of Rs.1000/- each. It has further been directed that the appellants have to go undergo three months imprisonment in default of payment of fine for offence under Section 498A I.P.C. and three months imprisonment in default of payment of fine for offence under Section 4 D. P. Act. All the sentences have been directed to run concurrently.

2. The prosecution story, in brief, is that the deceased, Dhanpati, daughter of Lal Bahadur (P.W.-1) (informant), was married to the appellant-Kamlesh Kumar in the year 1992. On 25.02.1995 at 6:30 a.m. Lal Bahadur (P.W.-1) lodged first information report (in short F.I.R.) (Ext. Ka-1) at P.S.-Lalganj, District-Raibareli alleging that after her marriage the appellant was asking Rs.20,000/- and a

motorcycle as a dowry and on account of non-fulfillment of dowry, the appellant-Kamlesh Kumar, his sister-Ram Payari (co-accused) and his father, the appellant-Ram Shankar (since deceased) used to harass and torture the deceased and had forcibly taken her all the jewellery. It is further stated in the F.I.R. that on 24.02.1995 the appellant-Kamlesh Kumar, co-accused (Ram Pyari) and the appellant-Ram Shanker (since deceased) caused death of the deceased, Dhanpati, aged about 22 years, by setting her on fire.

3. On the said information (Ext. Ka-1), chik report (Ext.-Ka-3) was registered as Crime No.63/95, under Section 498-A, 304-B & Section ¾ D.P. Act against the appellant-Kamlesh Kumar, co-accused-Ram Pyari and the appellant-Ram Shankar (since deceased) and the same was entered into General Diary (Ext. Ka-4) by Head Constable, Ram Sharma (P.W.-4). Investigation was handed over to Dy. S. P., Rajendra Kumar Pandey (P.W.-6).

4. Sri Ram Das (P.W.-5), Executive Magistrate/Tehsildar was deputed to conduct the inquest of the deceased, who reached the place of occurrence on 25.02.1995, conducted the inquest proceeding, prepared inquest report (Ext.-Ka-5) on 25.02.1995 at about 10:00 a.m., sealed the dead body of the deceased, prepared relevant police papers (Ext.-Ka-6 to Ext.-Ka-10) and sent it for post-mortem examination to District Hospital, Raibareli.

5. Dr. R. P. Verma (P.W.3) and late Dr. S. K. Singh jointly conducted the post-mortem examination of the deceased-Dhanpati @ Dhanno, prepared post-mortem report (Ext.-Ka-2) and found the following anti-mortem injuries on her body :-

(I) Superficial to deep burn injuries on whole body containing red color riges.

(ii) Bloody froth was coming out from both nostrils.

6. In internal examination, it was found that brain including its membrane, lungs trachea were conjugated, both side of heart was full of blood, stomach was swollen containing 150 gm. liquid material.

7. According to him (P.W.-3), the deceased had died due to shock, caused by anti mortem burn injury, at any time in the morning of 24.02.2005.

8. Dy. S. P. Rajendra Kumar Pandey (P.W.-6), during investigation, visited the place of occurrence, prepared the site plan (Ext.-Ka-11), recorded the statement of witnesses, perused the inquest report as well as post-mortem report and filed charge sheet (Ext.-Ka-12) against the appellant Kamlesh Kumar, co-accused-Ram Pyari and the appellant Ram Shanker (since deceased) before the concerned Magistrate, who after providing the copy of relevant police papers as required under Section 207 of Criminal Procedure Code, 1973 (hereinafter referred to as Code) to the appellant and other co-accused, committed the case to Sessions Judge, Raibareli for trial.

9. The charges were framed against the appellant-Kamlesh Kumar, co-accused-Ram Pyari and the appellant-Ram Shankar (since deceased), who denied the charges and claimed for trial.

10. The prosecution, in order to prove its case, examined the Lal Bahadur (P.W.-1), Harsh Bahadur (P.W.2), Dr. R. B. Verma (P.W-3), Head Constable, Ram Sharma (P.W.-4), Executive Magistrate Ram Das (P.W.-5) and Investigating Officer, Rajendra Kumar Pandey (P.W.-6).

11. After the prosecution evidence, the statements of the appellants and other co-accused were recorded under Section 313 of the Code, who admitted that deceased had died due to burn injury, inside their house, within three years of her marriage but denied the prosecution story and stated that they have been falsely implicated. The appellant-Kamlesh Kumar stated that the deceased-Dhanpati wanted to go with him to Mumbai but he refused as his mother was disabled and due to his refusal, the deceased committed suicide by setting herself on fire. He further stated that he had given information of the said occurrence on same day at police station. The appellant-Ram Shanker (since deceased) further stated that after death of the deceased, her father and brother asked money from him and due to his refusal, he had been falsely implicated in this case.

12. To controvert the prosecution story, the appellants in their defence examined Mohd. Jarmish Khan (D.W.-1), Ram Baran (D.W.-2) and H.C.P.-Sri Ram Sharma (D.W.-3).

13. The trial Court, after hearing the learned counsel for the appellants as well as counsel appearing for the State and considering the material available on record, convicted and sentenced the appellant-Kamlesh Kumar and the appellant-Ram Shanker (since deceased) and acquitted the co-accused, Ram Pyari vide impugned judgment and order. Aggrieved with the said judgment, this appeal has been preferred by the appellants.

14. During the pendency of the appeal, the appellant, Ram Shanker died and his appeal has been abated vide order dated 03.05.2018.

15. Heard Sri Shishir Pradhan, learned counsel for the appellant and Sri G. D. Bhatt, learned A.G.A. for the State.

16. Learned counsel for the appellant has submitted that the appellant is innocent and has been falsely implicated in this case. Learned counsel further submitted that there was no demand of dowry from the side of the appellant as no complaint was made by the informant to any authority in this regard prior to this occurrence and no cruelty or harrasment was caused to the deceased soon before her death. The appellant was doing job in Mumbai and at the time of occurrence he had come to see his ailing mother. Learned counsel further submitted that the deceased was insisting to go Mumbai with the appellant but due to low income of the appellant, he advised the deceased to stay at his house with the mother for her service. Learned counsel further submitted that due to denial of the appellant, the deceased in frustration had committed suicide by setting her on fire inside in a room. Learned counsel further submitted that in order to save the deceased, the appellant, his family members and other co-villagers had broken and pulled down the door by axe and spade but could not save the deceased as she had died by burn injuries. Learned counsel further submitted that thereafter the appellant informed the concerned police station on same day in the evening and also informed his father-in-law (P.W.-1). Learned counsel further submitted that F.I.R. was lodged by delay of more than 24 hrs without any explanation by P.W.-1 after due consultation to extract money from appellants. Learned counsel further submitted that the impugned judgment and order passed by trial Court is against the settled principle of law as well as evidence available on record, which is is liable to be set aside and the appeal be allowed.

17. Per contra, learned A.G.A. vehemently opposing the submission of learned counsel for the appellant, submitted that the prosecution has successfully proved its case beyond reasonable doubt. Learned A.G.A. further submitted that at

the time of occurrence the appellant was sleeping with the deceased and had caused the death of the deceased due to demand of dowry. Learned A.G.A. further submitted that the information given by the appellant at police station after 12 hours of the occurrence, was in order to create a false story in his defence. Learned A.G.A. further submitted that deceased had died inside the house of the appellant and as the informant (P.W.-1) got information, he lodged F.I.R., therefore there is no delay in lodging the F.I.R. Learned A.G.A. further submitted that the fact that the appellant, who was present at the time of occurrence with the deceased and his version that deceased died due to suicidal burn injury is totally false as no sign, symptoms or evidence of suicide was found from the place of occurrence. Learned A.G.A. further submitted that neither any inflammable articles such as match box, kerosene oil etc. was found nor recovered from the place of occurrence by the Investigating Officer. Learned A.G.A. further submitted that the ocular evidence is supported with the medical evidence and there is no illegality in the impugned judgment and order passed by trial Court and the appeal is liable to be dismissed.

18. I have heard the rival submissions advanced by learned counsel for both the parties and perused the record.

19. Before considering the evidence available on record, led by both parties, in the light of argument advanced by the learned counsel for the parties, it is necessary to refer the relevant provision of law relating to the offence in question i.e. Section 304-B and Section 498-A I.P.C., Section 113-B of Indian Evidence Act and Section 2 Dowry Prohibition Act, 1961 which are as under:-

Section 304-B (1) *Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death. Explanation.--For the purpose of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961.*

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

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

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

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

Section 113-B of Indian Evidence Act-*Presumption as to dowry*

death.--When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death. Explanation.--For the purposes of this section, "dowry death" shall have the same meaning as in section 304B, of the Indian Penal Code.

Section 2 of Dowry Prohibition Act-*Definition of "dowry'. In this Act, "dowry" means any property or valuable security given or agreed to be given either directly or indirectly*

(a) by one party to a marriage to the other party to the marriage; or

(b) by the parent of either party to a marriage or by any other person, to either party to the marriage or to any other person."

20. The above provision, related with dowry death, clearly shows that if the death of any women is caused within seven years of her marriage by burn "or otherwise than under normal circumstances" and it is shown that if soon before the death of such women, she was subjected to cruelty or harassment by her husband or any relative of her husband, in connection with demand for dowry and if the prosecution succeeds to prove the above ingredient, such death shall be called as dowry death. In addition to above, Section 113-B of Indian Evidence Act further provides that in such cases, if it is shown that such women was subjected, soon before her death by the accused, to cruelty or harassment for in or connection with any demand for dowry, the Court shall presume that such accused had caused the dowry death.

21. Admittedly the appellant is husband of deceased-Dhanpati, who had died inside the house of the appellant within seven years of her marriage. This fact has been admitted by the appellant in his statement under Section 313 of the Code and also stated by Ram Baran (D.W.-2), who in his examination-in-chief has specifically stated that on the day of occurrence at about 7:00 a.m. he, upon hearing the noise and seeing the smoke coming out from the house of the appellant, reached at the house of the appellant. He further stated that Nanhe, Sukhdin, Ram Murat and so many villagers had also reached there. He further stated that the appellant-Kamlesh Kumar was trying to cut the door and they had also tried to cut that door but could not succeed as the handle of axe was broken. Thereafter they pulled down the door by spade and saw that the deceased, wife of the appellant-Kamlesh Kumar, had been burnt.

22. Thus it has only to be seen whether any cruelty or harassment was caused to deceased soon before her death due to demand of dowry or not.

23. The term *"soon before death"* used in Section 304-B I.P.C. and 113-B of Evidence Act has neither been explained nor defined either in I.P.C. or in Evidence Act and the term *"it is shown"* that soon before her death the deceased was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand of dowry, as condition precedent for dowry death, shows that the factum of cruelty or harassment by the appellant with the deceased soon before death of deceased is not required to be proved by prosecution beyond reasonable doubt. This fact may be proved by the prosecution by showing the facts and circumstances soon before death of deceased. In addition to above the term

"soon before death" does not mean just before death or immediately before death of deceased, she was subjected to torture, cruelty or harassment by her in-laws due to demand of dowry.

24. Hon'ble Supreme Court while discussing the object and purpose of Section 304-B I.P.C. and the scope of relevancy and meaning of phrase *"soon before death of deceased"* contained therein, in ***Kans Raj vs. State of Punjab (2000) 5 SCC 207*** has held as under :

"15. It is further contended on behalf of the respondents that the statements of the deceased referred to the instances could not be termed to be cruelty or harassment by the husband soon before her death. "Soon before" is a relative term which is required to be considered under specific circumstances of each case and no straitjacket formula can be laid down by fixing any time-limit. This expression is pregnant with the idea of proximity test. The term "soon before" is not synonymous with the term "immediately before" and is opposite of the expression "soon after" as used and understood in Section 114, Illustration (a) of the Evidence Act. These words would imply that the interval should not be too long between the time of making the statement and the death. It contemplates the reasonable time which, as earlier noticed, has to be understood and determined under the peculiar circumstances of each case. In relation to dowry deaths, the circumstances showing the existence of cruelty or harassment to the deceased are not restricted to a particular instance but normally refer to a course of conduct. Such conduct may be spread over a period of time. If the cruelty or harassment or demand for dowry is shown to have persisted, it shall be deemed to be "soon before death" if any other intervening circumstance showing the non-existence of such treatment is not brought on record, before such alleged treatment and the date of death. It does not, however, mean that such time can be stretched to any period. Proximate and live link between the effect of cruelty based on dowry demand and the consequential death is required to be proved by the prosecution. The demand of dowry, cruelty or harassment based upon such demand and the date of death should not be too remote in time which, under the circumstances, be treated as having become stale enough.

16. No presumption under Section 113-B of the Evidence Act would be drawn against the accused if it is shown that after the alleged demand, cruelty or harassment the dispute stood resolved and there was no evidence of cruelty and harassment thereafter. Mere lapse of some time by itself would not provide to an accused a defence, if the course of conduct relating to cruelty or harassment in connection with the dowry demand is shown to have existed earlier in time not too late and not too stale before the date of death of the woman. The reliance placed by the learned counsel for the respondents on Sham Lal v. State of Haryana [(1997) 9 SCC 759 : 1997 SCC (Cri) 759] is of no help to them, as in that case the evidence was brought on record to show that attempt had been made to patch up between the two sides for which a panchayat was held in which it was resolved that the deceased would go back to the nuptial home pursuant to which she was taken by the husband to his house. Such a panchayat was shown to have been held about 10 to 15 days prior to the occurrence of the case. There was nothing on record to show that the deceased was either treated with cruelty or harassed with the demand of

dowry during the period between her having taken to the nuptial home and her tragic end. Such is not the position in the instant case as the continuous harassment to the deceased is never shown to have settled or resolved."

25. In ***Rajindar Singh vs. State of Punjab, AIR 2015 SC 1359***, three Judges Bench of Hon'ble Supreme Court while placing reliance on the law laid down in ***Kans Raj (Supra)***, affirming the law laid down in ***Surindra Singh vs. State of Haryana, 2014 (4) SCC 129*** and ***Sher Singh vs. State of Haryana, (2015) 3 SCC 724*** and partly overruling the law laid down in ***Dinesh vs. State of Haryana, (2014) 12 SCC 532*** has held as under :

".....We, therefore, declare that any money or property or valuable security demanded by any of the persons mentioned in Section 2 *of the Dowry Prohibition Act, at or before or at any time after the marriage which is reasonably connected to the death of a married woman, would necessarily be in connection with or in relation to the marriage unless, the facts of a given case clearly and unequivocally point otherwise. Coming now to the other important ingredient of Section 304B- what exactly is meant by "soon before her death"?*

21. This Court in Surinder Singh v. State of Haryana (2014) 4 SCC 129, had this to say:

"17. Thus, the words "soon before" appear in Section 113-B *of the Evidence Act, 1872 and also in* Section 304-B IPC. *For the presumptions contemplated under these sections to spring into action, it is necessary to show that the cruelty or harassment was caused soon before the death. The interpretation of the words "soon before" is, therefore, important. The question is how "soon before"? This would obviously depend on the facts and circumstances of each case. The cruelty or harassment differs from case to case. It relates to the mindset of people which varies from person to person. Cruelty can be mental or it can be physical. Mental cruelty is also of different shades. It can be verbal or emotional like insulting or ridiculing or humiliating a woman. It can be giving threats of injury to her or her near and dear ones. It can be depriving her of economic resources or essential amenities of life. It can be putting restraints on her movements. It can be not allowing her to talk to the outside world. The list is illustrative and not exhaustive. Physical cruelty could be actual beating or causing pain and harm to the person of a woman. Every such instance of cruelty and related harassment has a different impact on the mind of a woman. Some instances may be so grave as to have a lasting impact on a woman. Some instances which degrade her dignity may remain etched in her memory for a long time. Therefore, "soon before" is a relative term. In matters of emotions we cannot have fixed formulae. The time-lag may differ from case to case. This must be kept in mind while examining each case of dowry death.*

18. In this connection we may refer to the judgment of this Court in Kans Raj v. State of Punjab *[(2000) 5 SCC 207 : 2000 SCC (Cri) 935] where this Court considered the term "soon before". The relevant observations are as under: (SCC pp. 222- 23, para 15) "15. ... 'Soon before' is a relative term which is required to be considered under specific circumstances of each case and no straitjacket formula can be laid down by fixing any time-limit. This expression is pregnant with the idea of proximity test. The term 'soon before' is not synonymous with the term 'immediately*

before' and is opposite of the expression 'soon after' as used and understood in Section 114, Illustration (a) of the Evidence Act. These words would imply that the interval should not be too long between the time of making the statement and the death. It contemplates the reasonable time which, as earlier noticed, has to be understood and determined under the peculiar circumstances of each case. In relation to dowry deaths, the circumstances showing the existence of cruelty or harassment to the deceased are not restricted to a particular instance but normally refer to a course of conduct. Such conduct may be spread over a period of time. If the cruelty or harassment or demand for dowry is shown to have persisted, it shall be deemed to be 'soon before death' if any other intervening circumstance showing the non-existence of such treatment is not brought on record, before such alleged treatment and the date of death. It does not, however, mean that such time can be stretched to any period. Proximate and live link between the effect of cruelty based on dowry demand and the consequential death is required to be proved by the prosecution. The demand of dowry, cruelty or harassment based upon such demand and the date of death should not be too remote in time which, under the circumstances, be treated as having become stale enough."

Thus, there must be a nexus between the demand of dowry, cruelty or harassment, based upon such demand and the date of death. The test of proximity will have to be applied. But, it is not a rigid test. It depends on the facts and circumstances of each case and calls for a pragmatic and sensitive approach of the court within the confines of law."

22. In another recent judgment in ***Sher Singh v. State of Haryana, 2015 (1) SCALE 250,*** *this Court said:*

"We are aware that the word 'soon' finds place in Section 304B; *but we would prefer to interpret its use not in terms of days or months or years, but as necessarily indicating that the demand for dowry should not be stale or an aberration of the past, but should be the continuing cause for the death under* Section 304 *or the suicide under* Section 306 *of the IPC. Once the presence of these concomitants are established or shown or proved by the prosecution, even by preponderance of possibility, the initial presumption of innocence is replaced by an assumption of guilt of the accused, thereupon transferring the heavy burden of proof upon him and requiring him to produce evidence dislodging his guilt, beyond reasonable doubt." (at page 262)*

23. We endorse what has been said by these two decisions. Days or months are not what is to be seen. What must be borne in mind is that the word "soon" does not mean "immediate". A fair and pragmatic construction keeping in mind the great social evil that has led to the enactment of Section 304B *would make it clear that the expression is a relative expression. Time lags may differ from case to case. All that is necessary is that the demand for dowry should not be stale but should be the continuing cause for the death of the married woman under Section 304B.*

24. At this stage, it is important to notice a recent judgment of this Court in Dinesh v. State of Haryana, 2014 (5) SCALE 641 in which the law was stated thus:

"The expression "soon before" is a relative term as held by this Court, which is required to be considered under the specific circumstances of each case and no straight jacket formula can be laid down by fixing any time of allotment. It can be said

that the term "soon before" is synonyms with the term "immediately before". The determination of the period which can come within term "soon before" is left to be determined by courts depending upon the facts and circumstances of each case." (at page 646)

25. ***We hasten to add that this is not a correct reflection of the law. "Soon before" is not synonymous with "immediately before"."*** *(Emphasis supplied)*

26. Lal Bahadur (P.W.-1), father of the deceased, in his examination-in-chief, stating that the deceased-Dhanpati was married to the appellant-Kamlesh Kumar in May, 1992, the appellant-Ram Shankar (since deceased) was her father-in-law whereas the co-accused-Ram Pyari was her sister-in-law (nand), has stated that he had given sufficient dowry and gift at the time of marriage of his daughter. He further stated that the appellant used to harass and torture his daughter by demanding Rs.20,000/- and one motorcycle as a dowry. He further stated that since he could not succeed to fulfill the said demand of dowry, the appellants had snatched the ornaments of the deceased and used to beat her. He further stated that the deceased was killed by setting her on fire in her matrimonial house within three years of her marriage. He, in his cross-examination, further stated that his daughter was not happy and again stated that after one year of her marriage the appellant-Kamlesh Kumar had asked him for Rs.20,000/- and one motorcycle as dowry. He further stated that the deceased had also told this fact when he had gone to her matrimonial house to take her back (Bidai). He further stated that when the appellant-Kamlesh Kumar had come to his house to take the deceased back (Bidai) he again put demand of said dowry. Harsh Bahadur (P.W.-2), brother of the deceased has also stated the fact of aforesaid demand of dowry as stated by Lal Bahadur (P.W.-1). Thus, it is clear that the appellants were continuously demanding Rs.20,000/- and one motorcycle as a dowry from the deceased as well as her father, Lal Bahadur (P.W.-1) and due to its non-fulfillment they used to torture and harass her soon before her death.

27. At this juncture it is also pertinent to note that in most of the cases the dowry death of deceased is caused inside the house of the accused persons and all the relevant facts as well as incriminating evidence are only in the knowledge of the accused persons but they do not come forward to disclose the fact, happened to the deceased soon before her death. So the prosecution cannot be blamed to produce such evidence which is not in the possession and knowledge of prosecution witnesses.

28. In ***Trimukh Maroti Kirkan vs. State of Maharashtra 2006 (10) SCC 681*** where accused was charged for committing murder of his wife for want of dowry and it was established by the prosecution that shortly before the offence, he was seen with his wife inside his house where he and his wife were normally used to reside. Hon'ble Supreme Court has held as under :

"Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes placed in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries

or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. *In Nika Ram v. State of Himachal Pradesh AIR 1972 SC 2077 it was observed that the fact that the accused alone was with his wife in the house when she was murdered there with 'khokhri' and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt. In Ganeshlal v. State of Maharashtra (1992) 3 SCC 106 the appellant was prosecuted for the murder of his wife which took place inside his house. It was observed that when the death had occurred in his custody, the appellant is under an obligation to give a plausible explanation for the cause of her death in his statement under Section 313 Cr.P.C.* ***The mere denial of the prosecution case coupled with absence of any explanation were held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the appellant is a prime accused in the commission of murder of his wife.*** *In State of U.P. v. Dr. Ravindra Prakash Mittal AIR 1992 SC 2045 the medical evidence disclosed that the wife died of strangulation during late night hours or early morning and her body was set on fire after sprinkling kerosene. The defence of the husband was that wife had committed suicide by burning herself and that he was not at home at that time. The letters written by the wife to her relatives showed that the husband ill-treated her and their relations were strained and further the evidence showed that both of them were in one room in the night. It was held that the chain of circumstances was complete and it was the husband who committed the murder of his wife by strangulation and accordingly this Court reversed the judgment of the High Court acquitting the accused and convicted him under Section 302 IPC.* ***In State of Tamil Nadu v. Rajendran (1999) 8 SCC 679 the wife was found dead in a hut which had caught fire. The evidence showed that the accused and his wife were seen together in the hut at about 9.00 p.m. and the accused came out in the morning through the roof when the hut had caught fire. His explanation was that it was a case of accidental fire which resulted in the death of his wife and a daughter. The medical evidence showed that the wife died due to asphyxia as a result of strangulation and not on account of burn injuries. It was held that there cannot be any hesitation to come to the conclusion that it was the accused (husband) who was the perpetrator of the crime."*** *(Emphasis supplied)*

29. Coming again to the fact of this case, where the prosecution has successfully proved all the ingredients of Section 304-B I.P.C. Now a question arise as to whether the appellant, who was present at the time of occurrence with deceased has succeeded to rebut the presumption of law, as provided under Section 113-B of Evidence Act, by producing any cogent and reliable evidence.

30. The appellant-Kamlesh Kumar, in his statement under Section 313 of the Code, has specifically stated that he had given information of the occurrence to the concerned police station that the deceased had committed suicide in frustration due to denial of appellant to carry her Mumbai and she could not be saved as door of the room was locked by her. To prove this fact neither the appellant nor any member of his family, who was present at place of occurrence, was examined by him before

the trial Court. Jarmish Khan (D.W.-1), record keeper of police office Raibareli and H.C.P.-Sri Ram Sharma (D.W.-3), who were produced by the appellant, have proved Ext.-Kha-1 G. D. Report No.30 dated 24.02.1995 at 18:10 p.m. H.C.P.-Sri Ram Sharma (D.W.-3) has stated that on 24.02.1995 he was posted at Kotwali, Lalganj, District-Raebareli and at that time the appellant-kamlesh Kumar had filed a written information showing that his wife, Smt. Dhanpati had committed suicide by setting her on fire. He further stated that he had entered the contents of the said information in Ext.-Kha-1 and informed the Police Inspector-Pritam Singh.

31. From perusal of the Ext.-Kha-1, it is clear that the appellant-Kamlesh Kumar had also mentioned in his information that in the intervening night of the occurrence the appellant and deceased were sleeping together on one bed, the deceased had arisen in the morning but the appellant continued to sleep. It is further mentioned that at about 7:00 a.m. appellant's sister saw the burn smoke, awoke the appellant and raised alarm. Thereafter he, his sister-Ram Pyari (co-accused) and co-villagers-Ram Murti, Nanhe and so many villagers appeared there and saw that the room where the deceased was burning, was locked from inside. It is also mentioned in the said information that all the persons, who were present on the spot, had tried to cut and tore the door but could not succeed as handle of axe was broken. Thereafter they pulled down the door by spade and saw that the deceased had been completely burnt and died. It is further mentioned in Ext.-Kha-1 that information was sent to his in-laws through his uncle.

32. Now the question arises whether the aforesaid explanatory evidence produced by the appellant to rebut the presumption of dowry death, is reliable and trustworthy. The appellant has not produced his uncle through whom he had sent information to the informant (P.W.-1). According to Dr. R. B. Verma (P.W.-3) the deceased was completely burnt but he in his cross-examination had denied the presence of any smell of kerosene oil. Investigating Officer, Rajendra Kumar Pandey (P.W.-6) who visited the place of occurrence did not find any inflammable materials such as Kerosene oil, match box, dibri etc. He had also not found the broken handle of axe whereby the appellant and other persons were trying to cut the door. The appellant in his statement, recorded under Section 313 of the Code has also not explained the necessity of giving information to the concerned police station by mentioning exculpatory story if he had already sent his uncle to inform the informant (P.W.-1).

33. In addition to above, site plan (Ext.-Ka-11) shows that the deceased was burnt at 'X' place which is pucca room. The appellant had not produced any evidence that how many rooms were in his house and also not pointed out the place where he was sleeping with the deceased whereas from perusal of site plan (Ext.-Ka-11) it transpires that most portion of the appellant's house is surrounded by thatched roof (chhappar). Lal Bahadur (P.W.-1) in his cross-examination has stated that the place where the deceased was burnt is pucca room having door and window situated in northern side of the house. This witness has also stated that one side of the appellant's house was raw (kachha) whereas one side was pucca and another side was damaged.

34. It is also pertinent to note at this juncture that the said occurrence was happened in the month of February having

approximately temperature of 18 degree celsius in the night. The appellant and deceased were young married couples at the time of occurrence and were sleeping on same bed in the night of the occurrence. It may be presumed that young couple of rural area in the month of February would sleep together at place having morality and secrecy and if there was only one pucca room in the house of the appellant it would be expected that they would not sleep outside the room where the co-accused and other family members/relatives were sleeping. In addition to above, Ram Baran (D.W.-2) in his cross-examination has also admitted that in the evening of the occurrence the appellant and the deceased had quarreled together. In such circumstances the defence of appellant that the deceased was sleeping with him in the night but she had committed suicide in another room, is not reliable. Further, the explanation of appellant that he was sleeping inside his house with the deceased and she awoke due to frustration, went into pucca room, bolted the door from inside and set herself on fire but she could not be saved and rescued by the appellant, his family members and co-villagers as she was completely burnt, is also neither trustworthy nor believable because if woman was burning inside the house of the appellant where the appellant and his family member were present, but they failed to experience bad smell caused by burning of the deceased, smoke or her cry and noise in the beginning of the said occurrence and also failed to make effective efforts to save her. Further more, the said occurrence was happened at or before 7:00 a.m. on 24.02.1995 but no information was given by the appellant to concerned police till 6:10 p.m. The conduct of appellant shows that during this period of twelve hours he was creating and manufacturing false evidence in his defence.

35. In addition to above, the written information/application filed by the appellant at concerned police station has neither been produced nor proved by the appellant before the trial Court. Mohd. Jarmish Khan (D.W.-1) and Ram Sharma (D.W.-3) proved an extract of General Diary (Ext.-Kha-1) wherein extract of information, given by appellant was entered by D.W.-3. Non production of said written information before the trial Court amounts suppression of important fact which is fatal to explanation of appellant. Thus, in the light of law laid down by Hon'ble Supreme Court in ***Trimukh Maroti Kirkan (supra)*** explanatory evidence produced by the appellant is not reliable and trustworthy to rebut the statutory presumption of Section-113-B of Evidence Act and failure to produce the reliable evidence further strengthen the prosecution case.

36. So far as the submission of learned counsel for the appellant that since the informant (P.W.-1), father of the deceased had not made any complaint regarding demand of dowry and harassment caused by the appellants to any police authority prior to this occurrence, the prosecution story becomes doubtful, is concerned, the record shows that Lal Bahadur (P.W.-1) was illiterate person and belongs to a rural area. He has further stated that the appellants were well known to him earlier to the marriage of the deceased, as they were his old relatives, therefore there was no discussion on the point of dowry.

37. It is often seen that in rural areas where the bride groom's family is well

known to the family of the bride earlier to their marriage settlement, the bride and her parents do not agitate some problem and issues occurred between them with family of bride groom after her marriage as they believe that due to lapse of time the problem whether it is related to demand of dowry or otherwise, may be subsided or pacified in future. Parents of bride do not want to interfere in such disputes. The poor and helpless father of the bride used to prefer to remain as a silent spectator in such disputes and avoid to complain to police authorities because he believes that such step may deteriorate the relationship of his daughter with her husband and in-laws. Failure to take any legal step in such disputes against the in-laws of the deceased does not mean that neither dowry was demanded nor harassment or cruelty was committed to the deceased soon before her death.

38. Recently in ***Preet Pal Singh vs. Sate of U.P., AIR 2020 SC 3995*** where Allahabad High Court had suspended the sentence of the appellant, convicted for the offence of dowry death, on the ground that no complaint for demand of dowry was made earlier by the father of the deceased, Hon'ble Supreme Court, setting aside the impugned order passed by this Court, has held as under :

"42. From the evidence of the Prosecution witnesses, it transpires that the Appellant had spent money beyond his financial capacity, at the wedding of the victim and had even gifted an I-10 car. The hapless parents were hoping against hope that there would be an amicable settlement. Even as late as on 17.6.2010 the brother of the victim paid Rs. 2,50,000/- to the Respondent No. 2. ***The failure to lodge an FIR complaining of dowry and harassment before the death of the victim, is in our considered view, inconsequential. The parents and other family members of the victim obviously would not want to precipitate a complete break down of the marriage by lodging an FIR against the Respondent No. 2 and his parents, while the victim was alive.***

(Emphasis supplied)

39. So far as the next submission made by learned counsel for the appellant that the F.I.R. was lodged by delay of 24 hours and without any explanation, is concerned, the record shows that Lal Bahadur (P.W.-1) was not present at the place of occurrence. He had come at the place of occurrence on 24.02.1995 at about 7:00 p.m. and lodged F.I.R. on the next day i.e. 25.02.1995 at about 6:30 a.m. The distance of place of occurrence from the concerned police station as shown in Ext.-Ka-3 is 8 kms. No time limit has been prescribed for lodging the F.I.R. either in Evidence Act or in the Code. The delay caused in lodging the F.I.R. depends upon facts and circumstances of the each case and if such delay is natural and reasonable, it cannot be treated fatal to the prosecution story. Hon'ble Supreme Court, on delay caused in lodging the F.I.R., in ***Tara Singh and others vs. State of Punjab, AIR 1991 SC 63*** has held as under :-

*"**The delay in giving the FIR by itself cannot be a ground to doubt the prosecution case. Knowing the Indian conditions as they are we cannot expect these villagers to rush to the police station immediately after the occurrence. Human nature as it is, the kith and kin who have witnessed the occurrence cannot be expected to act mechanically with all the promptitude in giving the report to the police. At times being grief-stricken***

because of the calamity it may not immediately occur to them that they should give a report. After all it is but natural in these circumstances for them to take some time to go to the police station for giving the" report. *Of course the Supreme Court as well as the High Courts have pointed out that in cases arising out of acute factions there is a tendency to implicate persons belonging to the opposite faction falsely. In order to avert the danger of convicting such innocent persons the courts are cautioned to scrutinise the evidence of such interested witnesses with greater care and caution and separate grain from the chaff after subjecting the evidence to a closer scrutiny and in doing so the contents of the FIR also will have to be scrutinised carefully.* ***However, unless there are indications of fabrication, the court cannot reject the prosecution version as given in the FIR and later substantiated by the evidence merely on the ground of delay.*** *These are all matters for appreciation and much depends on the facts and circumstances of each case." (Emphasis supplied)*

40. Coming to the facts of this case again, Lal Bahadur (P.W.-1) (informant), in his cross-examination, stating that after receiving the information of the occurrence, has stated that he had reached the place of occurrence at 7:00 p.m. He further stated that he had gone to concerned police station on next day with one Devtadin ; he is not so educated and he got the information written by Devtadin because he could not write due to weak sight. This witness is father of the deceased. Looking to the brutal death of deceased, it might be possible that he would have become numb and so puzzled that he would not be in a position to take further step and if in such situation he could not reach the concerned police station to lodge the F.I.R. in the night, it cannot be said that the delay caused for lodging the F.I.R., is fatal to the prosecution.

41. Thus the prosecution has succeeded to prove that the deceased had died within seven years of her marriage due to burn injuries inside the house of the appellant and she was subjected to cruelty and harassment by the appellant due to demand of dowry soon before her death. The appellant has failed to produce any reliable evidence in his defence to rebut or explain the prosecution evidence in view of the statutory presumption as provided under Section 113-B of Evidence Act. Learned trial Court has elaborately discussed the evidence led by the prosecution in the light of argument advanced by learned counsel for both the parties. The impugned judgment is well discussed, well reasoned, it requires no interference and liable to be affirmed.

42. Now coming to the question of sentence whether sentence passed by the Trial Court, is just and proper or not.

43. Appellant has been convicted for the offence under Section 304-B and 498-A I.P.C. and under Section 4 of D. P. Act. He has been sentenced only for seven years rigorous imprisonment for the offence under Section 304-B I.P.C., for 2 years rigorous imprisonment and fine of Rs. 1,000/- for the offence under Section 498-A I.P.C. and for one year rigorous imprisonment and fine of Rs.1,000/- for the offence under Section 4 of D. P. Act. It has been further directed that all the sentences have to run concurrently. Thus the maximum sentence, awarded against the appellant, is seven years.

44. It is settled principle of sentencing and penology that undue sympathy in awarding the sentence with accused is not required. The object of sentencing in criminal law should be to protect the society and also to deter the criminals by awarding appropriate sentence. In this regard Hon'ble Supreme Court has observed in ***State of Madhya Pradesh vs. Saleem @ Chamaru, AIR 2005 SC 3996*** which is as under:-

"The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal".

45. Looking into the nature and gravity of the offence, I am of the view that the punishment awarded by the Trial Court is just and appropriate and requires no interference. Appeal is liable to be dismissed and impugned judgment and order passed by the learned Trial Court is liable to be affirmed.

46. In the light of above discussion, the appeal lacks merit and is hereby ***dismissed***. The impugned judgment and order dated 19.01.2002 passed by Additional Session Judge/Fast Track Court-II, Raibareli in Sessions Trial No. 188 of 1995 (State vs. Ram Shankar and others), is maintained and affirmed.

47. The appellant-Kamlesh Kumar is on bail. His bail bond is cancelled. He is directed to surrender before the concerned Court forthwith to serve out the aforesaid sentence.

48. Let a copy of this judgment along with lower court record be sent to the concerned Court for necessary information and compliance.

(2020)12ILR A307
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 18.12.2020

BEFORE
THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

Criminal Appeal No. 309 of 2015

Ramu ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Rana Mritiunjay Singh, Desh Deepak Verma, Maneesh Kumar Singh, Neeta Singh Chandel, Piyush Kumar Singh

Counsel for the Respondent:
Govt. Advocate

Criminal Law –Indian Penal Code,1860 –Sections 376 - 4 POCSO Act - Criminal Appeal has been filed against conviction U/s 376 I.P.C and 4 POCSO Act.

Relative witnesses: - in heinous offence, the relative of the victim would not falsely implicate an innocent person by exonerating the real culprit and if such plea is taken by the accused appellant, it has to be proved by him as to why he is being falsely implicated. (Para 38)

Minor Contradiction: - Do not affect the core of prosecution- in offence of rape the statement of victim, supported by medico legal reports, is sufficient for conviction of accused and no further corroboration is required. (Para 40)

Offence punishable under POCSO Act as

well as I.P.C.- relevant provision of POCSO Act and also in relevant provision of I.P.C., like 376 I.P.C.- Trial Court is bound to punish the accused either in the relevant provision of POCSO Act, or under I.P.C. which is greater in degree. (Para 52)

Conviction by the Trial Court affirmed but the sentence is modified - sentence under section 376 I.P.C. maintained. Appellant has to undergone 14 years rigorous imprisonment; no separate sentence is required for offence under section 4 OF POCSO Act.

Appeal is partly allowed. (E-2)

List of Cases cited: -

1. Vahid Khan Vs St. of M.P. (2010) 2 SCC 9,

2. Masalti & ors. Vs St. of U. P., AIR 1965 SC 202

3. Mohabbat Vs St. of M.P., (2009) 13 SCC 630,

4. St.of H.P. Vs Sanjay (2017) 2 SCC 51

5. St. of M.P. Vs Saleem @ Chamaru, AIR 2005 SC 3996,

6. Independent Thought Vs U.O.I. & ors. (2017) 10 SCC 800

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

1. The instant appeal, under Section 374(2) of Code of Criminal Procedure, 1973 (in short 'Code'), has been preferred by appellant Ramu (in short 'appellant') against the judgment and order dated 28.02.2015, passed by Special Judge, Protection of Children from Sexual Offences Act, 2012 (in short 'POCSO Act') /Additional Sessions Judge, Court No.9, Barabanki, in Session Trial No.652 of 2013, (State vs. Ramu), arising out of Case Crime No.181 of 2013, Police Station Ramsanehi Ghat, District Barabanki whereby the appellant has been convicted for offence under Section 376 IPC and Section 4 of POCSO Act and has been sentenced for offence under Section 376 IPC for 14 years rigorous imprisonment and fine of Rs.10,000/- with further direction that in default of payment of fine, the appellant has to further undergo one year additional rigorous imprisonment and again has been sentenced for offence under Section 4 of POCSO Act for same sentence i.e. 14 years rigorous imprisonment and fine of Rs.10,000/- with further direction that in default of payment of fine, the appellant has to further undergo one year additional rigorous imprisonment. All the sentences were directed to run concurrently.

2. The prosecution case, in brief, is that appellant Ramu and Smt.Janak Dulari (P.W.1), mother of victim (P.W.3) were resident of village Surajpurwa Lalpur, Rajpur, Police Station-Ram Sanehighat, District Barabanki.On 25.07.2013, Smt. Janak Dulari (P.W.1) had gone to pull the paddy seedling (beran) by leaving her daughter (victim), aged about eight years and son Sumit, aged about three years at her house.Meanwhile, at about 9:00 a.m., appellant came at her house, enticed her daughter (victim) by alluring to give her cashew biscuit and took her to his mini rice mill (palesar) where he gave biscuit to her and took her into a room of the said rice mill, laid her on earth, undressed her, inserted his finger into the vagina of victim and also raped her.Thereafter, he threatened her not to tell about the incident to anyone, otherwise he would kill her.

3. At noon, when Janak Dulari (P.W.1) came back to her house, she saw the blood stained undergarment (panty) and frock of the victim and when she asked about the incident, the victim (P.W.3) told

her the whole story while weeping. Janak Dulari (P.W.1) rushed to the concerned Police Station with victim and lodged a written report (Ex.Ka.1), on the basis whereof Chik F.I.R. (Ex.Ka.5) was prepared and the said information was entered in the General Diary report dated 25.07.2013 at about 09:30 p.m. by lady Constable Sulekha Yadav (P.W.-5). Blood stained undergarment (panty) and frock of the victim were taken into custody and its recovery memo (Ex.Ka.7) was prepared by Const. Sulekha Yadav (P.W.5). Investigation of the case was undertaken by lady police Inspector Bholi Singh Chauhan (P.W.4), who perused the relevant police papers and also perused recovery memo (Ex.Ka.7) of blood stained undergarment (panty) and frock of the victim.

4. The victim was produced before Dr. Reena Verma (P.W.2), for medico-legal examination on 26.7.2013 at 4:30 p.m. In internal examination of victim, it was found that labia minora was lacerated, hymen was torn, marginal bleeding as well as first degree perineal tear were present, vagina was abraded, posterior fourchette was lacerated and the victim was examined by providing general anesthesia. Vaginal smear slide was prepared and sent for examination to trace the presence of spermatozoa and gonococci.

5. On 29.07.2013, the supplementary medico-legal report was prepared on the basis of medico-legal examination report as well as pathological report and on the ground of that examination, the age of victim was determined as eight years but the presence of gonococci and spermatozoa was not found.

6. During investigation, the victim was produced on 05.08.2013, by the Investigating Officer (P.W.4) before Additional Chief Judicial Magistrate, Court No.25, Barabanki, for recording her statement under Section 164 of the Code, where she stated that about 10 days ago, in the morning the appellant came to her house, at that time her mother and elder sister had gone to sow the paddy in field whereas she and her brother was at the house. She further stated that appellant came to her and said that he would give cashew biscuit. She further stated that she did not want to go but the appellant dragged her forcibly at his rice mill (palesar) and gave biscuit. Thereafter, he carried her inside the rice mill in a room and put cloth in her mouth and laid her down. She further stated that he removed her undergarment (panty) and inserted his finger into the vagina (female genital organ) and thereafter also inserted his penis (male genital organ). She further stated that there was profuse bleeding from her vagina and she was weeping. She further stated that the appellant had put on her frock and advised her to take painkiller to get relief. She further stated that the appellant had also wiped blood with the cloth and also washed the blood and threatened her not to tell her mother otherwise, he would beat. She further stated that she had gone to her house weeping and told the whole incident to her mother when she came back. She further stated that she had gone to the hospital where her private parts were stitched. She further stated that her undergarment (panty) as well as frock were also soaked/wet with blood.

7. During investigation, the appellant was arrested on 29.07.2013 and was produced before the Medical Officer at Health Centre, Ramsanehi Ghat, District Barabanki.

8. Inspector Bholi Singh Chauhan (P.W.4), visited the place of occurrence, recorded the statement of witnesses, prepared site plan (Ex.Ka.3) and after

investigation, submitted charge sheet (Ex.Ka.4) against the appellant under Sections 376, 506 IPC and Section 4 of POCSO Act, 2012. The concerned Magistrate took the cognizance and after providing the copies of relevant police papers to the appellant, as required under Section 207 of the Code, committed the case to the Court of Sessions, Barabanki as the case was exclusively triable by the Court of Sessions.

9. The learned trial Court, after hearing learned counsel for both the parties, framed charges for the offence under Sections 376, 506 IPC and Section 4 of POCSO Act, 2012, against the appellant, who denied the same and claimed for trial.

10. Prosecution in order to prove its case, examined Janak Dulari (P.W.1), Dr. Reena Verma (P.W.2), Victim (P.W.3), Inspector Bholi Singh Chauhan Investigating Officer (P.W.4), Constable C.P.357 Sulekha Yadav (P.W.5) and also relied on documentary evidences, i.e. written report (Ex.Ka.1), medico-legal examination (Ex.Ka.2), Site plan (Ex.Ka.3), Charge sheet (Ex.Ka.4), Chik F.I.R. (Ex.Ka.5), G.D. Report (Ex.Ka.6), Recovery memo (Ex.Ka.7) and chemical examination report (Ex.Ka.8).

11. After conclusion of prosecution evidence, the statement of appellant was recorded under Section 313 of the Code, who denied the prosecution story as well as evidence adduced by the prosecution, and stated that informant Janak Dulari (P.W.1) is sister-in-law (Bhaujai and Sali) of one Babu Lal with whom he had inimical terms, as Babu Lal was defeated in civil proceedings of land dispute with his father. It is further stated that informant Janak Dulari (P.W.1) used to perform domestic work of said Babulal and in connivance with said Babu Lal, a false case was lodged against him.

12. In support of his defence, to rebut the prosecution story, Chandrika Prasad (D.W.1), and Ramesh Chand (D.W.2) were examined by the appellant as defence witnesses.

13. Upon conclusion of trial, the trial Court vide impugned judgment and order dated 28.02.2015, convicted and sentenced the appellant as above. Aggrieved by the said judgment and order, the appellant has preferred this appeal.

14. Heard Ms. Neeta Singh Chandel, learned counsel for the appellant and Shri G.D. Bhatt, learned AGA for the State.

15. Learned counsel for the appellant submitted that appellant is innocent and has been falsely implicated due to enmity. Learned counsel further submitted that father of victim Sohan Lal had died and the victim's mother Janak Dulari (P.W.1) had illicit relations with Babulal and there was a land dispute between said Babulal and Ghanshyam, father of appellant.Learned counsel further submitted that the said offence was committed by son of Babulal and due to the said enmity, in connivance with Babulal, Janak Dulari (P.W.1) has falsely implicated the appellant in this case.Learned counsel also submitted that no sexual intercourse happened between the victim and the appellant, thus, offence of rape has not been committed. Learned counsel further submitted that medico-legal report is not in consonance with ocular evidence of the prosecution. Learned counsel further submitted that the learned trial Court, without application of proper judicial mind as well as without

considering the evidence available on record, convicted the appellant; and the said judgment and order is against the provision of law, which is liable to be set aside. Learned counsel further submitted that the appellant is languishing in jail since 2013; he has no criminal history and he was 25 years old at the time of offence therefore, if the offence is made out, linent view may be adopted by the Court.

16. Per contra, Learned AGA vehemently opposed the submission advanced by learned counsel for the appellant and submitted that at the time of occurrence, victim was aged about eight years. Her statement recorded by the Magistrate under Section 164 of the Code as well as her statement taken before the trial Court and the statement of medico-legal expert Dr. Reena Verma (P.W.2) fully corroborated the prosecution story. Learned AGA further submitted that there is no delay either in lodging of F.I.R. or in medico-legal examination. Learned AGA further submitted that in view of injury present on the private parts of body of the victim and the ocular evidence adduced by the prosecution, offence of rape is made out.There is no illegality in the impugned judgment and order passed by the Court below and the appeal is liable to be dismissed.

17. I have considered the submissions of learned counsel for the parties and perused the record.

18. Janak Dulari (P.W.1) mother of victim, while supporting the prosecution story, has stated that at the time of occurrence, she had gone to pull the paddy seedling (besar) with her elder daughter Manju, leaving the victim (P.W.3) and her son Sumit, in her house. She further stated that appellant Ramu allured her daughter (victim) to give cashew biscuit and took her to his mini rice mill (palesar). She further stated that when she returned to her house, her daughter (victim) (P.W.3) told her that Ramu had committed rape with her. She further stated that she had seen blood stain on her daughter's frock and undergarment (panty). Thereafter, she, with her daughter-victim, rushed to Police Station Kotwali and got the report (Ex.Ka.1) written by a person and gave the same to the concerned Police Station by putting her thumb impression. She further stated that statement of her daughter was recorded and she was medically examined.

19. Victim (P.W.3), aged about eight years at the time of occurrence, has stated that she was at her house and her mother Janak Dulari (P.W.1) had gone towards the field with her sister Manju to pull the paddy seedling. She further stated that at the time of occurrence, she with her younger brother was playing. She further stated that at that time, appellant Ramu took her to his mini rice mill (palesar) by alluring her to give cashew biscuit. She further stated that appellant had undressed her, inserted his finger and then his penis (male genital organ) into her vagina and forcibly put cloth in her mouth. She further stated that after the said occurrence, the appellant washed and clean her under handpump (bumba) and thereafter he dropped her at her home. She further stated that when her mother came back to her house, she narrated the whole occurrence to her, whereafter she went to Police Station Ramsanehi ghat with her mother, where report was lodged. Thereafter, she was carried to Women Hospital, Barabanki with police and her mother Janaki Devi (P.W.1) where she was medically examined and police had also recorded her statement. She

further stated that she made two thumb impressions at Police Station and also two thumb impressions at Women Hospital, Barabanki.

20. Both Janak Dulari (P.W.1) and victim (P.W.3) were cross examined at length. But in cross examination, they again narrated the same occurrence and nothing has come out in their cross examination to create any doubt in the prosecution story.

21. In addition to above, according to prosecution, the said incident took place on 25.07.2013 at about 9 a.m. and the FIR was lodged on same day at 21:30 p.m. Police Inspector Ms. Bholi Singh Chauhan (P.W.4), Investigating Officer, has stated that she was posted on 25.07.2013 as Inspector, Police Station Ramsanehi Ghat, District Barabanki and investigated the case. She further stated that during investigation, she had copied the recovery memo of the blood stained undergarment (panty) and frock of the victim in case diary, recorded the statement of victim as well as other witnesses, inspected the place of occurrence, prepared site plan (Ex.Ka.3) and also made attempt to arrest the appellant but he could not be arrested as he was absconding. She further stated that appellant was arrested by her on 29.07.2013, who was sent for medico-legal examination. She further stated that during investigation, victim was also produced before the Magistrate where her statement under Section 164 of Code was recorded and after conclusion of investigation, she filed charge sheet (Ex.Ka.4).

22. Lady Constable CP-357 Sulekha Yadav (P.W.5) stated that on 25.07.2013, on the basis of written report (Ex.Ka.1), she had prepared Chik F.I.R. No.102 of 2013 (Ex.Ka.5), pertaining to Crime No.181 of 2013, under Sections 376, 506 IPC and Section 6 POCSO Act against the appellant and entered the said information in the General Diary (Ex.Ka.6) at about 21:30 p.m. on 25.07.2013. She further stated that on that day, she had also taken into her custody the blood stained undergarment and frock of the victim, prepared the recovery memo (Ex.Ka.7) in the presence of mother of victim (P.W.1) and sent the said clothes worn by victim for chemical examination to Forensic Science Laboratory, Lucknow.

23. As per Chik FIR (Ex.Ka.5), place of occurrence is 08 kms away from the concerned Police Station. According to prosecution story, occurrence was happened at about 9:00 a.m. and Janak Dulari (P.W.1), mother of victim got the information of the occurrence from her daughter victim (P.W.3) at noon when she returned from her field. Thus, in view of the facts and circumstances of the case, as the offence is pertaining to rape with a child, aged about eight years, and information was lodged by an illiterate lady Janak Dulari (P.W.1) (mother of victim), there is no delay in lodging the FIR.

24. So far as submission of learned counsel, regarding contradiction between medical and ocular evidence as no sexual intercourse had taken place is concerned, in this case, the victim (P.W.3) was produced before Dr. Reena Verma (P.W.2) on 26.07.2013, where she was medically examined. According to Dr. Reena Verma (P.W.2), labia minora was lacerated and hymen of victim was torn and marginal bleeding was present. The victim, aged about 08 years, has also specifically stated that at the time of occurrence, the appellant had inserted his finger into her vagina,

thereafter inserted his penis and again put his finger into her private parts and also forcibly put cloth in her mouth. She further stated that appellant had washed her under handpump (bumba). In cross examination, she stated that appellant had only inserted his finger into her vagina and did nothing else.

25. At this stage, it is relevant to discuss the definition of rape as provided under Section 375 I.P.C.

375- Rape--A man is said to commit "rape" if he :

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person ; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person ; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions:--

(First) -- Against her will.

(Secondly) --Without her consent.

(Thirdly) -- With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

(Fourthly) --With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

(Fifthly) -- With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

(Sixthly) -- With or without her consent, when she is under sixteen years of age.

(Seventhly.-- When she is unable to communicate consent."

26. Thus, in view of the aforesaid definition of rape, it is clear that offence of rape includes not only sexual assault by penetration of penis to any extent but also includes inserting to any extent of any object or part of the body, not being the penis into the vagina of the victim.

27. In **Vahid Khan vs. State of M.P. (2010) 2 SCC 9**, Court reiterating the consistent view, held that even a slightest penetration is sufficient to make out an offence of rape and depth of penetration is immaterial.

28. The victim (P.W.3), the sole star witness, in this case was aged about only eight years at the time of occurrence. She, in her statement recorded under Section 164 of the Code, has categorically stated that appellant had inserted his finger and also entered his penis (male genital organ) into her vagina (female genital organ). She has also stated about the profused bleeding and pain occurred to her due to rape, committed with her by appellant.

29. Before the trial Court she has again categorically stated that at the time of

occurrence, the appellant had taken her away to rice mill (palesar) and had inserted his finger and also his penis into her vagina. She further stated that the appellant had washed her at handpump (bumba). In cross examination, she has admitted that appellant had only inserted his finger and nothing else. Thus, it is crystal clear that victim had categorically stated that appellant had inserted his finger into her vagina. In medical examination, conducted by Dr. Reena Verma (P.W.2), it was established that at the time of examination there was profuse bleeding from vagina of the victim, labia minora and hymen were torn, including her perineum, torn to first degree.

30. Therefore, in view of statement of Dr. Reena Verma (P.W.2), and statement of victim (P.W.3), it is crystal clear that offence of rape was committed by the appellant with the victim. Further, it is also clear that act committed by the appellant with victim (P.W.3) is covered under the meaning and definition of rape as provided under Section 375 IPC. In the result, there is no contradiction between medical and ocular evidence produced by the prosecution.

31. So far as next submission raised by learned counsel for appellant that the appellant is innocent and has been falsely implicated only due to enmity with one Babulal, resident of his village, is concerned, Janak Dulari (P.W.1) in her cross examination, has stated that she was earlier married to one Shiv Baksh, resident of Pahalwanpurwa and out of that wedlock, daughter Manju was born, but due to some disputes arose between them, she married with another person, resident of village Benipurwa and out of that wedlock, victim (P.W.3) was born. He further stated that again she got married with one Sohan and out of this wedlock, a son, named Sumit took birth. Further stating that all her three children are residing with her, she further stated that her third husband had died in motor accident and after his death, she is living as a widow. She also stated that Babulal used to help her and she also used to do domestic work in house of many people including Babulal. She further stated that she had sold her 04 *biswa* land for Rs.10.5 lac and purchased another 02 bigha land for Rs.8 lacs with the help of Babulal. She further stated that at the time of occurrence, she was residing in a hut, situated adjacent to house of Babulal. She further stated that Babulal had two sons, one was married and the other was unmarried. She specifically denied the suggestion, put to her by the defence counsel before the trial Court, that victim, at the time of occurrence, was in the house of Babulal where son of Babulal had tried to commit such bad act. Victim (P.W.3) has also denied suggestion, put to her during trial by defence counsel, that Sanjay, son of Babulal had inserted finger in her vagina.

32. Chandrika Prasad (D.W.1), examined by appellant in his defence, has stated that Janak Dulari (P.W.3) used to reside with one Babulal and he has no information whether appellant had committed rape with victim (P.W.3). According to him, there was civil dispute of abadi land between Babulal and appellant's father which was decreed in favour of father of appellant and main gate of house of Babulal was closed due to said decree. He further stated that according to rumour, prevailing in the village, Babulal's son had committed rape with victim but in connivance with Babulal, due to aforesaid enmity, the appellant was falsely implicated.

33. Ramesh Chandra (D.W.2) has stated that on the day of occurrence he was present at the rice mill (palesar) of appellant from 7 a.m. to 10 a.m. where his paddy grain was being grinded and on that day at about 9 a.m. Ramu had not committed rape with victim. Stating further that on that day his paddy grains was grinded till 11:00 a.m. -12:00 p.m., he further stated that his uncle's cycle repairing shop was situated in front of appellant's rice mill (palesar) where his uncle Sahdev was present from morning till night. He further stated that the house of Janak Dulari (informant) is situated adjacent to the house of Babulal, after the death of her husband, she used to reside at the house of Babulal and did his domestic work. He further stated that Babulal had two sons namely Raju and Sanjay, Raju was married whereas another son Sanjay @ Ramu, aged about 17-18 years, was unmarried. He further stated that as per rumour prevailing in the village said Ramu had committed rape with victim and due to enmity of civil dispute with Babulal, the appellant was falsely implicated.

34. Appellant, in his statement recorded under Section 313 of the Code, has stated that the informant Janak Dulari (P.W.1) was sister-in-law (Bhaujai and Sali) of Babulal who was inimical to him due to defeat in civil dispute and as the informant (P.W.1) used to do his (Babulal) domestic work, in connivance with Babulal, she had falsely implicated the appellant.

35. Offence of rape in all over the world is treated as heinous offence against humanity and hateful offence. This offence exploits the future life of victim and also defame the character and status of accused. Generally such type of offence is committed in sequestered and secluded place, in well and pre-planned manner, so that none can witness the occurrence. It is a case of brutal sexual assault committed by appellant. Thus, evidence of defence witnesses that they did not see the offence committed by the appellant and there was rumour in the village that appellant had not committed rape with victim, cannot be accepted because it cannot be expected from the appellant to provide an opportunity to defence witnesses to watch the offence, committed by appellant.

36. Informant Janak Dulari (P.W.1), in her cross examination, has denied the suggestion put to her that she had relations with said Babulal. She had also denied the suggestion put to her by defence counsel that the alleged rape was committed by son of Babulal and due to inimical terms of appellant with Babulal, she had falsely implicated the appellant. Victim (P.W.3) had stated that although her house is situated adjacent to the house of Babulal but Sanjay, son of Babulal has not inserted his finger into her vagina. She again stated that appellant had inserted his finger into her vagina.

37. In addition to above, the appellant had stated that there was enmity of civil dispute with Babulal which was decreed in favour of appellant but the appellant had not filed any document in this regard nor filed the said decree which was passed in his father's favour against Babulal. Thus, submission of learned counsel for appellant that there was enmity between Babulal and appellant, due to land dispute, Janak Dulari (P.W.1) in connivance with Babulal falsely implicated the appellant, has no force.

38. It is also pertinent to note at this juncture that the victim was aged about

only eight years at the time occurrence and grievous injuries were caused to her due to brutal rape committed by the appellant. The prosecution case is fully supported and corroborated by the ocular evidence of victim (P.W.3), her mother Janak Dulari (P.W.1) and also Dr. Reena Verma (P.W.2). It is well settled principle of law in such type of heinous offence, the relative of the victim or specially her mother would not falsely implicate an innocent person by exonerating the real culprit and if such plea is taken by the accused appellant, it has to be proved by him as to why he is being falsely implicated. It is very pertinent to quote at this very stage the law laid down in **Masalti and others vs. State of U. P., AIR 1965 SC 202**, wherein Court said as under :

".....But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. Often enough, where factions prevail in villages and murders are committed as a result of enmity between such factions, criminal Courts have to deal with evidence of a partisan type. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct....."

39. Similarly, in **Mohabbat vs. State of M.P., (2009) 13 SCC 630**, Court held as under :

".....Relationship is not a factor to affect credibility of a witness. It is more often than not a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the Court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible."

40. Victim (P.W.3) and her mother Janak Dulari (P.W.1), both belonging to rural area, are illiterate. They were cross-examined before the trial Court for the first time by skilled counsel of appellant. In such situation, it is inevitable to appear some contradiction in their statement which creates their statement more reliable. Victim, although categorically, has stated that appellant had inserted his finger and his penis into her vagina but in cross examination, she stated that the appellant had inserted his finger and nothing else. On the account of such contradiction, prosecution case cannot be said to be unreliable or doubtful because such contradiction is minor and natural. It is settled principle of law that in offence of rape the statement of victim, supported by medico legal reports, is sufficient for conviction of accused and no further corroboration is required.

41. In **State of Himachal Pradesh vs. Sanjay (2017) 2 SCC 51** where offence of rape was committed by the uncle of the victim aged about 9 years, Supreme Court, relying the testimony of victim and her mother, where FIR was lodged after three days and there was some disputes between the parties, reversing the judgment of acquittal, passed by the High Court and allowing the appeal, has held as under :-

"29. Likewise, delay of three days in lodging the FIR by PW-1, after eliciting the information from her daughter PW-2, is

inconsequential in the facts of this case. It is not to be forgotten that the person accused by the prosecutrix was none else than her Uncle. It is not easy to lodge a complaint of this nature exposing prosecutrix to the risk of social stigma which unfortunately still prevails in our society. A decision to lodge FIR becomes more difficult and hard when accused happens to be a family member. ***In fact, incestuous abuse is still regarded as a taboo to be discussed in pubic. This reticence hurts the victims or other family members who struggle to report. After all, in such a situation, not only the honour of the family is at stake, it may antagonize other relations as well, as in the first blush, such other members of family would not take charge of this nature very kindly. We also find that the so-called dispute between the parties was so trivial in nature that it would not have prompted PW-1 to lodge a false complaint, putting her minor daughter of impressionable age to risks of serious kinds, as pointed out above.***

30. By no means, it is suggested that whenever such charge of rape is made, where the victim is a child, it has to be treated as a gospel truth and the accused person has to be convicted. We have already discussed above the manner in which testimony of the prosecutrix is to be examined and analysed in order to find out the truth therein and to ensure that deposition of the victim is trustworthy. At the same time, after taking all due precautions which are necessary, when it is found that the prosecution version is worth believing, the case is to be dealt with all sensitivity that is needed in such cases. In such a situation one has to take stock of the realities of life as well. Various studies show that in more than 80% cases of such abuses, perpetrators have acquaintance with the victims who are not strangers. The danger is more within than outside. Most of the time, acquaintance rapes, when the culprit is a family member, are not even reported for various reasons, not difficult to fathom. The strongest among those is the fear of attracting social stigma. Another deterring factor which many times prevent such victims or their families to lodge a complaint is that they find whole process of criminal justice system extremely intimidating coupled with absence of victim protection mechanism. Therefore, time is ripe to bring about significant reforms in the criminal justice system as well. Equally, there is also a dire need to have a survivor centric approach towards victims of sexual violence, particularly, the children, keeping in view the traumatic long lasting effects on such victims.

31. After thorough analysis of all relevant and attendant factors, we are of the opinion that none of the grounds, on which the High Court has cleared the respondent, has any merit. ***By now it is well settled that the testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of a statement, the courts should find no difficulty to act on the testimony of the victim of a sexual assault alone to convict the accused. No doubt, her testimony has to inspire confidence. Seeking corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury. The deposition of the prosecutrix has, thus, to be taken as a whole. Needless to reiterate that the victim of rape is not an accomplice and her evidence can be acted upon without corroboration. She stands at a higher pedestal than an injured witness does. If the court finds it difficult to accept her***

version, it may seek corroboration from some evidence which lends assurance to her version. To insist on corroboration, except in the rarest of rare cases, is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated in material particulars, as in the case of an accomplice to a crime. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? The plea about lack of corroboration has no substance *(See Bhupinder Sharma v. State of Himachal Pradesh). Notwithstanding this legal position, in the instant case, we even find enough corroborative material as well, which is discussed hereinabove." (Emphasis supplied)*

42. Coming to the facts of this case again, admittedly, Janak Dulari (P.W.1) was residing with her children including the victim, she has no source of income, as she was earning her livelihood by doing domestic work as well as labour work. She was aware of the fact that she was deposing for such type of gruesome and serious offence wherein she might loose her social respect in the Society particularly in the village where she was residing. She was also aware of the consequence of exposing the offence of rape, committed with her daughter (P.W.3), because due to such offence the whole life of victim might spoiled by society, particularly in rural areas. Generally, in rural areas, due to illiteracy and unawareness, no one, particularly a woman, can be expected to lodge false criminal case for offence of rape committed with her daughter. In this backdrop, if it is alleged by accused-appellant that he has falsely been implicated, onus shifts upon him to prove such fact. Section 29 of the POCSO Act, 2012 is also relevant at this stage which is as under:-

"Where a person is prosecuted for committing or abetting or attenuating to commit any offence under sections 3,5,7 and section 9 of this Act, ***the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved."*** *(emphasis supplied)*

43. As discussed above, the appellant has not placed any reliable and documentary evidence before the trial Court as to why he was falsely implicated. Contrary to it, the prosecution has produced reliable and trustworthy evidence against the appellant. The witnesses produced by the prosecution were put to lengthy cross examination by the defence by the trial Court but nothing can be extracted by way of cross examination so as to create any doubt in their testimony.

44. There is no delay in lodging the FIR as well as in medico-legal examination. According to the statement and examination of all the witnesses, each and every fact and circumstances of the case proved by the prosecution leads to one conclusion that a hateful offence of rape has been committed by the appellant with the victim (P.W.3), aged about only eight years. There is nothing on record to show that prosecution witness including victim had any animosity with the appellant so as to implicate him falsely by leaving aside the real culprit. The trial Court had

elaborately discussed the prosecution evidence in the light of the arguments advanced by learned counsel for both the parties. The judgment and order passed is a well reasoned, well discussed and requires no interference and liable to be affirmed.

45. Now the question arises, whether sentence awarded to the appellant by trial Court is just and proper or not ?

46. It is settled principle of sentencing and penology that undue sympathy in awarding sentence with accused is not required. The object of sentencing in criminal law should be to protect society and also to deter criminals by awarding appropriate sentence. In this regard, Court in **State of Madhya Pradesh Vs. Saleem @ Chamaru, AIR 2005 SC 3996**, has said as under:-

"10. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal".

47. Now coming to this case, offence of rape has been committed by the appellant with victim aged about 8 years. He has been convicted for offence under Section 376 IPC and Section 4 POCSO Act, 2012 and has been sentenced for 14 years imprisonment with fine of Rs.10,000/- for offence under Section 376 IPC and also has been sentenced for same punishment for offence under Section 4 of POCSO Act.

48. Section 376 (2) (i) IPC (as it was on the date of offence i.e. on 25.07.2013) provides the following punishment for rape with victim under 16 years of age.

"Section 376:- Punishment for rape.-

1. .....

2. Whoever,--

.....

i. commits rape on a woman when she is under sixteen years of age; or

.....

shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

Section 4 of POCSO Act:-

"Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine."

49. Thus a person who commits penetrative sexual assault punishable under Section 4 of POCSO Act, 2012 shall be punished with imprisonment of either description for a term which shall not be less than 7 years but it may extend to imprisonment for life and shall also be liable to fine, whereas, a person who has been found guilty for offence under Section 376 (2) I.P.C. is liable to be punished with rigorous imprisonment for a term which shall not be less than 10 years but it may

extend to imprisonment for life which shall mean imprisonment for the remainder of that persons natural life and shall also be liable to the fine.

50. Thus it appears that a single/same act of sexual offence/rape has been declared as offence under Section 375 read with Section 376 I.P.C. and under also Section 4 of POCSO Act, if victim is aged about below 16 years.

51. It is settled principle of law that no person can be punished twice for one offence. Normally a criminal court, by virtue of Section 71 I.P.C., in such cases, where any criminal act is punishable in two or more Statute or in different provision of same statutes, convicts and sentence in such provision of such statutes where lesser punishment has been provided. Parliament was aware to this situation. Looking into the gravity of nature of offence of rape offences, particularly, rape with victim below age of 18 years, Section 42 and 42 A of POCSO Act, 2012 were incorporated to deal with such peculiar situation, which read as under:-

*"**Section: 42**: Alternative Punishment:- Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376C, 376D, 376E or section 509 of the Indian Penal Code (45 of 1860), then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree.*

***Section 42 (A)**: Act Not In Derogation Of Any Other Law:- The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency."*

52. Thus it is clear that if offence of sexual assault is punishable in relevant provision of POCSO Act and also in relevant provision of I.P.C., like 376 I.P.C., Trial Court is bound to punish the accused either in the relevant provision of POCSO Act, or under I.P.C. which is greater in degree.

53. Supreme Court while dealing with Section 42 and Section 42A and relevant provisions of POCSO Act, 2012 in **Independent Thought vs. Union of Indian and Others (2017) 10 SCC 800**, paras 79 and 80 has held :-

"79. Another aspect of the matter is that the POSCO was enacted by Parliament in the year 2012 and it came into force on 14th November, 2012. Certain amendments were made by Criminal Law Amendment Act of 2013, whereby Section 42 and Section 42A, which have been enumerated above, were added. It would be pertinent to note that these amendments in POCSO were brought by the same Amendment Act by which Section 375, Section 376 and other sections of IPC relating to crimes against women were amended. The definition of rape was enlarged and the punishment under Section 375 IPC was made much more severe. Section 42 of POCSO, as mentioned above, makes it clear that where an offence is punishable, both under POCSO and also under IPC, then the offender, if found guilty of such offence, is liable to be punished under that Act, which provides for more

severe punishment. This is against the traditional concept of criminal jurisprudence that if two punishments are provided, then the benefit of the lower punishment should be given to the offender. The legislature knowingly introduced Section 42 of POCSO to protect the interests of the child. As the objects and reasons of the POCSO show, this Act was enacted as a special provision for protection of children, with a view to ensure that children of tender age are not abused during their childhood and youth. These children were to be protected from exploitation and given facilities to develop in a healthy manner. When a girl is married at the age of 15 years, it is not only her human right of choice, which is violated. She is also deprived of having an education; she is deprived of leading a youthful life. Early marriage and consummation of child marriage affects the health of the girl child. All these ill effects of early marriage have been recognised by the Government of India in its own documents, referred to hereinabove.

80. Section 42A of POCSO has two parts. The first part of the Section provides that the Act is in addition to and not in derogation of any other law. Therefore, the provisions of POCSO are in addition to and not above any other law. However, the second part of Section 42A provides that in case of any inconsistency between the provisions of POCSO and any other law, then it is the provisions of POCSO, which will have an overriding effect to the extent of inconsistency. POCSO defines a child to be a person below the age of 18 years. Penetrative sexual assault and aggravated penetrative sexual assault have been defined in Section 3 and Section 5 of POCSO. Provisions of Section 3 and 5 are by and large similar to Section 375 and Section 376 of IPC. Section 3 of the POCSO is identical to the opening portion of Section 375 of IPC whereas Section 5 of POCSO is similar to Section 376(2) of the IPC. Exception 2 to Section 375 of IPC, which makes sexual intercourse or acts of consensual sex of a man with his own "wife" not being under 15 years of age, not an offence, is not found in any provision of POCSO. Therefore, this is a major inconsistency between POCSO and IPC. As provided in Section 42A, in case of such an inconsistency, POCSO will prevail. Moreover, POCSO is a special Act, dealing with the children whereas IPC is the general criminal law. Therefore, POCSO will prevail over IPC and Exception 2 in so far as it relates to children, is inconsistent with POCSO."

54. In view of the provision contained in Section 42 of POCSO Act, Trial Judge ought to have punished appellant only in Section 376 I.P.C., not in Section 4 of POCSO Act, 2012. In addition to it, he ought not to have punished appellant both in Sections 376 I.P.C. and in Section 4 of POCSO Act, 2012.

55. In the light of the above discussion, judgment and order dated 28.02.2015 passed by the trial Court, in Session Trial No.652 of 2013 (State vs. Ramu) so far as it relates to conviction of appellant, is maintained and affirmed but the sentence is modified. His sentence under Section 376 IPC is maintained. The appellant Ramu has to undergo 14 years rigorous imprisonment, with fine of Rs.10,000/- and in default of payment of fine, he has to undergo additional one year imprisonment. No separate sentence is required for offence under Section 4 of POCSO Act, 2012.

56. In view of the above discussion, the appeal is **partly allowed** to the aforesaid extent.

57. Let a copy of this judgment along with lower Court record be sent to the concerned trial Court, Barabanki for necessary information and compliance.

58. A compliance report be sent to this Court within two months.

(2020)12ILR A322
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 08.12.2020

BEFORE

THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

Criminal Appeal No. 317 of 1998

Shashi Kant ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
M. Iqbal, Sultan Hasan Ibrahim

Counsel for the Respondent:
Govt. Advocate

Criminal Law – Indian Penal Code,1860 – Sections 498-A, 304-B - Dowry Prohibition Act,1961 – Section 3/4 - Criminal Appeal has been filed against conviction U/s 498-A, 304-B I.P.C. and 3/4 D.P. Act

Criminal Law–Indian Penal Code,1860–Section 304-B, Section 498-A-Evidence Act ,1872-Section 113-B-Dowry Prohibition Act,1961–Section 2 are discussed: -

Criminal Law – Indian Penal Code,1860 – Section 304-B- Evidence Act ,1872 – Section 113-B- The term "soon before death" used in-does not mean just before death or immediately before death of deceased, she was subjected to torture, cruelty or harassment by her in-laws due to demand of dowry. (Para 20)

Delay in lodging the F.I.R. - depends upon facts and circumstances of each case- such delay is natural and reasonable, it cannot be treated fatal to the prosecution story (Para 34)

Order passed by the learned Trial Court is liable to be affirmed. (Para 44)

Appeal dismissed. (E-2)

List of Cases cited: -

1. Kans Raj Vs St. of Punj. (2000) 5 SCC 207

2. Rajindar Singh Vs St. of Punj., AIR 2015 SC 1359,

3. Surindra Singh Vs St. of Har., (2014)

4 SCC 129 4. Sher Singh Vs St. of Har., (2015) 3 SCC 724

5. Dinesh Vs St. of Har., (2014) 12 SCC 532

6. Sher Singh Vs St. of Har., 2015 (1) SCALE 250

7. Trimukh Maroti Kirkan Vs St. of Mah. (2006) 10 SCC 681

8. Tara Singh & ors. Vs St.of Punj., AIR 1991 SC 63

9. Naresh Kumar Vs St. of Har. (2015) 1 SCC 797

10. St. of M.P.h Vs Saleem @ Chamaru, AIR 2005 SC 3996

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

1. This appeal has been preferred against the judgment and order dated 18.5.1998, passed by Sessions Judge, Raebareli in S.T. No. 105 of 1995 arising out of Case Crime No. 23 of 1994, Police Station (in short 'P.S.') Mill Area, District Raebareli, whereby the appellant-Shashi Kant (hereinafter referred to as *'appellant'*) has been convicted and sentenced for seven years rigorous imprisonment for offence

U/s 304-B I.P.C.; for three years rigorous imprisonment for offence U/s 498-A I.P.C. and for one year rigorous imprisonment for offence U/s 3/4 Dowry Prohibition Act (hereinafter referred to as 'D.P. Act'). All the sentences have been directed to run concurrently.

2. The prosecution story, in brief, is that Smt. Mamta Sharma (hereinafter referred to as *'deceased'*), daughter of Balram (PW-2) was married with the appellant on 2.5.1993. The appellant, his mother Ram Bai (since acquitted), his father Lodheshwar (since acquitted) and his uncle Baleshwar (since acquitted) used to demand a scooter as dowry and were causing cruelty and harassment with deceased for non-fulfilling the demand of dowry. On 2.2.1994, deceased-Mamta got admitted in District Hospital, Raebareli with complain of consumption of poison and low general condition where she died on same day at 7:25 p.m. The death information report was sent from the District Hospital Raebareli to P.S. Kotwali, Raebareli. S.I. Sri Zafrul Haq (PW-6), conducted the inquest proceedings, prepared inquest report (Ex.Ka.5) and relevant police papers Ex.Ka.6 to Ex.Ka.9, sealed the dead body of the deceased and sent it for postmortem examination.

3. Dr. R.S. Agarwal (PW-3) and Dr. S.L. Sharma had conducted the postmortem examination of deceased on 3.02.1994 at 3:45 p.m. and prepared the postmortem report (Ex.Ka.2). According to him (PW-3), death of deceased could have occurred on 02.02.1994 at 7:25 p.m; the rigor mortis was present on all the four limbs; no external injury was found on the dead body and cause of death was not clear, as such, viscera of the deceased was preserved and sent for chemical examination.

4. Krishna Murari (PW-1), real brother of the deceased, filed a written information (Ex.Ka.1) before the Superintendent of Police, Raebareli, alleging that the deceased, aged about 18 years, was married to the appellant on 2.5.1993 and in her marriage, sufficient dowry was given to the appellant who was doing tailoring job at Raebareli, but he was not satisfied with the said dowry and was complaining with his (PW-1) sister that her (deceased's) parents had failed to give a scooter in dowry. It is further stated in the said written report that due to not giving the scooter in dowry, the appellant, along with Lodheshwar (father-in-law of the deceased) and Baleshwar (cousin father-in-law of the deceased) were annoyed. It is further submitted that on the eve of Makarsankranti festival *(Khichdi)*, he (PW-1) had gone to her sister's matrimonial house to take off her *(vidai)* where the appellant, his parents and uncle had again put a demand for a scooter and some cash as a condition for sending her. It is further stated that due to non-fulfillment of dowry, the appellant and other co-accused (since acquitted) used to torture and harass the deceased but he (PW-1), pacifying anyhow the deceased, returned to his house. It is further stated that on 7.2.1994, his relative Ram Shankar informed him that his sister had died whereupon, he rushed from his village. It is further stated that his sister was killed by her husband (appellant), her mother-in-law, her father-in-law and cousin father-in-law for want of dowry, by administering poison to her and on 7.2.1994, he had gone to P.S. Mill Area, but no action was taken.

5. On the said information (Ex.Ka.1), Station House Officer, P.S. Mill Area was directed by the Superintendent of Police, Raebareli to lodge the first information

report and to investigate the matter. In compliance of said direction, the said information was entered in Police General Diary (Ex.Ka.4) on 9.2.2004, Chik Report (Ex.Ka.3) was prepared by Head Constable Surendra Prasad Jaiswal (PW-4) and a criminal case was registered under Section 498-A, 304-B I.P.C. and Section 3/4 Dowry Prohibition Act against the appellant and other co-accused. Investigation of the case was handed over to Dy.S.P. Lalit Kumar Singh (PW-5) who perused the inquest report and other relevant police papers (Ex.Ka.5 to Ex.Ka.9), visited the place of occurrence, prepared site plan (Ex.Ka.10), recorded the statement of witnesses and filed a charge-sheet against co-accused Lodheshwar, Baleshwar and Smt. Ram Bai. Later on, the investigation of the case was transferred to Dy.S.P. Mrigendra Singh (PW-8) who filed a charge-sheet (Ex.Ka.13), against the appellant Shashi Kant, before the concerned Magistrate who took the cognizance of offence and since the offence was exclusively triable by Court of Session, after providing the copies of necessary police papers as required under Section 207 of the Code, committed the case for trial to court of Session, Raebareli.

6. Charges were framed against the appellant along with co-accused for the offence U/s 304 B, 498-A I.P.C. and Section 3/4 Dowry Prohibition Act.

7. The appellant and other co-accused denied the said charges and claimed for trial.

8. The prosecution in order to prove its case examined Krishna Murari (PW-1/informant), Balram (PW-2), Dr. R.S. Agarwal (PW-3), Head Constable Surendra Prasad Jaiswal (PW-4), Dy.S.P. Lalit Kumar Singh (PW-5), S.I. Sri Zafrul Haq (PW-6), Vinod Kumar Sharma, Scientist Forensic Science Laboratory, Lucknow (PW-7) and Dy.S.P. Mrigendra Singh (PW-8). PW-1 and PW-2 are witnesses of fact, whereas, rest witnesses are formal witnesses.

9. Trial Court, in addition to above witnesses also examined C.W-1 Badharauddin, Ward Boy, District Hospital, Raebareli.

10. Upon conclusion of prosecution evidence, the statement of appellant and other co-accused were recorded under Section 313 of the Code, to explain the prosecution evidence, wherein, the appellant and other co-accused denied the prosecution evidence and claimed that they had been falsely implicated. Co-accused Lodheshwar further stated that the dead body of the deceased was given in his custody with the consent of father of the deceased and there was no dispute regarding death of deceased but the brother of the deceased annoyed due to dispute, arose for returning the jewelry of deceased and lodged the F.I.R. Co-accused Baleshwar further stated that he was residing separately from co-accused Lodheshwar and he had no concern with him. The appellant and other co-accused Smt. Ram Bai did not state anything more except denial to the prosecution evidence.

11. Upon conclusion of the trial, the learned trial Court acquitted the co-accused Lodheshwar, Ram Bai and Baleshwar but convicted and sentenced the appellant-Shashi Kant by the impugned judgment and order.

12. Aggrieved by the said judgment and order, this criminal appeal has been preferred.

13. Heard Sri S.H. Ibrahim, learned counsel for the appellant, Sri Tilakraj Singh, learned A.G.A. assisted by Sri Hari Kant, brief holder for the State.

14. Learned counsel for the appellant has submitted that the appellant is innocent and has been falsely implicated in this case. Learned counsel further submitted that due to mistake, the deceased, had sou-motto consumed some poisonous substance/pesticides and died in the night of 02.02.1994. Learned counsel further submitted that in order to save the life of the deceased, the appellant took her away to District Hospital but she could not be saved during the treatment. Learned counsel further submitted that the information was given by the appellant to the father of the deceased who also participated in her cremation. Learned counsel further submitted that after seven days of the death of deceased, a false report, in order to grab the money, was lodged by Krishna Murari (PW-1), brother of the deceased. Learned counsel further submitted that no plausible explanation has been given by the prosecution for such huge delay in lodging the F.I.R. Learned counsel further submitted that the prosecution has also failed to prove the factum of demand of dowry as well as harassment soon before the death of the deceased. Learned counsel further submitted that the trial Court without considering the material and evidence available on record had, in cursory and illegal manner, passed the impugned judgment and order, and convicted the appellant which is against the settled provision of law and is liable to be set aside.

15. Per-contra learned A.G.A., vehemently opposing the submission made by learned counsel for the appellant, has submitted that admittedly the deceased had administered poisonous substance in the house of the appellant and died within seven years of her marriage. Learned A.G.A. further submitted that harassment and torture was caused to her, soon before her death for demand of dowry. Learned A.G.A. further submitted that delay in lodging the F.I.R. has been properly explained by the prosecution and no explanatory evidence, to rebut the statutory presumption of Section 113-B of Evidence Act has been produced by the appellant. Learned A.G.A. further submitted that the deceased had died within one year of her marriage but no evidence has been produced by the appellant regarding the manner and cause of death of the deceased. Learned A.G.A. further submitted that the impugned judgment and order has been passed by the learned trial Court in view of the settled provision of law and no interference is required at this stage.

16. I have considered the rival submission made by the learned counsel for the parties and peruse the record.

17. Before considering the evidence available on record, led by both parties, in the light of argument advanced by the learned counsel for the parties, it is necessary to refer the relevant provision of law relating to the offence in question i.e. Section 304-B and Section 498-A I.P.C., Section 113-B of Indian Evidence Act and Section 2 Dowry Prohibition Act, 1961 which are as under:-

Section 304-B (1) *Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that*

soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death. Explanation.--For the purpose of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961.

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

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

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

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

Section 113-B of Indian Evidence Act-*Presumption as to dowry death.--When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death. Explanation.--For the purposes of this section, "dowry death" shall have the same meaning as in section 304B, of the Indian Penal Code.*

Section 2 of Dowry Prohibition Act-*Definition of "dowry'. In this Act, "dowry" means any property or valuable security given or agreed to be given either directly or indirectly*

(a) by one party to a marriage to the other party to the marriage; or

(b) by the parent of either party to a marriage or by any other person, to either party to the marriage or to any other person."

18. The above provision, related with dowry death, clearly shows that if the death of any woman is caused within seven years of her marriage by burn *"or otherwise than under normal circumstances"* and it is shown that if soon before the death of such women, she was subjected to cruelty or harassment by her husband or any relative of her husband, in connection with demand for dowry and if the prosecution succeeds to prove the above ingredient, such death shall be called as dowry death. In addition to above, Section 113-B of Indian Evidence Act further provides that in such cases, if it is shown that such women was subjected, soon before her death by the accused, to cruelty or harassment for or in connection with any demand for dowry, the Court shall presume that such accused had caused the dowry death.

19. Admittedly, the appellant is the husband of deceased-Mamta who had died within one year of her marriage. This fact has been admitted by the appellant in his

statement under Section 313 of the Code. Thus, it has only to be seen whether any cruelty or harassment has been caused to the deceased soon before her death due to demand of dowry or not.

20. The term *"soon before death"*, used in Section 304-B I.P.C. and 113-B of Evidence Act, has neither been explained nor defined either in I.P.C. or in Evidence Act and the term "it is shown" that soon before her death, the deceased was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand of dowry, as condition precedent for dowry death, shows that the factum of cruelty or harassment by the appellant with the deceased soon before death of deceased is not required to be proved by prosecution beyond reasonable doubt. This fact may be proved by the prosecution by showing the facts and circumstances soon before death of deceased. In addition to above the term "soon before death" does not mean just before death or immediately before death of deceased, she was subjected to torture, cruelty or harassment by her in-laws due to demand of dowry.

21. Hon'ble Supreme Court while discussing the object and purpose of Section 304-B I.P.C. and the scope of relevancy and meaning of phrase "soon before death of deceased" contained therein, in **Kans Raj vs. State of Punjab (2000) 5 SCC 207** has held as under :

"15. It is further contended on behalf of the respondents that the statements of the deceased referred to the instances could not be termed to be cruelty or harassment by the husband soon before her death. "Soon before" is a relative term which is required to be considered under specific circumstances of each case and no straitjacket formula can be laid down by fixing any time-limit. This expression is pregnant with the idea of proximity test. The term "soon before" is not synonymous with the term "immediately before" and is opposite of the expression "soon after" as used and understood in Section 114, Illustration (a) of the Evidence Act. These words would imply that the interval should not be too long between the time of making the statement and the death. It contemplates the reasonable time which, as earlier noticed, has to be understood and determined under the peculiar circumstances of each case. In relation to dowry deaths, the circumstances showing the existence of cruelty or harassment to the deceased are not restricted to a particular instance but normally refer to a course of conduct. Such conduct may be spread over a period of time. If the cruelty or harassment or demand for dowry is shown to have persisted, it shall be deemed to be "soon before death" if any other intervening circumstance showing the non-existence of such treatment is not brought on record, before such alleged treatment and the date of death. It does not, however, mean that such time can be stretched to any period. Proximate and live link between the effect of cruelty based on dowry demand and the consequential death is required to be proved by the prosecution. The demand of dowry, cruelty or harassment based upon such demand and the date of death should not be too remote in time which, under the circumstances, be treated as having become stale enough.

16. No presumption under Section 113-B of the Evidence Act would be drawn against the accused if it is shown that after the alleged demand, cruelty or harassment the dispute stood resolved and there was no evidence of cruelty and

harassment thereafter. Mere lapse of some time by itself would not provide to an accused a defence, if the course of conduct relating to cruelty or harassment in connection with the dowry demand is shown to have existed earlier in time not too late and not too stale before the date of death of the woman. The reliance placed by the learned counsel for the respondents on Sham Lal v. State of Haryana [(1997) 9 SCC 759 : 1997 SCC (Cri) 759] is of no help to them, as in that case the evidence was brought on record to show that attempt had been made to patch up between the two sides for which a panchayat was held in which it was resolved that the deceased would go back to the nuptial home pursuant to which she was taken by the husband to his house. Such a panchayat was shown to have been held about 10 to 15 days prior to the occurrence of the case. There was nothing on record to show that the deceased was either treated with cruelty or harassed with the demand of dowry during the period between her having taken to the nuptial home and her tragic end. Such is not the position in the instant case as the continuous harassment to the deceased is never shown to have settled or resolved."

22. In **Rajindar Singh vs. State of Punjab, AIR 2015 SC 1359**, three Judges Bench of Hon'ble Supreme Court while placing reliance on the law laid down in **Kans Raj (Supra)**, affirming the law laid down in **Surindra Singh vs. State of Haryana, 2014 (4) SCC 129** and **Sher Singh vs. State of Haryana, (2015) 3 SCC 724** and partly overruling the law laid down in **Dinesh vs. State of Haryana, (2014) 12 SCC 532** has held as under :

".....We, therefore, declare that any money or property or valuable security demanded by any of the persons mentioned in Section 2 of the Dowry Prohibition Act, at or before or at any time after the marriage which is reasonably connected to the death of a married woman, would necessarily be in connection with or in relation to the marriage unless, the facts of a given case clearly and unequivocally point otherwise. Coming now to the other important ingredient of Section 304B- what exactly is meant by "soon before her death"?

21. This Court in Surinder Singh v. State of Haryana (2014) 4 SCC 129, had this to say:

"17. Thus, the words "soon before" appear in Section 113-B of the Evidence Act, 1872 and also in Section 304-B IPC. For the presumptions contemplated under these sections to spring into action, it is necessary to show that the cruelty or harassment was caused soon before the death. The interpretation of the words "soon before" is, therefore, important. The question is how "soon before"? This would obviously depend on the facts and circumstances of each case. The cruelty or harassment differs from case to case. It relates to the mindset of people which varies from person to person. Cruelty can be mental or it can be physical. Mental cruelty is also of different shades. It can be verbal or emotional like insulting or ridiculing or humiliating a woman. It can be giving threats of injury to her or her near and dear ones. It can be depriving her of economic resources or essential amenities of life. It can be putting restraints on her movements. It can be not allowing her to talk to the outside world. The list is illustrative and not exhaustive. Physical cruelty could be actual beating or causing pain and harm to the person of a woman. Every such instance of cruelty and related harassment has a different impact on the

mind of a woman. Some instances may be so grave as to have a lasting impact on a woman. Some instances which degrade her dignity may remain etched in her memory for a long time. Therefore, "soon before" is a relative term. In matters of emotions we cannot have fixed formulae. The time-lag may differ from case to case. This must be kept in mind while examining each case of dowry death.

18. In this connection we may refer to the judgment of this Court in Kans Raj v. State of Punjab [(2000) 5 SCC 207 : 2000 SCC (Cri) 935] where this Court considered the term "soon before". The relevant observations are as under: (SCC pp. 222- 23, para 15) "15. ... 'Soon before' is a relative term which is required to be considered under specific circumstances of each case and no straitjacket formula can be laid down by fixing any time-limit. This expression is pregnant with the idea of proximity test. The term 'soon before' is not synonymous with the term 'immediately before' and is opposite of the expression 'soon after' as used and understood in Section 114, Illustration (a) of the Evidence Act. These words would imply that the interval should not be too long between the time of making the statement and the death. It contemplates the reasonable time which, as earlier noticed, has to be understood and determined under the peculiar circumstances of each case. In relation to dowry deaths, the circumstances showing the existence of cruelty or harassment to the deceased are not restricted to a particular instance but normally refer to a course of conduct. Such conduct may be spread over a period of time. If the cruelty or harassment or demand for dowry is shown to have persisted, it shall be deemed to be 'soon before death' if any other intervening circumstance showing the non-existence of such treatment is not brought on record, before such alleged treatment and the date of death. It does not, however, mean that such time can be stretched to any period. Proximate and live link between the effect of cruelty based on dowry demand and the consequential death is required to be proved by the prosecution. The demand of dowry, cruelty or harassment based upon such demand and the date of death should not be too remote in time which, under the circumstances, be treated as having become stale enough."

Thus, there must be a nexus between the demand of dowry, cruelty or harassment, based upon such demand and the date of death. The test of proximity will have to be applied. But, it is not a rigid test. It depends on the facts and circumstances of each case and calls for a pragmatic and sensitive approach of the court within the confines of law."

22. In another recent judgment in ***Sher Singh v. State of Haryana, 2015 (1) SCALE 250****, this Court said:*

"We are aware that the word 'soon' finds place in Section 304B; but we would prefer to interpret its use not in terms of days or months or years, but as necessarily indicating that the demand for dowry should not be stale or an aberration of the past, but should be the continuing cause for the death under Section 304 or the suicide under Section 306 of the IPC. Once the presence of these concomitants are established or shown or proved by the prosecution, even by preponderance of possibility, the initial presumption of innocence is replaced by an assumption of guilt of the accused, thereupon transferring the heavy burden of proof upon him and requiring him to produce evidence dislodging his guilt, beyond reasonable doubt." (at page 262)

23. We endorse what has been said by these two decisions. Days or

months are not what is to be seen. What must be borne in mind is that the word "soon" does not mean "immediate". A fair and pragmatic construction keeping in mind the great social evil that has led to the enactment of Section 304B would make it clear that the expression is a relative expression. Time lags may differ from case to case. All that is necessary is that the demand for dowry should not be stale but should be the continuing cause for the death of the married woman under Section 304B.

24. At this stage, it is important to notice a recent judgment of this Court in Dinesh v. State of Haryana, 2014 (5) SCALE 641 in which the law was stated thus:

"The expression "soon before" is a relative term as held by this Court, which is required to be considered under the specific circumstances of each case and no straight jacket formula can be laid down by fixing any time of allotment. It can be said that the term "soon before" is synonyms with the term "immediately before". The determination of the period which can come within term "soon before" is left to be determined by courts depending upon the facts and circumstances of each case." (at page 646)

25. We hasten to add that this is not a correct reflection of the law. "Soon before" is not synonymous with "immediately before"." (Emphasis Supplied)

23. Krishna Murari (PW-1) brother of the deceased, while stating that his sister was married with the appellant on 2.5.1993, has also stated that at the time of marriage, there was demand of scooter by the appellant and other accused person which could not be fulfilled by him. He further stated that after one month of her marriage, his sister came back and complained that due to non-fulfillment of dowry, the appellant and other accused person were causing harassment and torture with her. He further stated that after *gauna*, his sister came back and told him that the appellant and other accused were demanding a scooter and some money but he could not fulfill their demand due to his poor economic condition. He further stated that after her *gauna*, he went to take off *(vidayee)* his sister at Navratri and she again complained that their in-laws were harassing and torturing her for scooter and money. He further stated that just before 15 days to death of deceased Mamta Sharma, the appellant Shashi Kant had come to his (PW-1) house to take the deceased back and also asked for a scooter but he (PW-1) said that he could not fulfill the demand, thereupon he (appellant) got annoyed and took the deceased back. He further stated that on 3.2.1994, a person came on motorcycle and told him that his sister was ill and admitted in a hospital. Thereafter, his father went along with that person and when he returned he (PW-1) was told that deceased was caused to death by administering the poison.

24. Balram (PW-2), father of the deceased, has also stated that deceased was married with the appellant in the year 1993 and after her marriage, the appellant and other co-accused were demanding a scooter as a dowry. This witness further stated that for non-fulfillment of demand of scooter and money, the appellant and other accused person used to beat, torture and harass the deceased. He further stated that after 15-20 days of death of deceased, he was informed by an unknown person and upon that information he had gone to postmortem house where he became very aggrieved. He further stated that people, present there, had

forcefully received his signature on a plain paper. He further stated that the said people were saying that the deceased had administered poison and died. He further stated that he had learnt that Lodheshwar (co-accused) and other person were approaching the senior officer. He further stated that he was also present at the time of cremation and returned at 12:00 a.m. in the night.

25. Thus, in view of the statement of Krishna Murari (PW-1) and Balram (PW-2) it is clear that the deceased was taken back by appellant to his house just 15 days before her death and the appellant was demanding a scooter and money as a dowry from the deceased, her brother (PW-1) and father (PW-2) and due to its non-fulfillment, the appellant and other accused person were causing harassment and torture the deceased soon before her death.

26. At this juncture it is also pertinent to note that in most of the cases the death of married woman for want of dowry is caused inside the house of the accused persons and all the relevant facts as well as incriminating evidence are only in the knowledge of the accused persons but they do not come forward to disclose the fact, happened to the deceased soon before her death. So the prosecution cannot be blamed to produce such evidence which is not in the possession and knowledge of prosecution witnesses.

27. In **Trimukh Maroti Kirkan vs. State of Maharashtra 2006 (10) SCC 681** where accused was charged for committing murder of his wife for want of dowry and it was established by the prosecution that shortly before the offence, he was seen with his wife inside his house where he and his wife were normally used to reside. Hon'ble Supreme Court has held as under :

"Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes placed in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. *In Nika Ram v. State of Himachal Pradesh AIR 1972 SC 2077 it was observed that the fact that the accused alone was with his wife in the house when she was murdered there with 'khokhri' and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt. In Ganeshlal v. State of Maharashtra (1992) 3 SCC 106 the appellant was prosecuted for the murder of his wife which took place inside his house. It was observed that when the death had occurred in his custody, the appellant is under an obligation to give a plausible explanation for the cause of her death in his statement under Section 313 Cr.P.C.* ***The mere denial of the prosecution case coupled with absence of any explanation were held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the appellant is a prime accused in the commission of murder of his wife.*** *In State of U.P. v. Dr. Ravindra Prakash Mittal AIR 1992 SC 2045 the medical evidence disclosed that the wife died of strangulation during late night hours or early morning and her body was set on fire after sprinkling kerosene. The defence of the husband was that wife had committed suicide by burning herself and that he was not at home at that time.*

The letters written by the wife to her relatives showed that the husband ill-treated her and their relations were strained and further the evidence showed that both of them were in one room in the night. It was held that the chain of circumstances was complete and it was the husband who committed the murder of his wife by strangulation and accordingly this Court reversed the judgment of the High Court acquitting the accused and convicted him under Section 302 IPC. ***In State of Tamil Nadu v. Rajendran (1999) 8 SCC 679 the wife was found dead in a hut which had caught fire. The evidence showed that the accused and his wife were seen together in the hut at about 9.00 p.m. and the accused came out in the morning through the roof when the hut had caught fire. His explanation was that it was a case of accidental fire which resulted in the death of his wife and a daughter. The medical evidence showed that the wife died due to asphyxia as a result of strangulation and not on account of burn injuries. It was held that there cannot be any hesitation to come to the conclusion that it was the accused (husband) who was the perpetrator of the crime." (Emphasis Supplied)***

28. Coming again to the facts of this case, according to the prosecution evidence, at the time of her death, the deceased was with the appellant in her matrimonial house. According to Dr. R.S. Agarwal (PW-3), the cause of death of deceased was not known and her viscera was preserved for examination.

29. Vinod Kumar Sharma (PW-7), who has prepared Viscera Examination Report (Ex.Ka.12), has stated that the said viscera was related with Crime No. 23/1994, U/s 498-A, 304B I.P.C., P.S. Mill Area *(State vs. Shashi Kant and others)* and after examination of viscera, a poisonous substance i.e. Aluminum Phosphide was found in the said viscera. Thus, it is clear that the death of appellant was unnatural and caused by administration of a poisonous substance.

30. The prosecution has successfully proved all the ingredients of Section 304-B and Section 498-A I.P.C. as well as Section 4 of Dowry Prohibition Act. Now a question arise as to whether the appellant, who was present at the time of occurrence with deceased, has succeeded to rebut the presumption of law, as provided under Section 113-B of Evidence Act, by producing any cogent and reliable evidence.

31. The appellant-Shashi Kant in his statement under Section 313 of the Code has denied the prosecution story, but he did not state any thing more as to why he has been falsely implicated. He has stated that the prosecution witnesses have given statement against him due to enmity and he did not want to lead any explanation or evidence in his defence. The appellant has not produced any defence evidence to rebut the presumption under Section 113-B of Evidence Act.

32. It is also pertinent to mention at this juncture that the poisonous substance, aluminium phosphide which was found in viscera report of the deceased is not usually available and kept in the house by any person. From perusal of site plan (Ex.Ka.10), prepared by the Investigating Officer, Dy.S.P. Lalit Kumar Singh (PW-5), it transpires that the said occurrence was caused inside the house of appellant and the appellant was residing there as tenant of one Raghunath Prasad Srivastava. Krishna

Murari (PW-1) in his cross examination has stated that the appellant was permanent resident of village Hari Kusum Khera, P.S. Sareni, District Raebareli and were residing since 15-20 years in Raebareli city. He has further stated that co-accused Baleshwar was residing in Balapur (Raebareli) in a tenanted house and thereafter was residing in his own house. Thus, it is clear that appellant and his family member were not dealing with the business of such poisonous substance which was administered to the deceased. Further, they were also not doing the agricultural work, wherein, such type of pesticide is used. The deceased was a young lady, belonging to rural background, aged about 18 years at the time of occurrence and was caused to death within one year of her marriage and is not supported that she would go outside of her house in unknown new city to manage such poisonous substance. In such a situation, it becomes the bounden duty of the appellant to produce the evidence that in what circumstances, such poisonous substance was administered to the deceased inside his house.

33. In addition to above, neither the appellant Shashi Kant who is husband of the deceased nor any other co-accused who have been acquitted by the trial Court, had stated that how and when deceased was administered poisonous substance and in what condition and by whom the deceased was carried to the District Hospital for treatment. Non-disclosure of such important facts is fatal to the innocence of the appellant. Thus, in the light of law laid down by the Hon'ble Supreme Court in **Trimukh Maroti Kirkan (supra)** and failure to produce any evidence in defence by the appellant to rebut the statutory presumption of Section 113-B of the Evidence Act, further strengthen the prosecution case.

34. So far as the submission of learned counsel for the appellant that the F.I.R. was lodged by delay of seven days without any explanation, is concerned, Ex.Ka.1 shows that this written information was given to the Superintendent of Police, Raebareli which itself shows that the information given by Krishna Murari (PW-1) was not taken into consideration by the police of concerned police station. Further it has been specifically mentioned in Ex.Ka.1 that on 7.02.1994, the informant had approached P.S. Mill Area but no action was taken. The Trial Court in the impugned judgment and order had properly discussed not only the ground and explanation of delay but also the facts and circumstances of this case, in this regard. However, no time limit has been prescribed for lodging the F.I.R. either in Evidence Act or in the Code. The delay caused in lodging the F.I.R. depends upon facts and circumstances of the each case and if such delay is natural and reasonable, it cannot be treated fatal to the prosecution story. Hon'ble Supreme Court, on delay caused in lodging the F.I.R., in **Tara Singh and others vs. State of Punjab, AIR 1991 SC 63** has held as under :-

"The delay in giving the FIR by itself cannot be a ground to doubt the prosecution case. Knowing the Indian conditions as they are we cannot expect these villagers to rush to the police station immediately after the occurrence. Human nature as it is, the kith and kin who have witnessed the occurrence cannot be expected to act mechanically with all the promptitude in giving the report to the police. At times being grief-stricken because of the calamity it may not immediately occur to them that they should give a report. After all it is but natural in these circumstances for them to take some time to go to the police station for giving the" report. Of course the Supreme Court

as well as the High Courts have pointed out that in cases arising out of acute factions there is a tendency to implicate persons belonging to the opposite faction falsely. In order to avert the danger of convicting such innocent persons the courts are cautioned to scrutinise the evidence of such interested witnesses with greater care and caution and separate grain from the chaff after subjecting the evidence to a closer scrutiny and in doing so the contents of the FIR also will have to be scrutinised carefully. However, unless there are indications of fabrication, the court cannot reject the prosecution version as given in the FIR and later substantiated by the evidence merely on the ground of delay. These are all matters for appreciation and much depends on the facts and circumstances of each case."

35. Coming to the facts of this case again, Krishna Murari (PW-1) has stated that after getting the information of the occurrence, he had made written complaint at the concerned P.S. Mill Area and the concerned police inspector had assured him that he would make inquiry. He further stated that upon his assurance, he returned to his house but later on he learnt that no action was taken. Thereafter, he approached the Superintendent of Police and filed a written report (Ex.Ka.1). This witness was cross-examined by the defence counsel on the point of delay but nothing has come out in his cross examination whereby it can be shown that such delay was deliberately caused to rope the appellant falsely in this case. Thus in view of the fact and circumstances of this case, it cannot be said that the delay caused in lodging the F.I.R. is fatal to the prosecution case and hence there is no force in the submission of learned counsel for the appellant.

36. So far as the next argument of the learned counsel for the appellant that some of the accused namely Baleshwar, Lodheshwar and Rama Bai have been acquitted by the Trial Court on the same evidence but the appellant has been convicted, hence, the judgment of the trial Court is illegal, is concerned, record shows that the appellant is the husband of the deceased, whereas, other co-accused are father, mother and uncle of the appellant.

37. In **Naresh Kumar vs. State of Haryana (2015) 1 SCC 797**, in a case where appellant's mother and brother were acquitted but only appellant was convicted for dowry death of his wife, on plea raised by appellant that his case was at par with his mother and brother, three judges bench Hon'ble Supreme Court dismissing the appeal has held as under:-

"As regards the claim for parity of the case of the appellant with his mother and brother who have been acquitted, the High Court has rightly found his case to be distinguishable from the case of his mother and brother. The husband is not only primarily responsible for safety of his wife, he is expected to be conversant with her state of mind more than any other relative. If the wife commits suicide by setting herself on fire, proceeded by dissatisfaction of the husband and his family from the dowry, the interference of harassment against the husband may be patent. Responsibility of the husband towards his wife is qualitatively different and higher as against his other relatives."

38. In this case, a specific allegation of demand of scooter as dowry. has been made which usually was useless for other, co-accused who are parents and uncle of appellant Shashi Kant and such scooter was

to be used only by the appellant. In addition to above, sufficient evidence was produced before the trial Court that co-accused Baleshwar, uncle of the appellant was residing separately and no specific allegation was made against him for demand of scooter. The trial Court has also found that general allegations were made against co-accused Smt. Ram Bai, Lodeshwar who were parents-in-law of the deceased. Thus the other co-accused were on different footing, having different role in the case whereas appellant Shashi Kant, being husband of deceased having specific role, was more responsible than the other co-accused in the facts, circumstances and nature of this case. It is settled principle of criminal jurisprudence that convicted accused, having different role, cannot be acquitted only on the ground of other co-accused who have been acquitted by trial Court.

39. In view of the above, merely on the ground that the prosecution has failed to produce cogent evidence against other co-accused, it cannot be held that appellant-Shashi Kant, who is the husband of the deceased, is also entitled for any relief.

40. Thus the prosecution has succeeded to prove that the deceased had died within seven years of her marriage, by administering the poisonous substance inside the house of the appellant and she was subjected to cruelty and harassment by the appellant due to demand of dowry soon before her death. The appellant has failed to produce any reliable evidence in his defence to rebut or explain the prosecution evidence in view of the statutory presumption as provided under Section 113-B of Evidence Act. Learned trial Court has elaborately discussed the evidence led by the prosecution in the light of argument advanced by learned counsel for both the parties. The impugned judgment is well discussed, well reasoned, it requires no interference and liable to be affirmed.

41. Now coming to the question of sentence whether sentence passed by the Trial Court, is just and proper or not.

42. Appellant has been convicted for the offence under Section 304-B , 498-A I.P.C. and Section 3/4 D.P. Act. He has been sentenced only for seven years rigorous imprisonment for the offence under Section 304-B I.P.C., for 3 years rigorous imprisonment for the offence under Section 498-A I.P.C. and for 1 year rigorous imprisonment for the offence under Section 3/4 of D. P. Act. It has been further directed that all the sentences shall run concurrently. Thus the maximum sentence, awarded against the appellant, is seven years.

43. It is settled principle of sentencing and penology that undue sympathy in awarding the sentence with accused is not required. The object of sentencing in criminal law should be to protect the society and also to deter the criminals by awarding appropriate sentence. In this regard Hon'ble Supreme Court has observed in **State of Madhya Pradesh vs. Saleem @ Chamaru, AIR 2005 SC 3996** which is as under:-

"The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and

brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal."

44. Looking into the nature and gravity of the offence, I am of the view that the punishment awarded by the Trial Court is just and appropriate and requires no interference. Appeal is liable to be dismissed and impugned judgment and order passed by the learned Trial Court is liable to be affirmed.

45. In the light of aforesaid discussion, the appeal lacks merit and is hereby **dismissed**. The impugned judgment and order dated 18.5.1998, passed by Session Judge, Raebareli in Session Trial No. 105/1995 *(State vs. Lodeshwar and others)*, is maintained
and affirmed.

46. The appellant-Shashi Kant is on bail. His bail bond is cancelled. He is directed to surrender before the concerned Court forthwith to serve out the aforesaid sentence.

47. Let a copy of this judgment along with lower court record be sent to the concerned Court for necessary information and compliance.

(2020)12ILR A336
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.12.2020

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE SAMIT GOPAL, J.

Criminal Appeal No. 2919 of 2009

Shyam Lal ...Appellant (In Jail)
Versus
State of U.P. ...Opp. Party

Counsel for the Appellant:
Sri Neeraj Mishra, Sri A.N. Mishra, Sri Noor Mohammad

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

Criminal Law – Indian Penal Code,1860 - Section 376(2)(f) -Criminal Appeal has been filed against conviction U/s 376(2)(f) IPC **Quantum of Sentences : -** argument of the counsel – based on only quantum of sentences. (Para 31)

Cases are discussed by the counsel for the appellant is distinguishable from the facts of the present matter itself.

Defence could not produce any document which shows enmity with the first informant. (Para 45)

Prosecution has succeeded to prove its case beyond all reasonable doubts (Para 47)

Appeal dismissed. (E-2)

List of Cases cited: -

1. Rajendra Datta Zarekar Vs St.of Goa: 2008 (1) All JIC 123 & Bavo @ Manubhai Ambalal Thakore Vs St.of Guj.: 2012 (1) All JIC 319.

2. Shyam Narain Vs St. of NCT of Delhi: AIR 2013 SC 2209.

3. Jameel Vs St. of U.P. (2010) 12 SCC 532

4. Shailesh Jasvantbhai & anr. Vs St.of Guj. & ors.: (2006) 2 SCC 359

5. St. of M.P. Vs Babulal: AIR 2008 SC 582 Halsbury's Laws of England, (4th Edition: Vol.II: para 482)

6. Gopal Singh Vs St. of Uttarak.: 2013 (2) SCALE 533,

7. Madan Gopal Kakkad Vs Naval Dubey & anr.

(1992) 3 SCC 204

8. St. of Andh. P. Vs Bodem Sundra Rao: AIR 1996 SC 530

9. St. of Punj. Vs Gurmit Singh & ors. : AIR 1996 SC 1393

10. St. of Karn.a Vs Krishnappa: (2000) 4 SCC 75

11. Jugendra Singh Vs St. of U.P.: (2012) 6 SCC 297

(Delivered by Hon'ble Samit Gopal, J.)

1. The present appeal arises out of judgment and order dated 28.03.2009 passed by the Sessions Judge, Lalitpur in Session Trial No. 1 of 2008 (State of U.P. Vs. Shyam Lal) whereby the appellant has been convicted under Section 376(2)(f) IPC for life imprisonment and a fine of Rs. 2,000/-. In default of payment of fine, he has been directed to further undergo one year imprisonment.

2. In view of the legislative mandate as contained in Section 228-A of the Indian Penal Code, 1860 and the observations made by the Hon'ble Supreme Court in various judgments the identity of the prosecutrix/victim is not being disclosed and she will be referred to as "R' hereinafter.

3. The prosecution case as per the First Information Report lodged by Deepak Dheemar/PW-1 is that his daughter "R' aged about 12 years is mentally deranged, deaf and dumb since birth. On 01.09.2007 at about 12:00 PM "R' went to the fields but did not return till 02:00 PM, on which, the mother of the first informant namely Smt. Nanhi Bai wife of Nandlal went towards the field to search her and during search when his mother reached at a *talab* near a drain to his field, she did not find "R' there, to which, she started search near about wherein at the adjacent field of Harbhajan Dheemar, in which, maize was sown some sound was coming from there, to which, she went inside and saw "R' lying naked and Shyam Lal the appellant who is the caretaker of the fields of Harbhajan Dheemar was lying over her and was committing rape on her, wherein the mother of the first informant raised hue and cry, consequently, Shyam Lal after wearing his pant ran away and "R' was lying there in an injured condition and blood was oozing out from her private parts. The incident is said to be of around 02:30 PM. On the shrieks of the mother of the first informant, Kripa Ram PW-4 reached the place of occurrence who also the saw the incident. It is further stated in the FIR that then the mother of the first informant brought "R' back to the house and gave information about the incident to the villagers as a result of which, the entire village went into silence. The first informant then states that he reached the house at about 07:00 PM, on which, his mother informed him about the whole incident and then he along with his mother and "R' has reached the police station for lodging of the First Information Report.

4. The application for lodging of the First Information Report was given by the Deepak Dheemar, the father of "R' which is marked as Exb: Ka-1 to the records. On the basis of the said application, a First Information Report was registered on 01.09.2007 at about 20:30 hrs. (08:30 PM) at Police Station Bar, District Lalitpur as Case Crime No. 596 of 2007 under Section 376 IPC against Shyam Lal. The said First Information Report is marked as Exb: Ka-6 to the records. The prosecutrix/victim "R' was medically examined on 02.09.2007 at

01:00 PM by Doctor Alka Jain/PW-3 at District Women Hospital, Lalitpur. The medical examination report is marked as Exb: Ka-4 to the records. The doctor conducting the medical examination report found injuries on the body of the deceased and also on her private parts. The external injuries found on the person of the victim "R' are extracted hereinbelow:-

"1. Multiple soft scabbed abrasion in an area of 5.0 cms x 4.0 cms on right side face, 3.0 cms below right ear and 3.0 cms away from right angle of mouth.

2. Multiple soft scabbed abrasion in an area of 4.0 cms x 3.0 cms on left side face, 2.0 cms away from left angle of mouth.

3. Soft multiple scabbed abrasion in an area of 3.0 cms x 2.0 cms on right side of neck just below cheek."

The injuries found on the private parts of the victim are as follows:

"1. A lacerated wound at 6 O'Clock position at post-commissure above 1.0 cm x ½ cm ½ cm extending up in vagina.

2. A lacerated wound of floor of vagina extending from 5 to 8 O'Clock position above 2.5 cms x 2.5 cms x 1.0 cm deep.

3. Annuler tear hymen involving right ¼ to lower ½."

The doctor conducting the medical examination of the victim had put her on sedation and then had examined her. The same is specifically mentioned in the said medical examination report. The clothes worn by "R' were found blood stained by the doctor and as such she took the underwear, shirt and a wrapped towel on the waist and sealed them.

5. For the conclusion after medical examination, the doctor has stated that the supplementary report will be given after the reports of vaginal smear and radiology are seen. Further, she states that the external injuries are simple in nature caused by hard and blunt object and the duration of the injuries is above one day. For the injuries on her private parts, it is concluded that the same are simple in nature caused by friction against hard and blunt object and the duration is above one day.

A supplementary report dated 06.09.2007 was given by doctor Alka Jain with the following opinion:

" **Opinion**- Her injury on private parts are simple in nature caused by friction against hard blunt object, probability of sexual on may be there. Her age by appearance, physical examination and radiological examination appeared to be about twelve years."

6. The clothes of the victim which sealed by the doctor were sent to the chemical examiner for analysis. The chemical examiner gave report dated 05.10.2007 which is Exb: Ka-13 to the records, in which, in Article No. 1 being the underwear of the victim spermatozoa was found. In the Article Nos. 2 and 3 being the t-shirt and an *angocha*, no spermatozoa was found. On Article No. 1 human semen was found and on Article Nos. 1 and 3 human blood was found. On Article No. 4 being blood stained mud and blood stained grass along with plain mud, plain grass disintegrated blood was found as such it was not possible to opine about its origin.

7. The investigation concluded and a Charge Sheet No. 91 of 2007 dated 08.09.2007 was filed under Section 376 IPC against the appellant, the same is Exb: Ka-10 to the records.

8. The trial court vide its order dated 22.01.2008 framed charges under Section 376(2)(f) IPC against the accused Shyam Lal. The accused pleaded not guilty and claimed to be tried. He has led no defence evidence.

9. The prosecution in order to prove its case produced Deepak Dheemar as PW-1 who is the father of the prosecutrix/victim and the first informant. PW-2 Smt. Nanni Bai is the grand mother of "R' and an eye witness of the incident. Dr. Smt. Alka Jain/PW-3 is the doctor who conducted the medical examination of "R' on 02.09.2007 at about 01:00 PM and also gave the supplementary medical examination report dated 06.09.2007. PW-4/Kripa Ram is a co-villager and also claims to have reached the place of occurrence on hearing the shrieks and shouts of Smt. Nanni Bai PW-2 as he was working in the same field. Sant Ram, Head Constable/PW-5 took the victim/prosecutrix for medical examination report. Shiv Shankar Tiwari, Sub Inspector/PW-6 is the Investigating Officer of the case who arrested the accused on 02.09.2007 and concluded the investigation and filed charged sheet. Toran Singh, Constable PW- 7 took articles in a sealed condition to the chemical analyst for analysis.

10. The trial court after considering the entire evidence on record came to the conclusion that there is sufficient evidence against the accused-appellant Shyam Lal for committing rape on "R' and thus convicted the accused as stated above.

11. We have heard Sri Noor Mohammad, learned counsel for the appellant and Mrs. Archana Singh, learned Additional Government Advocate for the State and perused the record.

12. Learned counsel for the appellant at the very outset argued that he is not challenging the conviction as recorded by the trial court vide the impugned judgment and order dated 28.03.2009. He argues that only the quantum of sentence as awarded to the accused appellant Shyam Lal being life imprisonment is being challenged by him as the same is excessive and since the appellant accused is in jail since 02.09.2007 and has served out about 13 years in jail, the sentence be reduced from life imprisonment. Learned counsel for the appellant has in support of his argument relating to the quantum of punishment has relied upon the judgment of **Rajendra Datta Zarekar Vs. State of Goa: 2008 (1) All JIC 123** and **Bavo @ Manubhai Ambalal Thakore Vs. State of Gujarat: 2012 (1) All JIC 319.**

13. Per contra, learned Additional Government Advocate for the State of U.P. opposed the sole submission of the learned counsel for the appellant on the ground that the present case is a case which in all prospects is a barbaric action by the accused. It is further argued that "R' was a mentally deranged, deaf and dumb girl and also a minor being about 12 years of age and looking to the injuries received by her both on her body and private parts along with the report of the chemical analyst corroborating the incident. The appellant does not deserve any sympathy whatsoever. In support of his submission, she has placed reliance upon the judmgent of the Apex Court in the case of **Shyam Narain Vs. State of NCT of Delhi: AIR 2013 SC 2209**. It is further argued that the appeal be dismissed and no sympathy be extended to the accused-appellant.

14. PW-1 Deepak Dheemar is the first informant and the father of "R'. He states

that his daughter is aged about 12 years. She is deaf, dumb and mentally deranged and does not understand anything since birth. He further states about the said incident as narrated by him in the First Information Report which was got registered by him by moving an application which is marked as Exb: No. Ka-1 to the records. He further states that he had given an application to the Constable Clerk at the Police Station and had received the chik and copy of the same. He further states that his daughter along with his mother were taken to P.H.C., Bar for treatment, who were accompanied by Constable from where they were taken to District Hospital, Lalitpur and from there they were sent to Jhansi and even there the medical examination was not done and they were sent back to Lalitpur and then on the next day, the medical examination was done. He further states that on the next day of the incident, the Investigating Officer inspected the place of occurrence and took blood stained mud and grass and also plain mud and grass and kept them in different boxes and sealed it. A memo about the said recovery was prepared which was read out to them and then his mother affixed her thumb impression and put her signature. The recovery memo is marked as Exb: Ka-2 to the records. The clothes of "R' which was taken into custody were got identified by him in court which were marked as material Exb: Ka-1, 2 and 3 being the underwear, t-shirt and an *angocha* respectively. The blood stained mud and grass and plain mud and grass were also identified by him in court which were marked as material Exb: Ka-4 and 5 respectively.

15. In his cross examination, he stated that he is not an eye witness to the occurrence on the day of the incident. He had gone Teekamgarh and he had returned about 07:00 PM. When he returned, it was dark and the lights were on. He further states that the police station is at a distance of about one furlong from his house. His father is working in the Health Department and goes on his duty at about 08-09 AM and returns at about 07-08 PM. He works in the Health Center, Bar. He states that he is working as a labour and has failed in class 10th . He further states that his mother informed him about the incident and then he went to the police station. He states that when he went from his house to the police station uptil that time, his father had not come back. His mother had told him that there was a lot of resentment about the incident amongst his neighbours. He states that he did not state in the FIR lodged by him that his girl was bleeding from her private parts. He states that when he went to the hospital then his father had come. The field of Harbhajan Dheemar is situated at a distance of about two furlongs from his house. He states that there is a *talab* between the field of Harbhajan and his field. To go to the field of Harbhajan, *talab* will not come in between. He further states that he has done his sowing on his own. His daughter used to go to the field daily. To a suggestion that Shyam Lal did not commit rape on his daughter, he denies. Further to the suggestion that Shyam Lal did not go to his field to work as a labour, as a result of which, he was annoyed, he states that the same to be incorrect. He states that Kripa Ram is of his caste but is not his relative. He states that the field of Kripa Ram is in village Dhamna and his field is in village Bar. The distance between the field of Kripa Ram and his field about 1.5 furlong. To a suggestion that Kripa Ram who is his relative and due to said reason, he has been made as a witness, he denies the same. He further denies the suggestion that due to

village party bandi, false case has been got registered.

16. Smt. Nanni Bai PW-2 is the grand mother of "R' and is an eye witness to the incident. She states that "R' was aged about 13 years, she was mentally deranged, deaf and dumb since birth. She is the daughter of Deepak Dheemar. She further states that "R' went to the fields at around 12 PM but did not return upto 02:00 PM, to which, she went to search her and did not find her in her field. She then proceeded towards the drain and from the field of Harbhajan near the medh/divider in which maize was sown and from there, some sound was coming, to which, she proceeded to that place and saw "R' was lying on the field and Shyam Lal was above her and committing rape on her. "R' was naked. Her underwear was pulled down. On seeing, this she raised hue and cry, on which, Kripa Ram reached there. On seeing of her and Kripa Ram, Shyam Lal pulled up his pant and ran towards the field of Dhruva Maharaj. She went to "R' and saw blood was oozing out from her private parts. She then went near "R' dressed her, wrapped an *angocha* around her. The incident is of about 02:30 PM. Then she, Kripa Ram and "R' came back to the house. She then informed the persons of *Mohalla* about the incident. Deepak her son was not at home. Her husband had gone to the village on his duty. Her son had gone Teekamgarh, Madhya Pradesh and he returned back at 07:00PM, on which, she narrated him the entire story. Then, her son took her and "R' to Bar, where he got a report registered. She states that after lodging of the First Information Report "R' was sent along with the Police Constable to Primary Health Centre, Bar where the doctor was not present and hence her medical examination could not be done. Then, she was taken to District Women Hospital where also her medical examination was not done and she was taken to Jhansi. As the condition of the victim was not good, she was taken to Jhansi where her treatment was done. In Jhansi, they were asked as to where the incident had taken place, to which, they informed that it was in Lalitpur, on which, they were instructed to go back to Lalitpur and get the medical examination certificate. Then they came back to Lalitpur along with the police personnel and on the next day, "R' was medically examined at Lalitpur, District Women Hospital.

17. The Investigating Officer inspected the place of occurrence on the next day and took in possession blood stained mud and blood stained grass and plain mud and plain grass and sealed it. She further states to have affixed her thumb impression on the recovery memo and also states that her son had signed on the same. She was read over the recovery memo, to which, she states that it is the same which was marked as Exb: Ka-2 to the records. She identifies the accused present in court as the same person.

18. In her cross examination, she states that "R' is age aged about 13 years. She went at about 02:00 PM to search her. She states that she reached near "R' at about 02:30 PM. She then states that the distance between her house and the field is about 250 steps. The field is not visible from her house. There are 2-3 houses in between her house and the field. He further states that the crop of maize was standing in the field at the time of occurrence. She went alone. She found her grand daughter in the field of Harbhajan. Her field is at a distance of about 50-60 steps from the field of Harbhajan. She further states that when one goes from her house then her field will

come first and then field of Harbhajan will come. After conducting search in her field, she went to the field of Harbhajan. She states that she did not stay in her field. She further states that she did not ask anyone en-route about her grand daughter and neither did she meet anyone while going for the search. She had searched her grand daughter in the temple and in her field but she could not found her. When she reached the field of Harbhajan, there also she did not see anyone. When she proceeded further 10 steps inside, then she saw that Shyam Lal was over her grand daughter and was committing rape on her. She further states to have seen the incident from a distance of 3-4 steps. She states that as the field was sown with maize as such she could not see it from before but could see after reaching near to the place. She saw the incident alone, after which, she raised a hue and cry and tried to catch Shyam Lal but he ran away. Kripa Ram also had reached there who was also tried to catch Shyam Lal. Kripa Ram had reached there on the hearing shouts raised by the her. Kripa Ram was cutting grass on the other side of the field. She states that when Kripa Ram reached the place of occurrence, then Shyam Lal had started running Kripa Ram ran for about 15 steps to catch Shyam Lal. She further states that then she took "R' and saw blood was oozing from her private parts and blood was present on the grass also. She states that prior to the present incident, there was no enmity with Shyam Lal. She states to have narrated the incident to the persons of her *Mohalla*. No medical examination was conducted of "R' prior to the lodging for the report. She and her son had gone for lodging of the report at about 08:00 pm. Her son had got the report lodged and she had dictated report, which her son had transcribed, the same was written outside the Police Station. When they had gone to lodge the report, a Constable was there and Sub-Inspector was inside the room. The incident was not told to the Inspector but report was given. The victim was also taken to the Police Station. She and "R' were sitting outside the Police Station. Then, she states that they had started for getting the medical examination done, on the same day for which, they reached P.H.C Bar where they did not meet the doctor and then at about 09:00 PM they went to Lalitpur. In Lalitpur on seeing the condition being critical, she was referred to Jhansi where her treatment was done and medicines were given. Then, they were sent back for Lalitpur and then at Lalitpur District Women Hospital the medical examination was done. The medical examination was done on the next day. The Investigating Officer interrogated her on the day of medical examination. She did not give any statement to any one. She gave her statement to Inspector at the place of occurrence. To a suggestion that no such incident took place with the girl, she denies. To a further suggestion that due to village party bandi, she has given a false statement, she denies.

19. PW-3 Smt. Alka Jain was a Medical Officer at District Women Hospital, Lalitpur. She states that she had conducted the medical examination of "R' on 02.09.2007 at 01:00 PM. She had examined "R' both externally and internally and had drawn the medical examination report which is marked as Exb: Ka-4 to the records. The injuries received both on the body and private parts of "R' were noted by her in report. The said injuries have already been quoted above and as such are not being mentioned herein as being repetitive. She further states to have given a supplementary medical examination report dated 06.09.2007 which is marked as Exb:

Ka-5 to the records. The opinion as drawn there has also been reproduced above and is not being mentioned herein again. She states to have taken the clothes of "R' which were sealed by her and handed over to the police Constable.

20. In her cross examination, she states in categorical terms that the injuries received by "R' cannot be as a result of her bumping with a bush with thorns while running. She further states that even the said injuries cannot be received as a result of fall from a tree. She states that there can be a difference six hours either ways regarding time during of injuries. To a suggestion that "R' was habitual to sexual intercourse as her vaginal permitted two fingers, she denies the same and states that the condition of the organ was such because the patient was to be under sedation. She states that no definite opinion about the intercourse can be given. She further states that as per the Expert Report and Radiology Report and general appearance of "R', she was aged about 12 years. She states that from her opinion, she cannot be said 16 years old. To a suggestion that the injury report is a false report, she denies.

21. Kripa Ram PW-4 is a co-villager who is stated to have reached the place of occurrence on the shouts raised by Smt. Nanni Bai. He states that at about 02:30 PM on the day of occurrence, he was cutting grass in the field of Harbhajan. He heard the shouts of Nanni Bai and immediately went to her and saw Shyam Lal wearing his pant, on which, he chased him and tried to catch him but could not do so. He further states that to have seen "R' in a naked condition and blood was oozing out from her private parts, on which, he asked Nanni Bai as to what Shyam Lal was doing, to which, Nanni Bai told him that Shyam Lal had climbed over "R' and was committing rape on her. He states that "R' was aged about 13 years. He further states that "R' was mentally deranged, deaf and dumb girl. He states that then Nanni Bai got "R' wrapped with towel and took her to the house. He also came with them to the house. He states that there was no male member in the house of Nanni Bai at that time. He identifies the accused who is present in court.

22. In his cross examination, he states that he had left his house on the day of occurrence at about 01:30 PM, and on his way, met certain people and spent around 15 minutes with them and then had gone at around 01:45 PM from that place and reached the field of Harbhajan in 5-7 minutes. He further states that he had cut grass for about 30 minutes, when he heard the shrieks of Nanni Bai. He states that when he started from his house, he did not meet Nanni Bai, "R' and Shyam Lal the accused on the way. When he heard the shrieks of Nanni Bai, he was cutting grass at a distance of about 100 steps from the place from where Nanni Bai had raised the shouts. He could not see Nanni Bai from where he was, neither could have Nanni Bai seen him where he was. He states that there was no other person near about, he had seen Shyam Lal from a distance of about 15-20 steps. When he had reached the place of occurrence, he saw Shyam Lal pulling his pant which was upto the knee and he was semi naked. Shyam Lal started running after seeing him, he ran to catch Shyam Lal for some distance. He ran about 20-25 steps. Shyam Lal ran towards field of Dhruva Maharaj. He further states to have known Shyam Lal since his birth as he was also a resident of the same village. He states that when he reached there, it was

about 02:35 PM. He states that Nanni Bai belongs to his same caste as his. He states that he has no relationship with Nanni Bai. He states that his acquittance is with Nanni Bai as because of caste reasons. He states to have not gone to the police station. He states that his statement was recorded by the Investigating Officer after about a week of the incident near the shop of Hari Kishan in Qasba Bar. Apart from him other persons were also interrogated. He then went to his house. He was then never called and never taken any where. At the place where his statement was taken, the same was transcribed therein only. His signature was not taken, he is illiterate and cannot read what is written. To a suggestion that he did not see any such incident and was not present at the place of occurrence, he states to be false. To a further suggestion that he is only stating what he has heard, he states to be incorrect. To a further suggestion that he is giving a false statement at the behest of Nanni Bai, he states to be false.

23. Constable Sant Ram PW-5 states that at the time of occurrence, he was posted as a Constable at Police Station, Bar. On 01.09.2007 at about 08:30 PM, he took "R' for medical examination and at first went to Primary Health Centre, Bar where the doctor was not available and from there they went to District Women Hospital, Lalitpur where they were referred. On reaching District Women Hospital, Lalitpur since there was excessive bleeding from the private parts of "R' she was referred to Jhansi and then she was taken to Jhansi. In Jhansi, Medical College, the treatment was done and the doctor said that since it is a case of Lalitpur, the medical examination report may be got prepared from Lalitpur. They gave treatment to "R' but did not prepare any medical report about which he informed the S.H.O concerned who instructed him to take her Lalitpur. In consequence of which they reached Lalitpur at about 01:00 PM and her medical examination was done on 02.09.2007.

24. In his cross examination, he states that the grand-mother of the girl accompanied them upto P.H.C, Bar and at PHC Bar, the grandfather of the girl met them and he was accompanying them upto Lalitpur and taken to Jhansi and then back to Lalitpur. He states that there was no other female Constable accompanying them.

25. Shiv Shankar, Sub-Inspector/PW-6 was posted as the Sub-Inspector at Police Station, Bar at the date and time time of the occurrence. He is the Investigating Officer of the case. He initially identifies the handwriting of Constable Bhagwat Narain Nayak who was working with him but had died who had transcribed the chik First Information Report, the same was marked as Exb: Ka-6 to the records. He further identifies the handwriting of the said Constable who had transcribed the GD No. 36 at 20:30 hrs on 01.09.2007 at the said Police Station as the *kayami* GD. He identifies the handwriting of the said person from the original and produces its copy, thus the same is numbered as a true copy to the original and is marked as Exb: Ka-7 to the records. He further identifies the handwriting and signature of the S.H.O Baljeet Singh and proved GD No. 12 transcribed at 09:45 PM at the said Police Station, the same is marked as Exb: Ka-8 to the records. He further states that he took up the investigation of the matter on 01.09.2007 and after recording the chik FIR recorded the statement of the first informant and proceeded towards the place

of occurrence in the night. He states that as it was night the spot inspection could not done and then he got involved in tracing the accused on 02.09.2007. He recorded the statement Smt. Nanni Bai, the eye witness to the occurrence and in her presence and on her pointing out inspected the place of occurrence and prepared the site plan which is Exb: Ka- 9 to the records.

26. He further states to have recovered the blood stained mud and grass and plain mud and grass in presence of Smt. Nanni Bai and Deepak Dheemar and sealed the same. The recovery memo was marked as Exb: Ka-12 to the records. On 02.09.2007 at about 05:00 PM, he arrested the accused Shyam Lal from Pulwara Tirahey on the information of police informer and then he was lodged at lock up at the Police Station and his statement was recorded. He asked about the clothes which were worn by the accused at the time of the incident, to which, he stated that the underwear had sustained blood stains, he had burnt it. He further states that 04.09.2007 he transcribed the medical examination report of "R' in the case diary and then records the statement of Head Constable Bhagwat Narain and Constable Sant Ram on 08.09.2007. The supplementary medical examination report and pathological report was received by him and he transcribed them in the case diary. On the same day, he tried to interrogate "R' and gives his opinion that as she is mentally deranged and unable to give any statement. She was tried to ask by gesture but she could not give any reply to do. He then records the statement of Kripa Ram and then submitted charge sheet no. 91 of 2007 which is marked as Exb: Ka- 10 to the records. He further states that the material exhibits of the case were sent to the chemical analyst through Constable on 27.09.2007.

27. In his cross examination, he states that he tried to interrogate "R' at her house but since she was mentally deranged she could not give any statement. He states that he has mentioned in the case diary about his efforts regarding interrogation of "R'. He states that she was unable to talk, unable to understand gestures but still she gave some gestures and was not able to speak a word. He states that he had examined Kripa Ram and Smt. Nanni Bai at her house. He further states that the statement of Deepak was recorded at the Police Station. He states that at the time of preparation of site plan, Inspector Parashu Ram Pandey, Nanni Bai and Deepak were present there, the same was prepared on 02.09.2007. In the last, to a suggestion that he had done the entire paper work while being at the Police Station, he denies the same. To a further suggestion that as the prosecutrix/victim not being able to give any statement, a false charge sheet has been filed by him, he denies the same.

28. Toran Singh PW-7 was working as a Constable Police at Police Station Bar. He states that on 27.09.2007, he was given two bundles from the *maalkhana* of Police Station which he received for chemical analyst, Agra from which one bundle related to the present case. The other was of Case Crime No. 631 of 2007. He states that his ravangi was recorded in the GD No. 8 at 06:10 AM by Constable Bhagwat Narain, he identifies the handwriting and signature. The photocopy of the same was produced by him which was marked as Exb: Ka-11. He further states that the said material in a sealed condition was taken by him and delivered by him at the Forensic Science Laboratory, Agra. He states that during the intervening period, the said material was in his *supurtagi* and he did not let any one see and touch the same. He then

identifies proves the return GD dated 29.09.2007 being GD No. 21 transcribed at 10:30 PM by Constable *Moharrir*, Mathura Prasad, on which, his signature was also there and identifies it, the photocopy of the same was filed by him which was marked as Exb: Ka-12 to the records. He further states that the docket dated 10.09.2007 for the said material was prepared in the name of Constable Umesh Chandra Sharma which was taken by him to Agra but as there were three bundles, to which, an objection was raised there and the material was sent back, then Constable Umesh Chandra Sharma was sent on some other duty by the orders of the DIG and as such a new docket dated 29.06.2007 was prepared in his name. In his cross examination, to a suggestion that the material was not sealed, he denies the same.

29. The accused in his statement recorded under Section 313 Cr.P.C. states that the present case has been instituted due to an old enmity. He states that he had a fight with Deepak Dheeman and due to the said enmity, he has been falsely implicated. He further states that to give no defence evidence.

30. The trial court from the material on record came to the conclusion that the prosecutrix/victim was aged about 12 years on the date of the occurrence. The accused did not challenge the age of the prosecutrix and even no suggestion has been put on behalf of the accused regarding the age of the prosecutrix/victim nor he has been able to prove by any oral or documentary evidence that the prosecutrix/victim was above 12 years of age on the day of the occurrence and as such the age of the prosecutrix/victim was about 12 years and the accused who was charged under the tried sections is found guilty and the prosecution has succeeded in proving the charge against the accused beyond any reasonable doubt and convicted and sentenced him.

31. Learned counsel for the appellant at the very outset argued that he is not challenging the conviction but his argument is only on the quantum of sentence as provided to the appellant which he argues is excessive. Section 376 IPC is as follows:

"Section 376 IPC. Punishment for rape.--

(1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the women raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both: Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

(2) Whoever,--

(a) being a police officer commits rape--

(i) within the limits of the police station to which he is appointed; or

(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) on a woman in his custody or in the custody of a police officer subordinate to him; or

(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as

such public servant or in the custody of a public servant subordinate to him; or

(c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a woman's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or

(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

(e) commits rape on a woman knowing her to be pregnant; or

(f) commits rape on a woman when she is under twelve years of age; or

(g) commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine: Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years. Explanation

1.--Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section. Explanation

2.--"Women's or children's institution" means an institution, whether called an orphanage or a home for neglected woman or children or a widows' home or by any other name, which is established and maintained for the reception and care of woman or children. Explanation 3.--"Hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation"

32. The act as it stood gave a punishment of rigorous imprisonment not less than 10 years which may be for life and also liable for fine with a proviso that the Court may for adequate and special reasons to be mentioned in the judgment impose and sentence an imprisonment of either description for a term of less than 10 years. The simple reading of the Section shows to say that the act provides for a minimum sentence of 10 years which may be upto life imprisonment along with fine, with a proviso that for adequate and special reasons to be recorded in the judgment a sentence of imprisonment of either description for a term less than 10 years can also be provided.

33. In the present matter, the learned counsel for the appellant while relying upon the said two judgments which have been referred to above has stated that on the basis of the said two decisions the sentence of life imprisonment as imposed be reduced.

34. In the case of **Rajendra Dutt** (supra), the accused therein was charged for offence under Section 376(2)(f) and 342 IPC and was acquitted vide judgment and order dated 28.07.2004 passed by the First Adhoc Assistant Sessions Judge, Panaji. In an appeal against the said acquittal, the High Court convicted the appellant under Section 376(2)(f) and 342 IPC and sentenced him to 10 years rigorous and a fine of Rs. 10,000/- under first count and one months rigorous imprisonment and a fine of Rs. 1,000/- under the second count. An appeal was preferred to the Apex Court which was decided by the said judgment. The said appeal was dismissed with the

modification in fine of Rs. 10,000/- imposed under Section 376(2)(f) IPC which was reduced to Rs. 1,000/- and a fine of Rs. 1,000/- imposed under Section 342 IPC was set aside. The substantive sentence of ten years rigorous imprisonment awarded under Section 376(2)(f) IPC and one month rigorous imprisonment under Section 342 IPC were maintained.

35. In the other judgment relied by the learned counsel for the appellant **Babu @ Mannu** (supra), the accused was convicted under Section 376 IPC and 506(2) IPC and sentenced to undergo imprisonment for life with a fine of Rs. 20,000/- in default, to further undergo rigorous imprisonment for three years. The accused therein preferred an appeal before the High Court and the High Court dismissed the appeal and confirmed the sentenced and conviction as awarded by the Additional Sessions Judge against the judgment of the High Court. The accused approached the Apex Court with a limited stand that he is not challenging the conviction but questioning the quantum of sentence only. The Apex Court while deciding the appeal confirmed the conviction as imposed upon the appellant therein, however, the sentence of life imprisonment was modified to rigorous imprisonment for ten years with a fine of Rs. 1,000/- and in default to further undergo rigorous imprisonment one year. The ground which found consideration before the Apex Court is as follows:-

"11) Considering the fact that the victim, in the case on hand, was aged about 7 years on the date of the incident and the accused was in the age of 18/19 years and also of the fact that the incident occurred nearly 10 years ago, the award of life imprisonment which is maximum prescribed is not warranted and also in view of the mandate of Section 376(2)(f) IPC, we feel that the ends of justice would be met by imposing RI for 10 years. Learned counsel appearing for the appellant informed this Court that the appellant had already served nearly 10 years. "

36. The judgment of **Rajendra Dutt** (supra) is distinguishable from the facts of the present matter itself, inasmuch as, the accused therein was acquitted by the trial court against which an appeal was preferred to the High Court which was allowed and then he was convicted against which an appeal was preferred before the Apex Court under Section 2(A) of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970. Even, therein the Apex Court dismissed the appeal but maintained the conviction and sentence of 10 years as imposed upon the appellant by the High Court.

In so far as the judgment of **Babu @ Munna** (supra) is concerned, one of the facts which weighed with the Apex Court was the age of the accused therein being 18/19 years. Even on this count, the present case stands distinguished with the said case.

37. The law regarding the sentencing in a matter of rape with a minor girl has been sculled out in the case of **Shyam Narain** (supra). The Apex Court has held as follows:

"11. Primarily it is to be borne in mind that sentencing for any offence has a social goal. Sentence is to be imposed regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the

accused must realise that the crime committed by him has not only created a dent in his life but also a concavity in the social fabric. The purpose of just punishment is designed so that the individuals in the society which ultimately constitute the collective do not suffer time and again for such crimes. It serves as a deterrent. True it is, on certain occasions, opportunities may be granted to the convict for reforming himself but it is equally true that the principle of proportionality between an offence committed and the penalty imposed are to be kept in view. While carrying out this complex exercise, it is obligatory on the part of the Court to see the impact of the offence on the society as a whole and its ramifications on the immediate collective as well as its repercussions on the victim.

12. In this context, we may refer with profit to the pronouncement in **Jameel v. State of Uttar Pradesh: (2010) 12 SCC 532**, wherein this Court, speaking about the concept of sentence, has laid down that it is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence."

13. In **Shailesh Jasvantbhai and another v. State of Gujarat and others: (2006) 2 SCC 359**, the Court has observed thus:

"Friedman in his Law in Changing Society stated that: "State of criminal law continues to be - as it should be -a decisive reflection of social consciousness of society." Therefore, in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration".

14. In **State of M.P. v. Babulal: AIR 2008 SC 582**, two learned Judges, while delineating about the adequacy of sentence, have expressed thus : -

"19. Punishment is the sanction imposed on the offender for the infringement of law committed by him. Once a person is tried for commission of an offence and found guilty by a competent court, it is the duty of the court to impose on him such sentence as is prescribed by law. The award of sentence is consequential on and incidental to conviction. The law does not envisage a person being convicted for an offence without a sentence being imposed therefore.

20. The object of punishment has been succinctly stated in **Halsbury's Laws of England, (4th Edition: Vol.II: para 482)** thus:

"The aims of punishment are now considered to be retribution, justice, deterrence, reformation and protection and modern sentencing policy reflects a combination of several or all of these aims. The retributive element is intended to show public revulsion to the offence and to punish the offender for his wrong conduct. The concept of justice as an aim of punishment means both that the punishment should fit the offence and also that like offences should receive similar

punishments. An increasingly important aspect of punishment is deterrence and sentences are aimed at deterring not only the actual offender from further offences but also potential offenders from breaking the law. The importance of reformation of the offender is shown by the growing emphasis laid upon it by much modern legislation, but judicial opinion towards this particular aim is varied and rehabilitation will not usually be accorded precedence over deterrence. The main aim of punishment in judicial thought, however, is still the protection of society and the other objects frequently receive only secondary consideration when sentences are being decided". (emphasis supplied)"

15. In **Gopal Singh v. State of Uttarakhand: 2013 (2) SCALE 533**, while dealing with the philosophy of just punishment which is the collective cry of the society, a two-Judge Bench has stated that just punishment would be dependent on the facts of the case and rationalised judicial discretion. Neither the personal perception of a Judge nor self- adhered moralistic vision nor hypothetical apprehensions should be allowed to have any play. For every offence, a drastic measure cannot be thought of. Similarly, an offender cannot be allowed to be treated with leniency solely on the ground of discretion vested in a Court. The real requisite is to weigh the circumstances in which the crime has been committed and other concomitant factors.

16. The aforesaid authorities deal with sentencing in general. As is seen, various concepts, namely, gravity of the offence, manner of its execution, impact on the society, repercussions on the victim and proportionality of punishment have been emphasized upon. In the case at hand, we are concerned with the justification of life imprisonment in a case of rape committed on an eight year old girl, helpless and vulnerable and, in a way, hapless. The victim was both physically and psychologically vulnerable. It is worthy to note that any kind of sexual assault has always been viewed with seriousness and sensitivity by this Court.

17. In **Madan Gopal Kakkad v. Naval Dubey and another: (1992) 3 SCC 204**, it has been observed as follows:-

"... though all sexual assaults on female children are not reported and do not come to light yet there is an alarming and shocking increase of sexual offences committed on children. This is due to the reasons that children are ignorant of the act of rape and are not able to offer resistance and become easy prey for lusty brutes who display the unscrupulous, deceitful and insidious art of luring female children and young girls. Therefore, such offenders who are menace to the civilized society should be mercilessly and inexorably punished in the severest terms."

18. In **State of Andhra Pradesh v. Bodem Sundra Rao: AIR 1996 SC 530**, this Court noticed that crimes against women are on the rise and such crimes are affront to the human dignity of the society and, therefore, imposition of inadequate sentence is injustice to the victim of the crime in particular and the society in general. After so observing, the learned Judges had to say this: -

"The Courts have an obligation while awarding punishment to impose appropriate punishment so as to respond to the society's crime for justice against such criminals. Public abhorrence of the crime needs a reflection through the Court's verdict in the measure of punishment. The Courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large

while considering imposition of the appropriate punishment."

19. In **State of Punjab v. Gurmit Singh and others: AIR 1996 SC 1393**, this Court stated with anguish that crime against women in general and rape in particular is on the increase. The learned Judges proceeded further to state that it is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection of the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. Thereafter, the Court observed the effect of rape on a victim with anguish: -

"We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female."

20. In **State of Karnataka v. Krishnappa: (2000) 4 SCC 75**, a three-Judge Bench opined that the courts must hear the loud cry for justice by the society in cases of the heinous crime of rape on innocent helpless girls of tender years and respond by imposition of proper sentence. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the court. It was further observed that to show mercy in the case of such a heinous crime would be travesty of justice and the plea for leniency is wholly misplaced.

21. In **Jugendra Singh v. State of Uttar Pradesh: (2012) 6 SCC 297**, while dwelling upon the gravity of the crime of rape, this Court had expressed thus: -

"Rape or an attempt to rape is a crime not against an individual but a crime which destroys the basic equilibrium of the social atmosphere. The consequential death is more horrendous. It is to be kept in mind that an offence against the body of a woman lowers her dignity and mars her reputation. It is said that one's physical frame is his or her temple. No one has any right of encroachment. An attempt for the momentary pleasure of the accused has caused the death of a child and had a devastating effect on her family and, in the ultimate eventuate, on the collective at large. When a family suffers in such a manner, the society as a whole is compelled to suffer as it creates an incurable dent in the fabric of the social milieu."

22. Keeping in view the aforesaid enunciation of law, the obtaining factual matrix, the brutality reflected in the commission of crime, the response expected from the courts by the society and the rampant uninhibited exposure of the bestial nature of pervert minds, we are required to address whether the rigorous punishment for life imposed on the appellant is excessive or deserves to be modified. The learned counsel for the appellant would submit that the appellant has four children and if the sentence is maintained, not only his life but also the life of his children would be ruined. The other ground that is urged is the background of impecuniousity. In essence, leniency is sought on the base of aforesaid mitigating factors. It is seemly to note that the legislature, while prescribing a minimum sentence for a term which shall not be less than ten years, has also provided that the sentence may be extended upto life. The legislature, in its wisdom, has left it to the discretion of the Court. Almost for the last three decades, this Court has been

expressing its agony and distress pertaining to the increased rate of crimes against women. The eight year old girl, who was supposed to spend time in cheerfulness, was dealt with animal passion and her dignity and purity of physical frame was shattered. The plight of the child and the shock suffered by her can be well visualised. The torment on the child has the potentiality to corrode the poise and equanimity of any civilized society. The age old wise saying "child is a gift of the providence" enters into the realm of absurdity. The young girl, with efflux of time, would grow with traumatic experience, an unforgettable shame. She shall always be haunted by the memory replete with heavy crush of disaster constantly echoing the chill air of the past forcing her to a state of nightmarish melancholia. She may not be able to assert the honour of a woman for no fault of hers. Respect for reputation of women in the society shows the basic civility of a civilised society. No member of society can afford to conceive the idea that he can create a hollow in the honour of a woman. Such thinking is not only lamentable but also deplorable. It would not be an exaggeration to say that the thought of sullying the physical frame of a woman is the demolition of the accepted civilized norm, i.e., "physical morality". In such a sphere, impetuosity has no room. The youthful excitement has no place. It should be paramount in everyone's mind that, on one hand, the society as a whole cannot preach from the pulpit about social, economic and political equality of the sexes and, on the other, some pervert members of the same society dehumanize the woman by attacking her body and ruining her chastity. It is an assault on the individuality and inherent dignity of a woman with the mindset that she should be elegantly servile to men. Rape is a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a woman and the soul of the society and such a crime is aggravated by the manner in which it has been committed. We have emphasised on the manner because, in the present case, the victim is an eight year old girl who possibly would be deprived of the dreams of "Spring of Life" and might be psychologically compelled to remain in the "Torment of Winter". When she suffers, the collective at large also suffers. Such a singular crime creates an atmosphere of fear which is historically abhorred by the society. It demands just punishment from the court and to such a demand, the courts of law are bound to respond within legal parameters. It is a demand for justice and the award of punishment has to be in consonance with the legislative command and the discretion vested in the court. The mitigating factors put forth by the learned counsel for the appellant are meant to invite mercy but we are disposed to think that the factual matrix cannot allow the rainbow of mercy to magistrate. Our judicial discretion impels us to maintain the sentence of rigorous imprisonment for life and, hence, we sustain the judgment of conviction and the order of sentence passed by the High Court.

23. *Ex consequenti*, the appeal, being sans merit, stands dismissed."

38. It has further been held in various other judgments that an accused of rape has to be dealt with strong hands. In the present case, the accused was aged about 35 years as is evident from the charge sheet Ext. Ka-10 which is dated 08.09.2007. Even in the statement recorded under Section 313 Cr.P.C. which was recorded on 02.09.2009 the accused has given his age as 36 years.

39. Looking to both the documents i.e. the charge sheet and the statement recorded under Section 313 Cr.P.C. of the

accused, it is not in doubt that the accused was a grown up man aged somewhere between 35-36 years. "R' was mentally deranged, deaf and dumb girl since birth.

40. PW-2 Smt. Nanni Bai her grandmother is an eye witness to the incident and her statement in spite of her cross examination could not be shifted by the accused. Her presence as stated by her in her statement is very natural and the reason given by her for being present at the place of occurrence is very probable and prudent.

41. Kripa Ram PW-4 also gives a very natural version of his presence near the place of occurrence. His reaching the place of occurrence is also consequent to the shouts of PW-2 Nanni Bai.

42. The medical examination examination report in no uncertain terms shows injuries on the external body and even injuries were present on the internal parts/private parts of the victim.

43. The age of "R' has conclusively been established by medical evidence, oral evidence of the father of "R' being PW-1 Deepak Dheemar and the grand-mother of "R' being PW-2 Smt. Nanni Bai as about 12 years. The supplementary medical examination report also gives her age to be about 12 years.

44. The doctor giving the supplementary medical examination report has specifically opined that the injuries on the private part of "R' was as a result of friction against hard blunt object and the probability of sexual intercourse may be there.

45. The accused in his defence could not bring any document on record on evidence to show his enmity with the first informant in spite of the fact that he had stated so in his statement recorded under Section 313 Cr.P.C.

46. Deterrence is needed more than the theory of reformation in cases like this. Although by saying so the need for re-affirmative approach in sentencing is not being ignored but looking to the brutal nature of offence committed by the accused on a minor, mentally deranged, deaf and dumb girl aged about 12 years leaving her all bleeding from her private parts also inflicting injuries in the course of the same on her body which stands duly proved, leaves us with no other hypothesis but that the applicant-appellant has committed rape upon the girl which was witnessed by an eye witness. In the result, the sentence as awarded by the trial court is found to be proper and would be the appropriate sentence awarded.

47. In the result, this Court comes to the conclusion that the prosecution has succeeded in proving its case beyond all reasonable doubts against the appellant. The conviction and sentenced as awarded by the trial court is hereby upheld. The present appeal lacks merit and is accordingly **dismissed**.

48. The appellant is stated to be in jail since 02.09.2007 being the date of arrest as effected by Shiv Shanker PW-6. He is directed to serve out the sentence as awarded to him by the trial court.

49. Let the lower court record and copy of this judgment be sent to the trial court forthwith for necessary information and its compliance.

50. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad.

51. The computer generated copy of such order shall be self attested by the counsel of the party concerned.

52.Theconcerned Court/Authority/Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

(2020)12ILR A354
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.11.2020

BEFORE
THE HON'BLE J.J. MUNIR, J.

Habeas Corpus Writ Petition No. 140 of 2020

Shaurya Gautam (Minor) & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Digvijay Singh

Counsel for the Respondents:
A.G.A., Sri Anurag Kumar, Sri Pankaj Kumar Tyagi

Petition instituted by father-seeking custody of his two minor children-from grandmother (maternal) and Ashram where they have been admitted for their upbringing while he was in Jail under charges of killing his wife-sole natural surviving guardian-father is an accused-unless acquitted –not appropriate to place the two minor children in his custody.

Writ Petition dismissed. (E-9).

Held, the totality of the circumstances on record show that unless acquitted, it would not be appropriate to place the two minor children in their father's custody. It is all the more so as the elder of the two minors, who can express an intelligent preference about the guardian he would like to be with, has ruled out the father. He is also fearful of the father. It is also true that the minors have been placed in the care of an ashram, but they do not appear to be neglected in the matter of their education. It is not, indeed, an ideal situation about the minors' welfare to be placed in institutional care, 12 where the grandmother and the aunt are around in the same town. But the fears expressed by the grandmother, who is an old woman and the aunt, do not appear to be entirely unfounded. Also, the grandmother is in touch with the minors, as Shaurya Gautam informed us. She pays them regular visit and her caring hand is always there. **(Para 16)**

Writ Petition dismissed. (E-9)

List of Cases cited:-

1. Syed Saleemuddin Vs Dr. Rukhsana & ors., (2001) 5 SCC 247

2. Nithya Anand Raghavan Vs State (NCT of Delhi) & anr., (2017) 8 SCC 454

3. Tejaswini Gaud & ors.Vs Shekhar Jagdish Prasad Tewari & ors., (2019) 7 SCC 42

4. Yashita Sahu Vs St. of Raj. & ors., (2020) 3 SCC 67

5. Nil Ratan Kundu & anr. Vs Abhijit Kundu, (2008) 9 SCC 413

(Delivered by Hon'ble J.J. Munir, J.)

1. Awadhesh Gautam has instituted this petition for a writ of habeas corpus, on behalf of his two minor children - Shaurya Gautam and Km. Dishi Gautam. He prays that a writ, order or direction in the nature of habeas corpus may be issued by this Court, ordering Smt. Brahma Devi Tiwari, respondent no. 4 and Sri Braddhanand Bal Ashram, Arya Samaj Jama Wala, Tilak Road, Dehradoon, Uttarakhand, respondent no. 5, to produce the two minor children-detenues before this Court and upon production, they be ordered to be set a liberty in the manner that the minors be given into the father's custody.

2. A *rule nisi* was initially granted on 13.02.2020, but remained uncomplied with, on account of disruption of judicial work in the wake of CoViD-19 pandemic. Nevertheless, Mr. Pankaj Kumar Tyagi, Advocate, put in appearance on 08.10.2020 and sought time to comply with the *rule nisi*. Time was granted, fixing a date for return on 15.10.2020. On 15.10.2020, the *rule nisi* was again not complied with. In the circumstances, the petition was formally admitted to hearing, with Mr. Anurag Dubey waiving service on behalf of the fourth respondent. The Superintendent of Police, Hathras, was ordered to cause the two detenues to be produced before the Court on 03.11.2020 at 02:00 p.m. The Superintendent of Police, Hathras, was directed to seek cooperation from his counterpart in District Dehradun, Uttarakhand, in order to enforce the *rule*.

3. In compliance with the *rule*, the minors were produced before the Court on 03.11.2020. This Court has interacted with the elder of the two minors, Shauya Gautam, besides the minors' grandmother (maternal) Smt. Brahma Devi Tiwari. The Court also spoke to the minors' aunt *(mausi)* Smt. Uma Rawat, as also Awadhesh Gautam, the father, who has brought this petition. This Court has perused the writ petition and the counter affidavit filed on behalf of the fourth respondent.

4. Heard Mr. Digvijay Singh, learned counsel for the petitioners and Mr. Pankaj Kumar Tyagi, learned counsel appearing on behalf of respondent no. 4 and Sri Jhamman Ram, learned Additional Government Advocate appearing on behalf of the State.

5. It appears that this issue about the minors' custody has arisen in the context of Awadhesh Gautam's wife and the minors' mother, Poonam Gautam, dying an unnatural death, regarding which, Awadhesh Gautam and four others of his family were reported to the police by the fourth respondent, charging them with murder and destruction of evidence. A First Information Report dated 20.09.2017, giving rise to Case Crime No. 238 of 2017, under Sections 147, 302, 201 of the Indian Penal Code, 18601, Police Station - Sahpau, District - Hathras, was registered. It is alleged in the writ petition that Shaurya Gautam and Km. Dishi Gautam were forcibly taken away by respondent no. 4, when Awadhesh Gautam was sent to jail, in connection with the crime last mentioned. It is also mentioned that he was admitted to bail by an order of this Court dated 15.11.2019 passed in *Criminal Misc. Bail Application No. 5179 of 2019*. Upon his release from jail, he approached the fourth respondent. A request was made to permit him to meet the children. He discovered there that his children have been lodged in Sri Braddhanand Bal Ashram, Uttarakhand. He claims to have met his children there. The children, it is claimed by Awadhesh Gautam, asked him to take them away with him. They stated that their grandmother (mother's mother) was not likeable and she had left them alone with the *ashram*, wherefrom they wished emancipation. It is also asserted that he produced documents before the *ashram* authorities to show that he was the minors' father, and requested them to hand him over custody of the minor children. It is asserted that the *ashram*, respondent no. 5, refused to release the children.

6. These facts have been strongly controverted in the counter affidavit filed by respondent no. 4. It is denied that Shaurya Gautam and Km. Dishi Gautam

were forcibly removed from Awadhesh's custody. Rather, the two minors had been placed in the care of Awadhesh's brother, Neeraj Gautam. It must be remarked that Neeraj Gautam does not appear to be a brother of Awadhesh's, but a cousin or relative. It was Neeraj Gautam who handed over custody of the two minors to the fourth respondent, their maternal grandmother, in the presence of the Station House Officer, Police Station - Sahpau, District - Hathras. A photocopy of the aforesaid memo, albeit undated, is annexed to the counter affidavit as C.A.-3. It is asserted that the grandmother's custody cannot, therefore, be termed as unlawful. The fourth respondent has said in paragraph 12 of the counter affidavit that Awadhesh Gautam has murdered her daughter and she fears for the minors' life, if they were placed in his custody.

7. Apart from the said stand, it is submitted that the fourth respondent's custody, being not outrightly unlawful, the father's remedy lies in instituting proceedings to seek the minor's custody before the court of competent jurisdiction, under the Guardians and Wards Act, 18902. It is pointed out that Dinesh Gautam, Awadhesh's brother, has moved the Principal Judge, Family Court, Hathras, under Section 9/10 of Act, 1890, with a prayer that he be appointed the minors' guardian and their custody ordered to be handed over to him. This application has been instituted on 25.07.2019, where summonses were issued on 21.10.2019, returnable on 26.11.2019. The said application is still pending. It is urged that this petition, therefore, for a writ of habeas corpus, is not maintainable.

8. This Court has keenly considered the matter in all its various facets. So far as the question regarding maintainability of a habeas corpus writ petition to decide issues regarding custody of children or guardianship between a parent and some other kindred, or between two parents, both of whom are natural guardians is concerned, is, by now, fairly well-settled. This question came up for consideration before the Supreme Court in **Syed Saleemuddin v. Dr. Rukhsana and Others**3. It was held in **Syed Saleemuddin (supra)** held thus :

"11. From the principles laid down in the aforementioned cases it is clear that in an application seeking a writ of Habeas Corpus for custody of minor children the principal consideration for the Court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that present custody should be changed and the children should be left in care and custody of somebody else. The principle is well settled that in a matter of custody of a child the welfare of the child is of paramount consideration of the Court. Unfortunately, the Judgment of the High Court does not show that the Court has paid any attention to these important and relevant questions. The High Court has not considered whether the custody of the children with their father can, in the facts and circumstances, be said to be unlawful. The Court has also not adverted to the question whether for the welfare of the children they should be taken out of the custody of their father and left in the care of their mother. However, it is not necessary for us to consider this question further in view of the fair concession made by Shri M.N. Rao that the appellant has no objection if the children remain in the custody of the mother with the right of the father to visit them as noted in the

judgment of the High Court, till the Family Court disposes of the petition filed by the appellant for custody of his children."

9. The same question came up before the Supreme Court in **Nithya Anand Raghavan v. State (NCT of Delhi) and Another**4. In **Nithya Anand Raghavan (supra)**, it was held :

"44. The present appeal emanates from a petition seeking a writ of habeas corpus for the production and custody of a minor child. This Court in Kanu Sanyal v. District Magistrate, Darjeeling [Kanu Sanyal v. District Magistrate, Darjeeling, (1973) 2 SCC 674 : 1973 SCC (Cri) 980] , has held that habeas corpus was essentially a procedural writ dealing with machinery of justice. The object underlying the writ was to secure the release of a person who is illegally deprived of his liberty. The writ of habeas corpus is a command addressed to the person who is alleged to have another in unlawful custody, requiring him to produce the body of such person before the court. On production of the person before the court, the circumstances in which the custody of the person concerned has been detained can be inquired into by the court and upon due inquiry into the alleged unlawful restraint pass appropriate direction as may be deemed just and proper. The High Court in such proceedings conducts an inquiry for immediate determination of the right of the person's freedom and his release when the detention is found to be unlawful.

45. In a petition for issuance of a writ of habeas corpus in relation to the custody of a minor child, this Court in Sayed Saleemuddin v. Rukhsana [Sayed Saleemuddin v. Rukhsana, (2001) 5 SCC 247 : 2001 SCC (Cri) 841] , has held that the principal duty of the court is to ascertain whether the custody of child is unlawful or illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person. While doing so, the paramount consideration must be about the welfare of the child. In Elizabeth [Elizabeth Dinshaw v. Arvand M. Dinshaw, (1987) 1 SCC 42 : 1987 SCC (Cri) 13] , it is held that in such cases the matter must be decided not by reference to the legal rights of the parties but on the sole and predominant criterion of what would best serve the interests and welfare of the minor. The role of the High Court in examining the cases of custody of a minor is on the touchstone of principle of parens patriae jurisdiction, as the minor is within the jurisdiction of the Court [see Paul Mohinder Gahun v. State (NCT of Delhi) [Paul Mohinder Gahun v. State (NCT of Delhi), 2004 SCC OnLine Del 699 : (2004) 113 DLT 823] relied upon by the appellant]. It is not necessary to multiply the authorities on this proposition.

46. The High Court while dealing with the petition for issuance of a writ of habeas corpus concerning a minor child, in a given case, may direct return of the child or decline to change the custody of the child keeping in mind all the attending facts and circumstances including the settled legal position referred to above. Once again, we may hasten to add that the decision of the court, in each case, must depend on the totality of the facts and circumstances of the case brought before it whilst considering the welfare of the child which is of paramount consideration. The order of the foreign court must yield to the welfare of the child. Further, the remedy of writ of habeas corpus cannot be used for mere enforcement of the directions given by the foreign court against a person within

its jurisdiction and convert that jurisdiction into that of an executing court. Indubitably, the writ petitioner can take recourse to such other remedy as may be permissible in law for enforcement of the order passed by the foreign court or to resort to any other proceedings as may be permissible in law before the Indian Court for the custody of the child, if so advised.

47. In a habeas corpus petition as aforesaid, the High Court must examine at the threshold whether the minor is in lawful or unlawful custody of another person (private respondent named in the writ petition). For considering that issue, in a case such as the present one, it is enough to note that the private respondent was none other than the natural guardian of the minor being her biological mother. Once that fact is ascertained, it can be presumed that the custody of the minor with his/her mother is lawful. In such a case, only in exceptionable situation, the custody of the minor (girl child) may be ordered to be taken away from her mother for being given to any other person including the husband (father of the child), in exercise of writ jurisdiction. Instead, the other parent can be asked to resort to a substantive prescribed remedy for getting custody of the child.

10. More recently, the issue engaged the attention of their Lordships of the Supreme Court in **Tejaswini Gaud and Others v. Shekhar Jagdish Prasad Tewari and Others**5. In **Tejaswini Gaud** *(supra)*, it was held thus:

"19. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the Court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.

20. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus."

11. The Supreme Court, still later, considered the question in **Yashita Sahu v. State of Rajasthan and Others**6, where it was held :

"10. It is too late in the day to urge that a writ of habeas corpus is not maintainable if the child is in the custody of another parent. The law in this regard has developed a lot over a period of time but now it is a settled position that the court can invoke its extraordinary wirt jurisdiction for the best interest of the child. This has been done in *Elizabeth Dinshaw v. Arvand M. Dinshaw, Nithya Anand Raghavan v. State (NCT of Delhi) and Lahari Sakhamuri v. Sobhan Kodali* among others. In all these cases, the writ petitions were entertained. Therefore, we reject the contention of the appellant wife that the writ petition before the High Court of Rajasthan was not maintainable."

12. Here, the custody of the minors in the hands of the fourth respondent cannot be termed unlawful. The fourth respondent is the minors' grandmother. She has been given custody of the minors by Neeraj Gautam, the cousin or relative of Awadhesh's, in the presence of the Station House Officer, Police Station - Sahpau, District - Hathras, who had custody of the children after Awadhesh's arrest. Still, Awadhesh could say that being the natural guardian of the two minors, he has a right to seek their custody from the grandmother. It is precisely this right which Awadhesh asserts, by virtue of Section 6 (a) of the Hindu Minority and Guardianship Act, 19567. He says he is the sole natural surviving guardian, and therefore, entitled to the minors' custody. It is, no doubt, true that Awadhesh is the minors' natural guardian under Section 6 (a) of Act, 1956, but the issue about the minors' custody is not so much about the right of one who claims it, as it is about the minors' welfare. It is universally accepted for a principle in all matters, where questions relating to appointment or declaration of a guardian arise, or a claim is made to the minor's custody that it is the minor's welfare that is of paramount importance. This principle is engrafted in Section 13 (2) of Act, 1956 and also under Section 17 of Act, 1890. If it could be shown, therefore, *ex-facie*, that the minors' welfare is best secured in Awadhesh's hands, this Court would grant immediate custody to the father. Here, however, that does not appear to be the case. The father is an accused. The issue of welfare of the child cannot be mechanically determined. It is to be sensitively approached, taking into consideration both broad and subtle factors that would ensure it best. The principle governing custody of minor children, apart from other issues, fell for consideration of the Supreme Court in **Nil Ratan Kundu and Another v. Abhijit Kundu8. In Nil Ratan Kundu** *(supra)*, it was held by their Lordships thus :

Principles governing custody of minor children

52.In our judgment, the law relating to custody of a child is fairly well settled and it is this: in deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a human problem and is required to be solved with human touch. A court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the court is exercising *parens patriae* jurisdiction and is expected,*nay* bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development

and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor.

13. In **Nil Ratan Kundu**, facts also disclose that the father, who claimed the minor's custody from his maternal grandfather and grandmother, was, like here, an accused in a case relating to his wife's dowry death. The father's involvement in a case relating to his wife's dowry death was regarded by their Lordships as an important factor to be carefully addressed by the Court in reference to its facts and evidence. It must be noted here that **Nil Ratan Kundu** was a case that arose out of the proceedings under the Act, 1890, and therefore, there were detailed findings with reference to evidence, which is not the case here. Nevertheless, the fact about the involvement of a natural guardian, in a criminal case relating to the death of a spouse, was held to be an important consideration while determining the question of welfare of the minor. In this regard, it was held in **Nil Ratan Kundu** thus :

62. Now, it has come in evidence that after the death of Mithu (mother of Antariksh) and lodging of first information report by her father against Abhijit (father of Antariksh) and his mother (paternal grandmother of Antariksh), Abhijit was arrested by the police. It was also stated by Nil Ratan Kundu (father of Mithu) that mother of accused Abhijit (paternal grandmother of Antariksh)*absconded* and Antariksh was found sick from the house of Abhijit.

63. In our considered opinion, on the facts and in the circumstances of the case, both the courts were duty-bound to consider the allegations against the respondent herein and pendency of the criminal case for an offence punishable under Section 498-A IPC. One of the matters which is required to be considered by a court of law is the "character" of the proposed guardian. In Kirtikumar[(1992) 3 SCC 573 : 1992 SCC (Cri) 778] , this Court, almost in similar circumstances, where the father was facing the charge under Section 498-A IPC, did not grant custody of two minor children to the father and allowed them to remain with the maternal uncle.

64. Thus, a complaint against the father alleging and attributing the death of the mother, and a case under Section 498-A IPC is indeed a relevant factor and a court of law must address the said circumstance while deciding the custody of the minor in favour of such a person. To us, it is no answer to state that in case the father is convicted, it is open to the maternal grandparents to make an appropriate application for change of custody. Even at this stage, the said fact ought to have been considered and an appropriate order ought to have been passed.

14. It was also emphasized in **Nil Ratan Kundu** that wishes of the minor ought to be taken into consideration, where the minor is of an age that he can express his/her intelligent choice. This is a principle embodied in Section 17 (3) of Act, 1890. Bearing in mind these facts, this Court carefully interacted with the elder of the two minors, that is to say, Shaurya Gautam.

He is a 10-year old boy and fairly intelligent. He informed the Court that he and his sister stay at Sri Braddhanand Bal Ashram, but he is not at all disturbed about the fact that his maternal grandmother has placed him and his sister there. He also told the Court that there is a school, which he and his sister attend. The grandmother *(nani)* comes over to meet Shaurya and his sister. He is emphatic that he does not wish to go back to his father or stay with him. On being asked the reason, he says that he fears for his life. He also said that he wishes to stay at the hostel. During the course of conversation, the child emotionally brokedown and wept. He insisted upon staying with the hostel and refused to go back to his father. Smt. Brahma Devi Tiwari, the minors' grandmother, told the Court that she stayed alone. Her daughter and son-in-law live close by. On being asked why she does not house the children in her home, she said that she is fearful of their father. He would kidnap both of them and get her framed in a false case. It is for the said reason that she has housed the two children in the *ashram*. The minors' aunt, Smt. Uma Rawat, told the Court that she is a housewife. Her husband is an engineer in a US-based firm, domiciled in Dehradun. She also reiterated that they do not keep the children with them, because the father would get them implicated in some false case. The father, on being asked, denied these allegations and said that he never threatened his in-laws.

15. This Court has looked into the allegations in the First Information Report, which shows that the father is facing trial on a charge of murder of his wife. The First Information Report indicates that his wife had called her mother on 17.09.2017 that there was a conspiracy afoot, where she could be crushed to death under the wheels of a tractor. Later on, she was found dead near Jalesar Road, portraying it as an accident. At least, that is the case in the First Information Report. The postmortem report shows crush injuries, from the skull to the upper abdomen. Awadhesh Gautam has said in the petition that his wife met an unnatural death, due to accidental burn injuries. This does appear to be the case.

16. This Court does not consider it appropriate to say anything more about the issue. Whatever has been remarked hereinabove, is only to fathom the nature of the allegations against Awadhesh Gautam. It is, in no way, an expression of opinion about the criminal charges against him. The totality of the circumstances on record show that unless acquitted, it would not be appropriate to place the two minor children in their father's custody. It is all the more so as the elder of the two minors, who can express an intelligent preference about the guardian he would like to be with, has ruled out the father. He is also fearful of the father. It is also true that the minors have been placed in the care of an *ashram*, but they do not appear to be neglected in the matter of their education. It is not, indeed, an ideal situation about the minors' welfare to be placed in institutional care, where the grandmother and the aunt are around in the same town. But the fears expressed by the grandmother, who is an old woman and the aunt, do not appear to be entirely unfounded. Also, the grandmother is in touch with the minors, as Shaurya Gautam informed us. She pays them regular visit and her caring hand is always there.

17. In the overall circumstances of the case, this Court does not think that Awadhesh Gautam is entitled to the minor's custody, at least at this stage, when he is

facing criminal charges. If and when he is acquitted and the children, still minors, it would be open to him to make an appropriate application, seeking their custody to the court of competent jurisdiction, under the Act, 1890, which shall be decided in accordance with law, according to the circumstances then obtaining, without being influenced by anything said here.

18. In the result, this petition fails and stands **dismissed**.

19. In totality of the circumstances obtaining for the present, this Court does not find it appropriate to grant any visitation rights to Awadhesh Gautam.

(2020)12ILR A362
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.12.2020

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Habeas Corpus Writ Petition No. 362 of 2020

Km. Rachna & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Avinash Pandey, Sri Shagir Ahmad, Amicus

Counsel for the Respondents:
Sri J.K. Pandey, A.G.A.

Parents claimed that minor was enticed by one Arjun and minor has left with him-Minor claim that she was beaten by her mother-out of frustration she has gone to her friend's home who is a sister of Arjun-Magistrate determined her age as 17 years and directed Child Welfare Committee directed to keep her in Women protection home-questions involved-Whether writ of habeas corpus maintainable against the judicial order passed by Magistrate or by Child welfare Committee?-Whether detention of a corpus in women Protection Home pursuant to an order is an illegal detention? Matter referred to Larger bench-as different views in this context exist. (E-9)

List of Cases cited:-

1. Menu Patel Vs St. of UP, 2015 SCC OnLine All 5892

2. Smt. Neelam Vs St. of U.P. & ors., Habeas Corpus Writ Petition No.36519 of 2015, decided on 20.7.2015

3. Pushpa Devi Vs St. of U.P. & ors., 1994 HVVD (All) C.R. Vol. II 259

4. Smt. Raj Kumari Vs Superintendent, Women Protection, Meerut & ors., 1997 (2) A.W.C. 720

5. Smt. Preeti Nishad through her Husband, Mahendra Kumar Vs St. of U.P., Habeas Corpus No.146 of 2015.

6. Rahul Kumar Singh & anr. Vs St. of U.P. & ors., Habeas Corpus Writ Petition No.47442 of 2015, decided on 15.9.2015

7. Kajal & anr. Vs St. of U.P. & ors., Habeas Corpus Writ Petition No.3914 of 2018, decided on 22.2.2019

8. Saurabh Pandey Vs St. of U.P., 2019 SCC OnLine All 4430

9. Smt. Shahjahan Vs St. of U.P. & ors., 9 2015 SCC OnLine All 5224

10. Km. Mona @ Reema Vs St. of U.P., 2014 SCC OnLine All 7099

11. Guria Bhagat @ Guria Rawani Vs St. of Jhark. & ors., 2013 SCC OnLine Jhar 2149

12. Smt. Himani Vs St. of U.P. & ors., 2013 SCC OnLine All 13088

13. Akash Kumar Vs St of Jhark. & ors., 2014 (19) R.C.R. (Criminal) 816

14. Irfan Khan Vs St. of M.P. & ors., 2016 (3) MPLJ 449

15. Manish S/o Natvarlal Vaghela Vs St. of Guj., Special Criminal Application No.5659 of 2019, decided on 23.12.2019

16. Shikha Kumari Vs St. of Bih., 2020 CRI. LJ 2184

(Delivered by Hon'ble Pritinker Diwaker, J.)

1. This petition has been filed by the petitioners, seeking a writ of habeas corpus, commanding respondent no.4-Superintendent, Children Home (Girl) District Saharanpur, to release corpus-petitioner no.2-Km. Anchal, who has been allegedly illegally detained in the Children Home (Girl) District Saharanpur.

2. Facts of the instant case are that on 16.2.2020, FIR was lodged by Smt. Sudha, mentioning therein that on 15.2.2020, her minor daughter Km. Anchal (hereinafter referred to as 'petitioner no.2-corpus') aged 17 years has been enticed by one Arjun S/o Rishipal. She has alleged that while leaving the house, petitioner no.2-corpus had taken certain ornaments and cash amount. She has further alleged that the father, mother and brother of Arjun have helped him in taking petitioner no.2-corpus. Based on this FIR, offence under Sections 363 and 366 of IPC was registered against Arjun, his parents and relatives.

Later, petitioner no.2-corpus was recovered on 4.3.2020 and on the same day, her Section 161 Cr PC statement was recorded wherein she has stated that as quite often she was beaten by her mother, out of frustration, on 15.2.2020, without informing her family members, she had gone to the house of her friend, namely, Km. Rachna-petitioner no.1, sister of Arjun. She has further stated that she was never taken away by any one and of her own free-will, she was living with her friend. She, however, has refused for her medical examination. As per High School Certificate, her age has been found 17 years, whereas as per Radiological examination conducted on 6.3.2020, her age was found about 20 years. In her statement recorded under Section 164 of Cr PC on 7.3.2020, she has reiterated that of her own she had gone to the house of petitioner no.1 and that nobody had forcibly taken her. On 13.3.2020, petitioner no.2-corpus was produced before the Chief Judicial Magistrate, Saharanpur and it was submitted by the police that as per High School Certificate, age of petitioner no.2-corpus comes to 17 years and 20 days and, therefore, suitable order be passed in relation to her custody. Mother of petitioner no.2-corpus filed an application before the Magistrate to the effect that petitioner no.2-corpus is minor and, therefore, in the interest of justice, she be sent to Balika Vikas Grih/Child Development Home. After considering all the facts of the case, a finding was recorded by the Magistrate, determining the age of petitioner no.2-corpus to be 17 years and the Magistrate has directed for producing her before Bal Kalyan Samiti/Child Welfare Committee (hereinafter referred to as 'the Committee') for issuance of further direction with regard to the custody of petitioner no.2-corpus. Pursuant to the order passed by the Magistrate, petitioner no.-2-corpus was produced before Committee and the order was passed by the Committee for keeping her in Children Home (Girl). Pursuant to this order, petitioner no.2-corpus is in Children Home (Girl) Saharanpur.

3. Aggrieved with this order, present petition has been preferred for issuance of a

writ of habeas corpus. The main grounds, which have been raised by the petitioners, are:

(i) that in 164 of Cr PC statement, petitioner no.2-corpus has categorically stated that she was being subjected to torture by her mother and brother, therefore, she left her house;

(ii) that petitioner no.2-corpus was living happily with petitioner no.1, i.e. her friend;

(iii) that once the custody of petitioner no.2-corpus has already been denied by her parents and petitioner no.2-corpus wants to go with petitioner no.1, she could not have been sent to Children Home (Girl) and that she has been kept in Children Home (Girl) against her wish;

(iv) that petitioner no.2-corpus is not minor and, therefore, she cannot be kept against her wish; and

(v) that even if petitioner no.2-corpus is minor, then also she cannot be kept in Children Home (Girl) against her wish.

4. In compliance of the order passed by the Magistrate, the Committee has passed the order impugned, sending petitioner no.2- corpus to the Children Home (Girl) and pursuant to this order, petitioner no.2-corpus is in Children Home (Girl). It is this order, which has been challenged by the petitioner before this Court, seeking issuance of a writ of habeas corpus on the ground that the detention of the corpus is illegal and, therefore, she be set free forthwith. In this regard, reliance has been placed upon various judgments of this Court.

5. On the other hand, opposing the arguments of the petitioners, learned State Counsel has argued that the writ of habeas corpus is not maintainable as the order impugned has been passed by the Committee pursuant to the order of the Magistrate and the judicial order, right or wrong, cannot be assailed in a petition seeking writ of habeas corpus. State Counsel submits that petitioner no.2 has an efficacious alternative remedy of filing an appeal under Section 101 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as 'the Act') and the judicial order can only be challenged before the appellate Court. He submits that while passing the order impugned, the Committee has exercised the power of Magistrate and in view of the provisions of Section 27 of the Act, for all purposes, the Committee acts like the Magistrate. Once the order has been passed by the Magistrate, it can only be assailed before the appropriate Court by filing an appeal. In support thereof, he placed reliance on the various judgments passed by this Court.

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

7. Undisputedly, the Committee has passed the order pursuant to the order dated 13.3.2020 passed by the Magistrate. Provisions of Section 27 (9) of the Act makes it clear that while passing such orders, the Committee exercises the power of Judicial Magistrate. Section 27 of the Act reads as under:

"27. Child Welfare Committee.--(1) The State Government shall by notification in the Official Gazette constitute for every district, one or more Child Welfare Committees for exercising the powers and to discharge the duties conferred on such Committees in relation to children in need of care and protection

under this Act and ensure that induction training and sensitisation of all members of the committee is provided within two months from the date of notification.

(2) The Committee shall consist of a Chairperson, and four other members as the State Government may think fit to appoint, of whom at least one shall be a woman and another, an expert on the matters concerning children.

(3) The District Child Protection Unit shall provide a Secretary and other staff that may be required for secretarial support to the Committee for its effective functioning.

(4) No person shall be appointed as a member of the Committee unless such person has been actively involved in health, education or welfare activities pertaining to children for at least seven years or is a practicing professional with a degree in child psychology or psychiatry or law or social work or sociology or human development.

(5) No person shall be appointed as a member unless he possesses such other qualifications as may be prescribed.

(6) No person shall be appointed for a period of more than three years as a member of the Committee.

(7) The appointment of any member of the Committee shall be terminated by the State Government after making an inquiry, if--

(i) he has been found guilty of misuse of power vested on him under this Act;

(ii) he has been convicted of an offence involving moral turpitude and such conviction has not been reversed or he has not been granted full pardon in respect of such offence;

(iii) he fails to attend the proceedings of the Committee consecutively for three months without any valid reason or he fails to attend less than three-fourths of the sittings in a year.

(8) The District Magistrate shall conduct a quarterly review of the functioning of the Committee.

(9) The Committee shall function as a Bench and shall have the powers conferred by the Code of Criminal Procedure, 1973 (2 of 1974) on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of First Class.

(10) The District Magistrate shall be the grievances redressal authority for the Child Welfare Committee and anyone connected with the child, may file a petition before the District Magistrate, who shall consider and pass appropriate orders."

8. Further, before entering into the merits of the case, we feel it appropriate to refer to some important provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015. Sub-section (4) of Section 1 of the Act reads as under:

"(4) Notwithstanding anything contained in any other law for the time being in force, the provisions of this Act shall apply to all matters concerning children in need of care and protection and children in conflict with law, including –

(i) apprehension, detention, prosecution, penalty or imprisonment, rehabilitation and social re-integration of children in conflict with law;

(ii) procedures and decisions or orders relating to rehabilitation, adoption, re-integration, and restoration of children in need of care and protection."

Sub-section 14 (iii) (a) of Section 2 of the Act is as under:

"(14) "child in need of care and protection" means a child--

... ... …

(iii) who resides with a person (whether a guardian of the child or not) and such person--

(a) has injured, exploited, abused or neglected the child or has violated any other law for the time being in force meant for the protection of child"

Sections 29 and 37 of the Act are as under:

"29. Powers of Committee. (1) The Committee shall have the authority to dispose of cases for the care, protection, treatment, development and rehabilitation of children in need of care and protection, as well as to provide for their basic needs and protection.

(2) Where a Committee has been constituted for any area, such Committee shall, notwithstanding anything contained in any other law for the time being in force, but save as otherwise expressly provided in this Act, have the power to deal exclusively with all proceedings under this Act relating to children in need of care and protection."

37. Orders passed regarding a child in need of care and protection.- (1) The Committee on being satisfied through the inquiry that the child before the Committee is a child in need of care and protection, may, on consideration of Social Investigation Report submitted by Child Welfare Officer and taking into account the childs wishes in case the child is sufficiently mature to take a view, pass one or more of the following orders, namely:--

(a) declaration that a child is in need of care and protection;

(b) restoration of the child to parents or guardian or family with or without supervision of Child Welfare Officer or designated social worker;

(c) placement of the child in Childrens Home or fit facility or Specialised Adoption Agency for the purpose of adoption for long term or temporary care, keeping in mind the capacity of the institution for housing such children, either after reaching the conclusion that the family of the child cannot be traced or even if traced, restoration of the child to the family is not in the best interest of the child;

(d) placement of the child with fit person for long term or temporary care;

(e) foster care orders under section 44;

(f) sponsorship orders under section 45;

(g) directions to persons or institutions or facilities in whose care the child is placed, regarding care, protection and rehabilitation of the child, including directions relating to immediate shelter and services such as medical attention, psychiatric and psychological support including need-based counselling, occupational therapy or behaviour modification therapy, skill training, legal aid, educational services, and other developmental activities, as required, as well as follow-up and coordination with the District Child Protection Unit or State Government and other agencies;

(h) declaration that the child is legally free for adoption under section 38.

(2) The Committee may also pass orders for--

(i) declaration of fit persons for foster care;

(ii) getting after care support under section 46 of the Act; or

(iii) any other order related to any other function as may be prescribed."

Section 101 of the Act reads as under:

"101. Appeals.- (1) Subject to the provisions of this Act, any person aggrieved by an order made by the Committee or the Board under this Act may, within thirty days from the date of

such order, prefer an appeal to the Childrens Court, except for decisions by the Committee related to Foster Care and Sponsorship After Care for which the appeal shall lie with the District Magistrate:

Provided that the Court of Sessions, or the District Magistrate, as the case may be, may entertain the appeal after the expiry of the said period of thirty days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time and such appeal shall be decided within a period of thirty days.

(2) An appeal shall lie against an order of the Board passed after making the preliminary assessment into a heinous offence under section 15 of the Act, before the Court of Sessions and the Court may, while deciding the appeal, take the assistance of experienced psychologists and medical specialists other than those whose assistance has been obtained by the Board in passing the order under the said section.

(3) No appeal shall lie from,--

(a) any order of acquittal made by the Board in respect of a child alleged to have committed an offence other than the heinous offence by a child who has completed or is above the age of sixteen years; or

(b) any order made by a Committee in respect of finding that a person is not a child in need of care and protection.

(4) No second appeal shall lie from any order of the Court of Session, passed in appeal under this section.

(5) Any person aggrieved by an order of the Children's Court may file an appeal before the High Court in accordance with the procedure specified in the Code of Criminal Procedure, 1973 (2 of 1974)."

Section 102 of the Act is as under:

"102. Revision.- The High Court may, at any time, either on its own motion or on an application received in this behalf, call for the record of any proceeding in which any Committee or Board or Children's Court, or Court has passed an order, for the purpose of satisfying itself as to the legality or propriety of any such order and may pass such order in relation thereto as it thinks fit:

Provided that the High Court shall not pass an order under this section prejudicial to any person without giving him a reasonable opportunity of being heard."

9. In the case of **Menu Patel v. State of UP**1, it has been held by this Court:

"9. The issue whether the victim/corpus who is a minor, can be sent to Nari Niketan against her wish, is no longer res-integra and has been conclusively settled by a catena of decisions of this Court. In the case of *Smt. Kalyani Chowdhary v. State of U.P.* reported in 1978 Cr. L.J. 1003 (D.B.), a Division Bench of this Court has taken the view that:

"no person can be kept in a Protective Home unless she is required to be kept there either in pursuance of Immoral Traffic in Women and Girls Protection Act or under some other law permitting her detention in such a home. In such cases, the question of minority is irrelevant as even a minor cannot be detained against her will or at the will of her father in a Protective Home."

Further, in **Smt. Neelam vs. State of Uttar Pradesh & Ors**2, a Division Bench of this Court has again held that:

"The issue whether the victim/corpus who is a minor, can be sent

to Nari Niketan against her wish, is no longer res-integra and has been conclusively settled by a catena of decisions of this Court. In the case of *Smt. Kalyani Chowdhary v. State of U.P.* reported in 1978 Cr. L.J. 1003 (D.B.), a Division Bench of this Court has taken the view that:

"no person can be kept in a Protective Home unless she is required to be kept there either in pursuance of Immoral Traffic in Women and Girls Protection Act or under some other law permitting her detention in such a home. In such cases, the question of minority is irrelevant as even a minor cannot be detained against her will or at the will of her father in a Protective Home."

In **Pushpa Devi v. State of Uttar Pradesh & Ors**3, it has been held by this Court:

"In any event, the question of age is not very material in the petitions of the nature of habeas corpus as even a minor has a right to keep her person and even the parents cannot compel the detention of the minor against her will, unless there is some other reason for it.

We have no mind to enter into the question and decide as to when a particular minor is to be set at liberty in respect of her person or whether she shall be governed by the direction of her parents. The question of custody of the petitioner as a minor, will depend upon various factors such as her marriage which she has stated to have taken place with Guddu before the Magistrate.

Apart from the above factors, the more important aspect is as to whether there is any authority for detention of the petitioner with any person in law. Though, it is said that she has been detained in the Nari Niketan under the directions of the Magistrate, the first thing to be seen should be as to whether the Magistrate can direct the detention of a person in the situation in which the petitioner is. No Magistrate has an absolute right to detain any person at the place of his choice or even any other place unless it can be justified by some law and procedure. It is very clear that this petitioner would not be accused of the offence under Sections 363 and 366 I. P. C. We are taking the version because she could only be a victim of it. A victim may at best be a witness and there is no law at least now has been quoted before us whereunder the Magistrate may direct detention of a witness simply because he does not like him to go to any particular place. In such circumstances, the direction of the Magistrate that she shall be detained at Nari Niketan is absolutely without jurisdiction and illegal. Even the Magistrate is not a natural guardian or duly appointed guardian of all minors."

A Division Bench of this Court in the case of **Smt. Raj Kumari v. Superintendent, Women Protection, Meerut & Ors.**4 had taken a similar view and laid down the following dictum:

"In view of the above, it is well settled view of this Court that even a minor cannot be detained in Government Protective Home against her wishes. In the instant matter, petitioner has desired to go with Sunil Kumar besides this according to the two medical reports, i. e. of the Chief Medical Officer and L. L. R. M., College Meerut, the petitioner is certainly not less than 17 years and she understands her well being and also is capable of considering her future welfare. As such, we are of the opinion that her detention in Government Protective Home, Meerut against her wishes is undesirable and impugned order dated 23.11.96 passed by the Magistrate directing her detention till the party concerned gets a declaration by the civil court or the competent court of law

regarding her age, is not sustainable and is liable to be quashed."

Yet this Court, in another case in Smt. Preeti Nishad through her Husband, Mahendra Kumar v. State of Uttar Pradesh5, observed as under:

"The main objection of Sri S. N. Tilhari, learned A.G.A. that the petitioner should be asked to file revision at this stage will be defeating the spirit of Article 21 of the Constitution of India. The petitioner is neither an accused nor an offender of law. She is simply a citizen of this country who has done no wrong. She is major. The C.M.O. concerned has given her age to be around 20 years. This is based on medical examination and x-ray report. So far the certificate submitted by the father is concerned, it appears to be fabricated. corpus has clearly mentioned that she has never studied in the school from where the age certificate has been obtained. It is not a matriculation certificate. It is a lower class certificate issued recently after the controversy arose. It cannot be trusted compared to the C.M.O. report and her own version before the Court.

She has made statement before this Court that she does not want to live in any Nari Niketan or Sudhar Griha. She does not even want to live with his father. Somehow due to incorrect judicial order she is languishing in Nari Niketan for the last seven months. It will be a travesty of justice if this Court dismisses this petition on any alternative remedy. The law on the subject is very clear. The Court cannot shut its eyes and relegate a citizen to further harassment and illegal detention. Neither the S.D.M. nor the A.D.J. had any jurisdiction to send a lady to a protective home without her consent. The respective orders passed by them are set aside."

While concluding in the case of **Smt. Neelam** (supra), this Court held as follows:

"Now coming to the second objection canvassed by learned A. G. A. before this Court that the detention of the petitioner cannot be said to be illegal as she has been sent to Nari Niketan in pursuance of a judicial order, we hold that the second objection raised by learned A. G A. is also without any merit in view of the principle laid down by the a Division Bench of this Court in the case of Pushpa Devi (supra) that a victim may at best be a witness and there is no law at least now has been quoted before us whereunder the Magistrate may direct detention of a witness simply because he does not like him to go to any particular place.

Thus, merely because the petitioner has been sent to Nari Niketan pursuant to a judicial order which per se appears to be without jurisdiction, her detention cannot be labelled as "legal" rendering this Habeas Corups writ petition liable to be dismissed as not maintainable."

In the case of **Rahul Kumar Singh & Anr. v. State of Uttar Pradesh & Ors.**6 it has been held by this Court:

"The issue whether a minor, can be sent to Nari Niketan against her wish, is no longer res-integra and stands conclusively settled by a catena of decisions of this Court. In the case of **Smt. Kalyani Chowdhary v. State of U.P. reported in 1978 Cr. L.J. 1003 (D.B.)**, a Division Bench of this Court has taken the view that:

"No person can be kept in a Protective Home unless she is required to be kept there either in pursuance of Immoral Traffic in Women and Girls Protection Act or under some other law permitting her detention in such a home. In such cases, the question of minority is irrelevant as even a minor cannot be detained against her will or at the will of her father in a Protective Home."

In the case of **Kajal & Anr. v. State of Uttar Pradesh & Ors.**7, it has been held as under:

"It may also be appreciated that the issue whether the victim/corpus who is a minor, can be sent to Nari Niketan against her wish, is no longer res-integra and has been conclusively settled by a catena of decisions of this Court. In the case of *Smt. Kalyani Chowdhary v. State of U.P.* reported in 1978 Cr. L.J. 1003 (D.B.), a Division Bench of this Court has taken the view that:

"no person can be kept in a Protective Home unless she is required to be kept there either in pursuance of Immoral Traffic in Women and Girls Protection Act or under some other law permitting her detention in such a home. In such cases, the question of minority is irrelevant as even a minor cannot be detained against her will or at the will of her father in a Protective Home."

... ... …

Thus, merely because the petitioner has been sent to Nari Niketan pursuant to a judicial order which per se appears to be without jurisdiction, her detention cannot be labelled as "legal" rendering this Habeas Corups writ petition liable to be dismissed as not maintainable."

10. Above judgments, thus, lay down the law that writ of habeas corpus is maintainable even if the same has been filed against a judicial order of the Magistrate, sending the corpus to Juvenile Home/Nari Niketan/Child Care Home or any other Home duly authorized/recognized.

11. In some other judgments passed by this Court, a contrary view has been taken wherein it has been held that if a corpus has been sent to the Juvenile Home/Nari Niketan/Child Care Home pursuant to the order passed by the Committee, detention of the corpus cannot be said to be illegal, requiring issuance of a writ of habeas corpus. One such view has been taken by this Court in the case of **Saurabh Pandey v. State of Uttar Pradesh**8, which reads as under:

"10. Once the corpus is found a child, as defined by Section 2 (12) of the J.J. Act, 2015, and, allegedly, a victim of a crime (in this case Case Crime No.475 of 2018 detailed above), she would fall in the category of child in need of care and protection in view of clauses (iii), (viii) and (xii) of sub-section (14) of section 2 of the J.J. Act, 2015. Hence, the order passed by the Child Welfare Committee placing the corpus in a protection home would be within its powers conferred by section 37 of the J.J. Act, 2015.

11. In view of the above, as the corpus is in Women Protection Home pursuant to an order passed by the Child Welfare Committee, which is neither without jurisdiction nor illegal or perverse, keeping in mind the provisions of the J.J. Act, 2015, the detention of the corpus cannot be said to be illegal so as to warrant issuance of a writ of habeas corpus. If the petitioner is aggrieved by the order of the Child Welfare Committee, the petitioner is at liberty to take recourse to the remedy of an appeal provided under Section 101 of the J. J. Act, 2015."

In the case of **Smt. Shahjahan v. State of Uttar Pradesh & Ors.**9, it has been observed as under:

"6. Having considered the submissions raised and the aforesaid background, once the petitioner has already filed a revision in relation to the custody of the same victim against the order dated 8.10.2014 that is stated to be pending, it cannot be said that the victim is under unlawful custody.

8. The victim, therefore, does not appear to be in unlawful custody and, therefore, the present Habeas Corpus Writ Petition in the aforesaid background would not be maintainable. It is open to the petitioner to seek her remedy in the revision which she has filed before the appropriate Court."

Further, in the case of **Km. Mona @ Reema v. State of Uttar Pradesh**10, it has been held as under:

"After considering the facts and circumstances of the case, the corpus was sent to Muzaffarnagar by learned A.C.J.M., Court No. 3, Muzaffarnagar on 9.5.2013. It is a very serious case in which a girl of the Bihar State has been kidnapped who herself lodged the FIR in police station, Nai Mandi, Muzaffarnagar (U.P.). On the application moved by the I.O. she has been sent to Nari Niketan, Meerut by learned A.C.J.M., Court No. 3, Muzaffarnagar vide order dated 9.5.2013. The order dated 9.5.2013 is not suffering from any illegality and irregularity. The order has been passed in welfare of the corpus. The deponent of this writ petition Nadeem Ahmad is real brother of the accused Intazar, it appears that this petition has been filed with ulterior motive without disclosing the credential of the person who has filed this writ petition on behalf of the corpus Km. Mona @ Reema. The corpus has been sent from Muzaffarnagar to Meerit in pursuance of the judicial order dated 9.5.2013, in any case her detention is not illegal. The present writ petition is devoid of merit, therefore, the prayer for setting the corpus on her liberty is refused."

In the case of **Guria Bhagat @ Guria Rawani v. State of Jharkhand & Ors**11, it has been held as under:

"5. ... ... Thus, in no circumstances, it can be said that the custody of the petitioner with the Nari Niketan at Deoghar is an illegal custody. If the petitioner is aggrieved by the order of Judicial Magistrate, First Class, Dhanbad, she is at liberty to challenge the same in accordance with law before an appropriate forum. So far this writ of Habeas Corpus is concerned, the same is not tenable at law as the custody of the present petitioner with the Nari Niketan at Deoghar is by virtue of the order of Judicial Magistrate, First Class, Dhanbad dated 26.9.2013 and more particularly, when the application preferred by the petitioner for her release has been rejected by the Judicial Magistrate, First Class, Dhanbad by a detailed speaking order dated 22.10.2013. These two orders, make the custody of the petitioner with the Nari Niketan at Deoghar is a legal one. Unless these two orders are challenged in an appropriate matter before the appropriate forum as per the law applicable to the petitioner as well as the respondent, there is no substance in this writ petition. Hence, the same is hereby dismissed, reserving the liberty with the petitioner to challenge the orders passed by the Judicial Magistrate, First Class, Dhanbad."

In **Smt. Himani v. State of Uttar Pradesh & Ors.**12, it has been held that:

"9. Considering the facts, circumstance of the case, submission made by learned counsel for the petitioner, learned A.G.A.for the State of U.P., counsel appearing on behalf of respondent no.4 and counsel appearing on behalf of Pt. Vigyan Prakash Sharma, it appears that in the present case the corpus was allegedly kidnapped by Devendra Singh alias Bunty on 20.6.2012, its FIR has been lodged on 2.7.2012 in case crime no. 111 of 2012 under sections 363, 366 I.P.C., Police Station Nangal District Bijnor. According to the school certificate, the date of birth of the corpus is 10.5.1996, but according to the first medical examination report she

was aged about 19 years but according to second medical examination done by Medical Board, constituted by C.M.O. Bijnor, she was found above 18 years and below 20 years of age. According to the statement recorded under section 164 Cr.P.C., she has not supported the prosecution story, she stated that she had gone in the company of Devendra Singh alias Bunty with her free will and consent. The Marriage certificate filed with this petition as Annexure-2 shows that it has been issued by Pt. Vigyan Prakash Sharma, Purohit of Sri Jharkhand Mahadeo Mandir on 24.2.2012 mentioning therein that the corpus and Devendra Singh have performed marriage in the temple on 24.2.2012 at 5.30 P.M. but marriage certificate shows that it was not bearing the signatures of family members of corpus and Pt. Vigyan Prakash Sharma was not legally authorized to issue such type of marriage certificate but Pt. Vigyan Prakash Sharma who appeared before this Court tendered his unconditional apology and assured the Court that in future he shall not issue such type of certificate, therefore, this Court is restrained to proceed further against Pt. Vigyan Prakash Sharma by accepting unconditional apology tendered by him. According to the school record, the date of birth of the corpus is 10.5.1996, according to her date of birth she was minor aged about 16 years on the date of the alleged incident. In such an age, she was playing with emotions and she was not capable to foresee her future prospects of her life. The corpus has refused to go in the company of her father. In such circumstances, the learned Judicial Magistrate/Civil Judge (J.D.) Najibabad, District Bijnor sent the corpus to Nari Niketan Moradabad vide order dated 24.7.2012. The order dated 24.7.2012 is not suffering from any illegality or irregularity. The corpus has been detained in Nari Niketan Moradabad in pursuance of the judicial order dated 24.7.2012, therefore, her detention is not illegal. The present petition is devoid of the merits. The prayer for quashing the impugned order dated 24.7.2012 is refused."

In the case of **Akash Kumar v. State of Jharkhand & Ors.**13, it has been held by the Jharkhand High Court that:

"4. Having heard learned counsel for both the sides and looking to the facts and circumstances of the case, we see no reason to entertain this writ of Habeas Corpus mainly for the following facts and reasons:

(i) It appears that the custody of this petitioner is with the respondent State in pursuance of the judicial order passed by the Judicial Magistrate, 1st Class, Ranchi in G.R. No. 2366 of 2013 dated 27th May, 2013 which is at Annexure-5 to the memo of this writ application. Once the custody with the State is in pursuance of the judicial order, it cannot be said that the State is having illegal custody of the petitioner and, hence, the writ of Habeas Corpus is not tenable, at law.

(ii) Learned counsel for the petitioner has relied upon Sections 6, 7 and 14 of the Juvenile Justice Act, 2000 and submitted that the order passed by the Judicial Magistrate, 1st Class in G.R. No. 2366 of 2013 is de hors the provisions of this Act and, hence, custody with the respondent is illegal. The contention for issuance of prerogative writ of Habeas Corpus under Article 226 of the Constitution of India, is not accepted by this Court. For issuance of the writ of Habeas Corpus in exercise of power under Article 226 of the Constitution of India, it must be established by the petitioner that the custody with the State of any person is illegal. Here, there is no illegal custody of

the petitioner with the respondents, on the contrary, this is as per the order passed by the Judicial Magistrate, 1st Class, Ranchi in G.R. No. 2366 of 2013 dated 27th May, 2013 (Annexure-5). The order passed by the concerned trial court may be illegal, but, the custody with the respondent State is absolutely legal. It is one thing that the order passed by the Judicial Magistrate, 1st Class, Ranchi may be illegal and it is altogether another thing so far as custody with respondent-State is concerned, otherwise, in all bail matters, there shall be writ of Habeas Corpus. If the argument of the counsel for the petitioner is accepted, in bail application also under Section 439 of the Code of Criminal Procedure, where person is in judicial custody by virtue of the order passed by the learned trial court, writ of Habeas Corpus should be filed. This is a fallacy in the argument canvassed by the counsel for the petitioner. Until and unless the order passed by the Judicial Magistrate, 1st Class, Ranchi in this case is quashed and set aside by the competent court in appropriate proceeding, the custody of the petitioner with the respondent-State is legal."

Similar view has been taken by the Madhya Pradesh High Court in the case **Irfan Khan v. State of MP & Ors.**14

The Gujarat High Court, in **Manish S/o Natvarlal Vaghela vs. State of Gujarat**15 has dealt the similar question and held that:

"11. It is pertinent to note that the allegations of the petitioner are regarding non-compliance of various provisions of the Act and Rules. Against this, the Child Welfare Committee has came with a case that after following procedure and getting order from the Court, it has given the child to adoptive father. Therefore, when the child has been given in adoption by the order of the Court to adoptive parents, then that act cannot be treated as an illegal act of granting custody of minor. Even if there is lack of following due procedure under the Act and Rules by the Child Welfare Committee that can be agitated by the petitioner under the provisions of appeal/revision, as referred to above by taking out separate proceedings. When there is an efficacious alternative remedy available, writ of habeas corpus cannot be issued especially when the Child Welfare Committee has got necessary orders from the Court before handing over the custody of minor to adoptive parents.

14. Considering the facts on record, the corpus is not under any illegal confinement, therefore, this petition with a prayer for issuance of writ of habeas corpus is not maintainable. Not only that Juvenile Justice (Care and Protection of Children) Act, 2015 provides complete mechanism for custody, care and protection of a child and the Child Welfare committee is competent to pass order in this regard and if there is any grievance against such order, remedy of appeal is also available. In view of this, the petitioner is having alternative remedy and this petition with a prayer to issue writ of habeas corpus is not maintainable. Therefore, present petition is dismissed."

Similar situation was there in Patna High Court in the case of **Shikha Kumari v. State of Bihar**16 wherein the matter was referred to the larger Bench and it has held by the Bench that:

"67. Thus, it is evident that a writ of habeas corpus would not be maintainable, if the detention in custody is pursuant to judicial orders passed by a Judicial Magistrate or a court of competent jurisdiction. It is further evident that an illegal or irregular exercise of jurisdiction by a Magistrate passing an order of remand cannot be treated as an illegal detention.

Such an order can be cured by way of challenging the legality, validity and correctness of the order by filing appropriate proceedings before the competent revisional or appellate forum under the statutory provisions of law but cannot be reviewed in a petition seeking the writ of habeas corpus.

68. We, accordingly, sum up our conclusions in respect of the first three issues for determination as follows:-

Question No.1 : "Whether, in a petition for issuance of writ of habeas corpus, an order passed by a Magistrate could be assailed and set-aside ?"

Answer : Our irresistible conclusion in view of the ratio laid down by the Supreme Court in the aforementioned cases is that a writ of habeas corpus would not be maintainable, if the detention in custody is as per judicial orders passed by a Judicial Magistrate or a court of competent jurisdiction. Consequently an order of remand passed by a Judicial Magistrate having competent jurisdiction cannot be assailed or set aside in a writ of habeas corpus.

Question No.2: "Whether an order of remand passed by a Judicial Magistrate could be reviewed in a petition seeking the writ of habeas corpus, holding such order of remand to be an illegal detention ?"

Answer: An illegal or irregular exercise of jurisdiction by a Magistrate passing an order of remand can be cured by way of challenging the legality, validity and correctness of the order by filing appropriate proceedings before the competent revisional or appellate court under the statutory provisions of law. Such an order of remand passed by a Judicial Magistrate of competent jurisdiction cannot be reviewed in a petition seeking the writ of habeas corpus.

Question No.3: "Whether an improper order could be termed/viewed as an illegal detention ?"

Answer: In view of the clear, unambiguous and consistent view of the Supreme Court in the aforediscussed cases, we unhesitatingly conclude and hold that an illegal order of judicial remand cannot be termed/viewed as an illegal detention."

12. The two sets of judgments delivered by this Court reflect that one view of this Court is that a writ of habeas corpus is maintainable against the order passed by the Committee/Court, sending the corpus to the Juvenile Home/Nari Niketan/Child Care Home, whereas according to other view, if a judicial order has been passed by the competent Court, veracity of the same cannot be decided in a writ of habeas corpus and the same is required to be challenged before the competent Court.

13. Apart from above mentioned cases, attention of this Court has also been drawn on many other cases wherein issuance of a writ of habeas corpus has been held to be maintainable, whereas in some cases, the view of this Court is otherwise.

14. Considering the various provisions of the Act and the law laid down by various Courts, we are of the view that this matter is required to be heard by a larger Bench, so that question as to whether writ of habeas corpus is maintainable against the order passed by the Judicial Magistrate/Committee, sending the corpus to the Juvenile Home/Nari Niketan/Child Care Home, can finally be decided. Likewise, yet another question is required to be addressed, as to whether even a minor can be kept in the Juvenile Home/Nari

Niketan/Child Care Home against his/her wishes?

15. We, accordingly, formulate the following questions to be decided by the larger Bench:

(1) Whether a writ of habeas corpus is maintainable against the judicial order passed by the Magistrate or by the Child Welfare Committee appointed under Section 27 of the Act, sending the victim to Women Protection Home/Nari Niketan/Juvenile Home/Child Care Home ?;

(2) Whether detention of a corpus in Women Protection Home/Nari Niketan/Juvenile Home/Child Care Home pursuant to an order (may be improper) can be termed/viewed as an illegal detention ?; and

(3) Under the Scheme of the Juvenile Justice (Care and Protection of Children) Act, 2015, the welfare and safety of child in need of care and protection is the legal responsibility of the Board/Child Welfare Committee and as such, the proposition that even a minor cannot be sent to Women Protection Home/Nari Niketan/Juvenile Home/Child Care Home against his/her wishes is legally valid or it requires a modified approach in consonance with the object of the Act ?

16. Let the matter be placed before Hon'ble the Chief Justice, on administrative side, for constituting a larger Bench.

17. However, it is clarified that pendency of this Reference shall not come in the way of the 'corpus' to avail other remedies available to him/her under the law questioning his/her detention.

18. We would like to acknowledge and appreciate the efforts and assistance rendered by Mr Shaghir Ahmad, learned Senior Advocte, Amicus.

(2020)12ILR A375
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.10.2020

BEFORE

THE HON'BLE J.J. MUNIR, J.

Habeas Corpus Writ Petition No. 370 of 2020

Smt. Sharada Devi & Anr. ...Petitioners
Versus
Man Singh & Ors. ...Respondents

Counsel for the Petitioners:
Sri Anand Priya Singh

Counsel for the Respondents:
G.A.

A. Constitution of India- Article 226 - Writ of habeas corpus - Custody dispute of minor child between natural guardians - Maintainability - In child custody matters, writ of habeas corpus is maintainable where it is proved that detention of minor child by parent or others is illegal and without any authority of law - court can invoke its extraordinary writ jurisdiction under Art. 226 for the best interest of the child - *Limitation* determination about custody made under Art.226, is summary - before writ court, rights are determined only on the basis of affidavits therefore determination about the entitlement to custody of a minor, made in habeas corpus petition carries the status of a tentative determination only - where decision requires fine and intricate questions of fact to be delved into, which in turn would require an elaborate and careful sifting of evidence, parties may be asked to approach Civil Court of competent jurisdiction, under the Guardians and Wards Act, 1890, to establish a better right to custody (Para 13, 14, 24)

B. Constitution of India – Article 226 - Habeas corpus writ petition - Hindu

Minority and Guardianship Act - Section 6, 13 - Custody of minor child - Mother's remarriage after father's death - Effect - remarriage of the mother do not lead to an inference ipso facto that the minor's welfare would not be secure in mother's hands - no such principle that on a mother's remarriage, neglect of her minor child begotten of her first marriage is to be presumed or inferred on a constructive basis - Even after remarriage mother still entitle to custody of her child - grandmother, is not entitled to the custody of the minor solely because minor mother has remarried (Para 21)

Petitioner grand mother seeking custody of her minor grand daughter from the custody of minor's mother (i.e. from her daughter-in-law) after death of son of petitioner - Court found that the mother of child & her second husband providing a congenial atmosphere to minor - No circumstance of neglect cited, from which conclusion may be drawn that the minor's welfare is not best secured in the mother's hands. - mother closer in her years to the minor than the grandmother, therefore, better suited to safeguard minor's welfare - minor appeared to be comfortable with the mother's second husband - Grandmother petition dismissed - however grandparents granted right to meet & interact with their grand daughter for three days, twice a year. (Para 24, 25, 26)

Writ Petition dismissed. (E-5)

List of Cases cited: -

1. Syed Saleemuddin Vs Dr. Rukhsana & ors. (2001) 5 SCC 247

2. Nithya Anand Raghavan Vs State (NCT of Delhi) & anr (2017) 8 SCC 454

3. Tejaswini Gaud & ors. Vs Shekhar Jagdish Prasad Tewari & ors. (2019) 7 SCC 42

4. Yashita Sahu Vs St. of Raj. & ors. (2020) 3 SCC 67

5. Amit Beri & anr. Vs Smt. Sheetal Beri wife of Amit Beri AIR 2003 All 78

6. Sudha Vs State rep. by Superintendent of Police, Nagapattinam District & ors. 2015 SCC OnLine Mad 11442

(Delivered by Hon'ble J.J. Munir, J.)

1. Smt. Sharada Devi, the first petitioner is Km. Shruti Singh's grandmother (father's mother). Km. Shruti Singh has been arrayed as the second petitioner and profiled as the detenue in this habeas corpus writ petition.

2. Smt. Sharada Devi says that Km. Shruti Singh, her minor grand-daughter and the daughter of her deceased son, Balram Singh is in the unlawful custody of her mother, Smt. Paramsheela, respondent no.3 along with Man Singh, Smt. Ramwati Devi and Sunil Patel, respondent nos.1, 2 and 4, in that order.

3. Smt. Sharada Devi has petitioned this Court praying that a writ, order or direction in the nature of habeas corpus be issued, ordering her minor grand daughter, Km. Shruti Singh to be produced before the Court, and upon production set at liberty in the manner that her custody be delivered to Smt. Sharada Devi.

4. The facts, in the background of which this cause has arisen, shortly put, are these: the late Balram Singh son of Ram Sabad Singh and Smt. Paramsheela were married on 02.02.2011, according to Hindu rites. In due course, the couple were blessed with a child, a baby girl, named Km. Shruti Singh. She was born on 12.12.2012. Smt. Paramsheela lived with her husband, the late Balram Singh in the family home, where Smt. Sharada Devi, Balram Singh's mother, the first petitioner, also lived. It is acknowledged that Smt. Paramsheela discharged all her obligations as Balram Singh's wife. Balram Singh was employed with the Indian Air Force as a Corporal. He had come home on leave. On 21.02.2015, he became the victim of a road

accident and passed away. It appears that after Balram Singh's death, Paramsheela, his widow moved back to her father's place along with the parties' minor daughter, Km. Shruti Singh. She appears to have severed relations with her matrimonial home.

5. After her husband's death, Smt. Paramsheela moved on in life and married Sunil Patel son of Ramjeet Patel, a native of Village Harhahua, Post Office Manikpur, District Mau. Sunil Patel is the fourth respondent here. Smt. Paramsheela and Sunil Patel have been blessed with a son on 26.08.2018. There is some grievance made by Smt. Sharada Devi that the Indian Air Force paid all the post retiral benefits of the late Corporal Balram Singh to Smt. Paramsheela, though she had remarried. It is also indicated that Smt. Paramsheela, being paid all the post retiral benefits of her deceased husband, Balram Singh, does not take good care of the minor, Km. Shruti Singh, employing those funds. It is claimed that Smt. Paramsheela, her husband Sunil Patel and their son are a family. She has, thus, become part of a new family, where Km. Shruti Singh has no place. It is urged that respondent nos.1 and 2 are Smt. Paramsheela's father and mother, who stay with her at her matrimonial home. Smt. Paramsheela is short of necessary resources to provide the required nutrition, lodging and education to the minor. Smt. Sharada Devi, being Km. Shruti Singh's grandmother, is entitled to the custody of the minor, after her mother has remarried.

6. It is in the background of these facts and cause of action that the first petitioner, Smt. Sharada Devi has asked this Court to hold the mother's custody for Km. Shruti Singh unlawful and deliver the minor into the first petitioner's custody.

7. Heard Mr. Anand Priya Singh, learned Counsel for the petitioners, Mr. Sanjay Srivastava, learned Counsel appearing on behalf of respondent nos.3 and 4 and Mr. Jhamman Ram, learned A.G.A. appearing on behalf of respondents nos.5, 6 and 7.

8. This Court issued a *rule nisi* on 23.09.2020 ordering the minor, Km. Shruti Singh to be produced before the Court on 08.10.2020. In compliance with the *rule nisi*, the minor, Km. Shruti Singh has been produced, accompanied by her mother, Smt. Paramsheela. This Court interacted with the minor as well as her mother in order to gauge, within the scope of these summary proceedings, if the minor's welfare was best secured in the hands of her mother. The Court will advert to the outcome of that enterprise a little later in this judgment.

9. Mr. Sanjay Srivastava, learned Counsel appearing on behalf of respondent nos.3 and 4 and Sri Jhamman Ram, learned A.G.A. raised a preliminary objection about the maintainability of this petition. It was urged by them that the mother being the minor's natural guardian, the minor's custody with her cannot be termed unlawful. Once the custody, where the minor is placed, is not unlawful, a writ of habeas corpus cannot issue. It is the learned Counsel's submission that what this petition discloses is a pure custody dispute, where the grandmother on the paternal side asks for the minor's custody, because she says that the mother has lost that right, owing to her remarriage. A dispute of this kind cannot be remedied by moving this Court through a petition for a writ of habeas corpus. It is the learned Counsel's contention that the first petitioner's remedy is to approach the Court of competent jurisdiction under the Guardians and Wards Act, 1890 and establish her right to

custody, superior to that of the mother. This petition for a writ of habeas corpus, in the submission of the learned Counsel for the respondents, is not maintainable.

10. Mr. Anand Priya Singh, learned Counsel for the petitioner on the other hand submits that by now it has come to be well settled that a petition for a writ of habeas corpus is maintainable to decide custody disputes, even between parents, if it can be shown that the minor's custody with one party is unlawful on the touchstone of the child's welfare.

11. The objection raised by the learned Counsel appearing for the respondents has engaged the attention of the Supreme Court in **Syed Saleemuddin v. Dr. Rukhsana and Ors., (2001) 5 SCC 247**. In **Syed Saleemuddin**, it has been held:

"11. From the principles laid down in the aforementioned cases it is clear that in an application seeking a writ of Habeas Corpus for custody of minor children the principal consideration for the Court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that present custody should be changed and the children should be left in care and custody of somebody else. The principle is well settled that in a matter of custody of a child the welfare of the child is of paramount consideration of the Court. Unfortunately, the Judgment of the High Court does not show that the Court has paid any attention to these important and relevant questions. The High Court has not considered whether the custody of the children with their father can, in the facts and circumstances, be said to be unlawful. The Court has also not adverted to the question whether for the welfare of the children they should be taken out of the custody of their father and left in the care of their mother. However, it is not necessary for us to consider this question further in view of the fair concession made by Shri M.N. Rao that the appellant has no objection if the children remain in the custody of the mother with the right of the father to visit them as noted in the judgment of the High Court, till the Family Court disposes of the petition filed by the appellant for custody of his children."

12. The question has also been considered by the Supreme Court in **Nithya Anand Raghavan vs. State (NCT of Delhi) and another, (2017) 8 SCC 454**. In **Nithya Anand Raghavan**, it was held:

"44. The present appeal emanates from a petition seeking a writ of habeas corpus for the production and custody of a minor child. This Court in *Kanu Sanyal v. District Magistrate, Darjeeling [Kanu Sanyal v. District Magistrate, Darjeeling*, (1973) 2 SCC 674 : 1973 SCC (Cri) 980], has held that habeas corpus was essentially a procedural writ dealing with machinery of justice. The object underlying the writ was to secure the release of a person who is illegally deprived of his liberty. The writ of habeas corpus is a command addressed to the person who is alleged to have another in unlawful custody, requiring him to produce the body of such person before the court. On production of the person before the court, the circumstances in which the custody of the person concerned has been detained can be inquired into by the court and upon due inquiry into the alleged unlawful restraint pass appropriate direction as may be deemed just and proper. The High Court in such proceedings conducts an inquiry for

immediate determination of the right of the person's freedom and his release when the detention is found to be unlawful.

45. In a petition for issuance of a writ of habeas corpus in relation to the custody of a minor child, this Court in *Sayed Saleemuddin v. Rukhsana [Sayed Saleemuddin v. Rukhsana*, (2001) 5 SCC 247 : 2001 SCC (Cri) 841] , has held that the principal duty of the court is to ascertain whether the custody of child is unlawful or illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person. While doing so, the paramount consideration must be about the welfare of the child. In *Elizabeth [Elizabeth Dinshaw v. Arvand M. Dinshaw*, (1987) 1 SCC 42 : 1987 SCC (Cri) 13] , it is held that in such cases the matter must be decided not by reference to the legal rights of the parties but on the sole and predominant criterion of what would best serve the interests and welfare of the minor. The role of the High Court in examining the cases of custody of a minor is on the touchstone of principle of parens patriae jurisdiction, as the minor is within the jurisdiction of the Court [see *Paul Mohinder Gahun v. State (NCT of Delhi) [Paul Mohinder Gahun v. State (NCT of Delhi)*, 2004 SCC OnLine Del 699 : (2004) 113 DLT 823] relied upon by the appellant]. It is not necessary to multiply the authorities on this proposition.

46. The High Court while dealing with the petition for issuance of a writ of habeas corpus concerning a minor child, in a given case, may direct return of the child or decline to change the custody of the child keeping in mind all the attending facts and circumstances including the settled legal position referred to above. Once again, we may hasten to add that the decision of the court, in each case, must depend on the totality of the facts and circumstances of the case brought before it whilst considering the welfare of the child which is of paramount consideration. The order of the foreign court must yield to the welfare of the child. Further, the remedy of writ of habeas corpus cannot be used for mere enforcement of the directions given by the foreign court against a person within its jurisdiction and convert that jurisdiction into that of an executing court. Indubitably, the writ petitioner can take recourse to such other remedy as may be permissible in law for enforcement of the order passed by the foreign court or to resort to any other proceedings as may be permissible in law before the Indian Court for the custody of the child, if so advised.

47. In a habeas corpus petition as aforesaid, the High Court must examine at the threshold whether the minor is in lawful or unlawful custody of another person (private respondent named in the writ petition). For considering that issue, in a case such as the present one, it is enough to note that the private respondent was none other than the natural guardian of the minor being her biological mother. Once that fact is ascertained, it can be presumed that the custody of the minor with his/her mother is lawful. In such a case, only in exceptionable situation, the custody of the minor (girl child) may be ordered to be taken away from her mother for being given to any other person including the husband (father of the child), in exercise of writ jurisdiction. Instead, the other parent can be asked to resort to a substantive prescribed remedy for getting custody of the child."

13. This question about the maintainability of a petition for a writ of habeas corpus with a custody dispute as the

cause of action, more recently came up for consideration before the Supreme Court in **Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others, (2019) 7 SCC 42**. In **Tejaswini Gaud**, their Lordships examined the question elaborately and held:

"19. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the Court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.

20. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus.

21. In the present case, the appellants are the sisters and brother of the mother Zelam who do not have any authority of law to have the custody of the minor child. Whereas as per Section 6 of the Hindu Minority and Guardianship Act, the first respondent father is a natural guardian of the minor child and is having the legal right to claim the custody of the child. The entitlement of father to the custody of child is not disputed and the child being a minor aged 1½ years cannot express its intelligent preferences. Hence, in our considered view, in the facts and circumstances of this case, the father, being the natural guardian, was justified in invoking the extraordinary remedy seeking custody of the child under Article 226 of the Constitution of India."

14. Once again, the issue arose before the Supreme Court in **Yashita Sahu vs. State of Rajasthan and others, (2020) 3 SCC 67**. It was held in **Yashita Sahu**:

"10. It is too late in the day to urge that a writ of habeas corpus is not maintainable if the child is in the custody of another parent. The law in this regard has developed a lot over a period of time but now it is a settled position that the court can invoke its extraordinary writ jurisdiction for the best interest of the child. This has been done in *Elizabeth Dinshaw v.*

Arvand M. Dinshaw [Elizabeth Dinshaw v. Arvand M. Dinshaw, (1987) 1 SCC 42 : 1987 SCC (Cri) 13], *Nithya Anand Raghavan v. State (NCT of Delhi) [Nithya Anand Raghavan v. State (NCT of Delhi*), (2017) 8 SCC 454 : (2017) 4 SCC (Civ) 104] and *Lahari Sakhamuri v. Sobhan Kodali [Lahari Sakhamuri v. Sobhan Kodali*, (2019) 7 SCC 311 : (2019) 3 SCC (Civ) 590] among others. In all these cases, the writ petitions were entertained. Therefore, we reject the contention of the appellant wife that the writ petition before the High Court of Rajasthan was not maintainable."

15. The way the law about the maintainability of a petition for a writ of habeas corpus to decide custody disputes has evolved, in the opinion of this Court it can no longer be said for a blanket proposition that a custody dispute between natural guardians is beyond the writ's scope. It is not that, that in every matter where the custody of a minor with a natural guardian is questioned on the basis of a lost entitlement or a superior right founded on better welfare for the minor, the parties are to be asked to approach the Court of competent jurisdiction under the Guardians and the Wards Act. The question about the welfare of the minor can equally be examined by this Court in the exercise of its jurisdiction to issue a writ of habeas corpus, as by the Court of competent jurisdiction under the Guardians and Wards Act. The only limitation appears to be that where the decision requires fine and intricate questions of fact to be delved into, which in turn would require an elaborate and careful sifting of evidence, the parties may be asked to approach the Civil Court. Also generally, the determination about the entitlement to custody of a minor, made in the exercise of our jurisdiction to issue a writ of habeas corpus, carries the status of a tentative determination. Invariably, the parties ought to be left free, irrespective of the determination made here to suit their rights to a minor's custody finally before the Court under the Guardians and Wards Act.

16. This petition in the totality of circumstances and the law applicable is, therefore, held maintainable.

17. The Court may now proceed to consider the merits of the parties' claim.

18. Under Section 6(a) of the Hindu Minority and Guardianship Act, 1956, the mother is the minor's natural guardian after the father. The issue, whether the mother can claim to be the natural guardian, if the father claims custody or can she claim to be the natural guardian in a different context, until the father is dead, need not trouble this Court, as the father is no more. Section 6 of the Act, last mentioned, provides:

"6. Natural guardians of a Hindu minor.--The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are--

(a) in the case of a boy or an unmarried girl--the father, and after him, the mother:

Provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(b) in the case of an illegitimate boy or an illegitimate unmarried girl--the mother, and after her, the father;

(c) in the case of a married girl--the husband:

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section--

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yatiorsanyasi).

Explanation.--In this section, the expressions "father" and "mother" do not include a stepfather and a stepmother."

19. At the same time, Section 13 of the said Act emphasizes "welfare' of the minor to be of paramount consideration. Section 13 is extracted *infra*:

"13. Welfare of minor to be paramount consideration.--(1) In the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor."

20. A conjoint reading of Sections 6(a) and 13 leads to the inevitable conclusion that welfare of the minor is always the paramount consideration. In a given case, the natural guardian may not be found suitable where the welfare of the minor appears to be best secured in some other hands. But that said, the mother is generally the best person to groom the minor into a young and useful citizen. She is also the best person to take care of the minor's needs as he/ she grows up. There is a presumption in favour of the parents that they would secure the welfare of their children best, and it is on the foot of that presumption that both the parents have been acknowledged to be a minor's natural guardian, under Section 6(a) of the Hindu Minority and Guardianship Act. There could, of course, be disentitling factors in a case that may work against the mother. This reasoning was adopted to deprive the mother of her right to custody by this Court in **Amit Beri and another vs. Smt. Sheetal Beri wife of Amit Beri, AIR 2003 All 78**. In that case, the mother was deprived of the minor's custody because it was found that she regularly attended night clubs and came home late. During that period, the minor was left in some care house.

21. In the present case, there is no positive assertion of any fact or circumstance to indicate that the mother is disentitled to custody. No circumstance of neglect has been cited, from which a conclusion may be drawn that the minor's welfare is not best secured in the mother's hands. There is a general assertion about the fact that the mother has remarried and the first petitioner, the grandmother wants this Court to infer *ipso facto* that her remarriage and a son born of that marriage would lead to the minor's neglect. There is nothing said for a specific instance against the mother's husband, or for that matter against anyone else in the household that may demonstrate neglect. The grandmother wants this Court to presume or construct neglect upon remarriage by the mother. This Court is afraid that there is no such principle that on a mother's remarriage, neglect of her minor child begotten of her first marriage is to be presumed or inferred on a constructive basis.

22. This Court has spoken to the minor and her mother, a fact earlier recorded in this judgment. The minor, Km. Shruti Singh is a bright child, all of nine

years. She told the Court that she reads in class IIIrd at the Geeta's School. She knows her teacher. She conveyed to the Court that she wants to stay with her mother. She referred to Sunil Patel as *'Papa'*. That reference to Sunil Patel came with ease and comfort. Upon the Court asking the minor her father's name, she disclosed Sunil's name. She conveyed to the Court that she was happy to stay with her mother. To a further question by this Court, if she wishes to stay with her mother, she said an unqualified 'Yes'. She also told the Court that she did not know her grandmother and said that she did not want to stay with her. The Court is of opinion that the child is well integrated into her mother's household and is developing a balanced personality. She appears to be receiving fairly good education too. The mother told the Court that she has remarried and stays with her husband, along with his two brothers. She said that her husband (the minor's father) passed away in an accident. The minor had stayed with her since she was born. Her husband, Sunil Patel is a skilled worker, who earns his livelihood by fixing tiles. She said that she had no financial difficulty and could bring up the minor. She could fund and ensure her education. She said that she had a young son, aged a year and a half, begotten of Sunil Patel.

23. This Court does not find that there is the slightest reason to believe that the minor's interest or welfare would in any manner suffer in the hands of her mother while she stays in Sunil's home, where she has rehabilitated herself after her husband's death. This Court must note again that the sole reason to doubt the mother's suitability as a good guardian to the minor is the grandmother's apprehension emanating from the mother's remarriage. There are no instances or facts positive cited to infer neglect or compromised welfare for the minor in her mother's home. The question, whether remarriage of the mother disentitles her or can lead to an inference *ipso facto* that the minor's welfare would not be secure in her hands, fell for consideration of a Division Bench of the Madras High Court in **Sudha vs. State rep. by Superintendent of Police, Nagapattinam District and others, 2015 SCC OnLine Mad 11442**. In that case, the paternal grandmother, like the present case, had resisted the mother's claim to custody of the minor, a girl whose father had passed away, on ground that the mother had remarried. It was claimed by the grandmother that on account of the mother's remarriage, the minor's welfare would not be best ensured in the mother's hands. It was held by their Lordships in **Subha** thus:

"15. Admittedly, the petitioner is the mother and natural guardian of the minor, Kaviyasri and the father of the minor child is no more. The 13th respondent is only the paternal grand mother of the child. The only argument advanced by the learned Senior counsel on behalf of the paternal grand mother of the child is that the petitioner, after the death of her husband, father of the detenue, married another person and therefore, giving custody of the child to the mother would not be in the interest and welfare of the minor detenue.

16. After the death of her husband, the petitioner was free, as per law, to decide her second marriage, accordingly, she married the aforesaid Mr. Suseendran. It is the legal right of the petitioner, which cannot be construed as an illegal act. Merely because the petitioner married another person, after the death of her previous husband, she cannot be said

incompetent, to be the guardian of minor child and seeking custody of the child.

17. Mr. C. Suseendran, who married the petitioner has also filed an affidavit stating that he is willing to take care of the minor, Kaviyasri as a dutiful father, if the custody is given to the petitioner, mother of the minor and he assured that he along with the petitioner will take care of the welfare of the minor child and extend all support to the petitioner for the study and growth of the alleged detenue, Kaviyasri. The affidavit filed by the person, who subsequently married the petitioner would also strengthen the case of the petitioner. As Government is also taking a policy to encourage widows remarriage, holding the view that the mother is not entitled to have the custody, merely because she married another persons would be improper and against social justice.

18. In the instant case, the petitioner is admittedly the mother and natural guardian of the minor, Kaviyasri, whose father is no more. Solemnizing second marriage with another person after the death of her earlier husband is not an illegal or improper act. In the aforesaid circumstances, we are of the view that the claim of the petitioner is legally sustainable, when the claim is made by the mother and natural guardian, seeking custody and that there is no legal embargo for the petitioner in seeking the custody and further, the 13th respondent is not a similarly placed person, seeking custody of the child."

24. In the present case, this Court has found on a detailed consideration of the matter that the third respondent, the minor's mother, Smt. Paramsheela and her husband, Sunil Patel appear to provide a congenial atmosphere to the minor, where she can be expected to blossom and grow up into a well groomed citizen. This Court has also borne in mind the fact that the mother is closer in her years to the minor than the grandmother, and, therefore, better suited to safeguard her welfare. The minor appears to be comfortable with the mother's husband, Sunil Patel. And above all, the mother is the minor's natural guardian, against whom this Court does not find any disentitling facts established by the grandmother. This Court may clarify that the determination about custody made here is summary. It is open to the grandmother, the first petitioner to establish a better right to custody, if so advised, before a Court of competent jurisdiction under the Guardians and Wards Act. If that course is adopted by the first petitioner, nothing said here, will affect the determination of parties' right by that Court in accordance with law, and on the basis of evidence led.

25. In the result, the *rule nisi* issued in this case, cannot be made absolute. The rule is discharged and this petition is **dismissed**.

26. The first petitioner is the grandmother of the minor. The minor's grandfather is also there. The minor is their deceased son's child. The grandparents have a right to meet and interact with their grand daughter. For the purpose, the mother shall accompany the minor to the grandparents abode and stay in town for three days, twice a year. During this period, the grandparents shall be freely permitted to interact with the minor. The grandparents in turn shall make suitable arrangement for the minor's mother to stay with them in their house, extending due courtesy to her. These two meetings with the grandparents per year shall take place, as far as possible, during the summer and

the winter break for the Schools. Of course, it will be open to the parties to adjust the schedule of these meetings, but not so as to infringe the condition of the meeting between the grandparents and the minor taking place twice for three days each in one calendar year. This arrangement for the mother taking the minor to her grandparents has been made bearing in mind the grandparents' seniority and age.

(2020)12ILR A385
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.11.2020

BEFORE

THE HON'BLE J.J. MUNIR, J.

Habeas Corpus Writ Petition No. 443 of 2020

Aditay Divedi & Kumari Chhabi Divedi ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Shravan Kumar Mishra

Counsel for the Respondents:
G.A., Sri Manoj Mishra

Civil Law -Hindu Minority and Guardianship Act (32 of 1956)- Section 13 - Guardians and Wards Act (8 of 1890) , S.7 - Custody of minor child - Habeas Corpus Petition - Determination - Paramount consideration is where the minor's welfare would be better secured - In selecting a guardian, the court is expected, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development, favourable surroundings, moral and ethical values - If the minor is old enough to form an intelligent preference, the court must consider such preference as well - though the final decision rest with court as to what is conducive to the welfare of the minor - Welfare of the child has to be determined owing to the facts and circumstances of each case and the Court cannot take a pedantic approach (Para 8, 10)

Custody of minor child - Petition by mother for custody of her minor children from father - Both natural Guardian - minors staying with the father during all the time the mother has been away - Both children indicated their preference of not to staying with mother and expressed definitive preference to stay with father - Mother granted visitation rights from morning till evening twice a month. (Para 12,13,14)

Writ Petition allowed. (E-5)

List of Cases cited:-

1. Githa Hariharan (Ms) & anr. Vs R.B.I. & anr 1999 (2) SCC 228

2. Nil Ratan Kundu & anr. Vs Abhijit Kundu (2008) 9 SCC 413

3. Tejaswini Gaud & ors. Vs Shekhar Jagdish Prasad Tewari & ors. (2019) 7 SCC 42

(Delivered by Hon'ble J.J. Munir, J.)

1. This petition for a writ of habeas corpus has been instituted by Smt. Priti Dwivedi with a prayer that Aditya Dwivedi and Kumari Chhavi Dwivedi, her two minor children be ordered to be produced on a *rule nisi* from the custody of Dilip Dwivedi, the minors' father and ordered to be set at liberty in the manner that the custody of the two minors be handed over to Priti Dwivedi, their mother and natural guardian.

2. A *rule nisi* in the matter was issued on 09.09.2020, ordering the two minors to be produced on 16.09.2020. This Court finding it to be a sensitive matter where the two minors caught in a battle between their parents, could be spared all that agony, referred the parties to the Allahabad High Court Mediation and Conciliation Center,

in order to attempt an amicable settlement. That order was made on 18.09.2020. The report of the mediation center dated 19.10.2020 shows that mediation sessions were held on 21.09.2019, 09.10.2020, 12.10.2020, 14.10.2020 and 19.10.2020. Unfortunately, the mediation was completed with a report of "no agreement". This Court, accordingly, proceeded to hear the matter on merits on 22.10.2020 and judgment was reserved.

3. Parties have exchanged affidavits where Dilip Dwivedi, the 4th respondent has filed a counter affidavit and the petitioner, a rejoinder.

4. On 22.10.2020, the minor detenues Master Aditya Dwivedi and Kumari Chhavi Dwivedi were both required to be present. They were produced by their father, Dilip Dwivedi. This Court interacted with the minors in considerable detail. The outcome of that enterprise would be alluded to later in this judgment.

5. Heard Sri Shravan Kumar Mishra, learned counsel for the petitioners, Sri Manoj Mishra, learned counsel appearing on behalf of respondent no. 4 and Sri Indrajeet Singh Yadav, learned A.G.A. appearing on behalf of the State.

6. Priti Dwivedi and Dilip Dwivedi were married according to Hindu rites on 28.01.2012. A son named Aditya and a daughter Chhavi were born of the wedlock of parties. Aditya is now aged seven years whereas Chhavi is aged about five years. It is not in issue that parties have become an estranged couple and live apart.

7. A reading of the pleadings of the parties here and the documents annexed show that the husband and wife are in the thick of a matrimonial discord. There is also litigation pending between them, with the wife having filed for restitution of conjugal rights under Section 9 Hindu Marriage Act and for Maintenance under Section 125 Cr.P.C.

8. A reading of the counter affidavit shows that the husband has come up with very serious allegations questioning his wife's fidelity. He has also attempted to annex some documentary proof about all that. This Court is not inclined to look into those allegations or the material in support. It is not our business at all in the present proceedings to go into those murky allegations. Both the children are young, and, normally for children that age, the mother is always regarded better equipped to secure their welfare. It is not so much about the right of the guardian to the minors' custody as it is about the minors' welfare. It is beyond cavil by now that welfare of the minor is of paramount importance. The father and the mother are both natural guardian under Section 6 (a) of the Hindu Minority and Guardianship Act. The mother's right as a natural guardian under Section 6(a) of the Hindu Minority and Guardianship Act stands at par with the father, once the father is absent from the minors' care, in view of the decision of the Supreme Court in **Githa Hariharan (Ms) and another vs. Reserve Bank of India and another, 1999 (2) SCC 228**. It would, thus, always be central to a decision about the minor's custody between the two guardians, both of whom are natural, as to where the minor's welfare would be better secured. This principle has been endorsed by their Lordships of the Supreme Court in **Nil Ratan Kundu and another vs. Abhijit Kundu, 2008 (9) SCC 413**. It is held in **Neel Ratan Kundu** *(supra)*:

52.In our judgment, the law relating to custody of a child is fairly well settled and it is this: in deciding a difficult

and complex question as to the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided *solely* by interpreting legal provisions. It is a human problem and is required to be solved with human touch. A court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the court is exercising*parens patriae*jurisdiction and is expected,naybound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor.

9. The principles on which the welfare of the minor is to be tested are encapsulated in the remarks of their Lordships in **Nil Ratan Kundu** *(supra)* above extracted.

10. It is also a settled principle that welfare of a child has parameters on which it may be determined, but in a given case, what conclusions may be drawn by the Court, are not founded on any kind of a stereotyped approach. It has to be the outcome of a keen assessment about the circumstances obtaining in the case. In this connection, reference may be made to the observations of the Supreme Court in **Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others, 2019 (7) SCC 42**, where in the context of facts there, the principle was stated thus:

35. The welfare of the child has to be determined owing to the facts and circumstances of each case and the Court cannot take a pedantic approach. In the present case, the first respondent has neither abandoned the child nor has deprived the child of a right to his love and affection. The circumstances were such that due to illness of the parents, the appellants had to take care of the child for some time. Merely because, the appellants being the relatives took care of the child for some time, they cannot retain the custody of the child. It is not the case of the appellants that the first respondent is unfit to take care of the child except contending that he has no female support to take care of the child. The first respondent is fully recovered from his illness and is now healthy and having the support of his mother and is able to take care of the child.

(Emphasis by Court)

11. It is, thus, evident that while parameters on which the welfare of a child can be determined are enumerated by high authority and also spelt out by statutes such as Section 17(2) of the Guardians and Wards Act, every case has its individual features to be carefully analyzed in the application of these principles. It must also be emphasized that guardianship and the right to custody may be different. Normally, the two coalesce but where aberrations such as a fission of the nuclear family takes place, notwithstanding the natural guardianship being with one or the other or both the parents, custody becomes a more important issue. Who should have

custody or the dominant part of custody with visitation rights to the other, is also to be determined on the same principles of welfare as apply to the case of appointment or declaration of a guardian under Section 17 of the Guardians and Wards Act.

12. In the present case, what this Court finds is that the minors are staying with the father during all the time that the mother has been away. Aditya Dwivedi has informed the Court that he reads at the Ansy Convent School, relating to which there are documents also on record brought in through the counter affidavit. Chhavi Dwivedi also reads in the said school. Aditya has shared with the Court the fact the he has his grandmother (father's mother), aunt *(Bua)*, his father and sister, all of whom stay together at the father's place. He has clearly indicated his preference not to stay with his mother. He said that she beats him. On the Court inquiring further into the matter, pointing out to the child who is quite intelligent that mothers do have to chastise children, he said that she hits him and his sister for no cause. He expressed his definitive preference to stay with his father. Aditya is about seven years old and a fairly intelligent child. The preference that he has expressed about the guardian in whose custody he would wish to stay cannot be ignored altogether. The Court has also spoken to the other minor Kumari Chhavi. She is a younger child but fairly intelligent. She is aged about five years. She also spoke in the same vein, indicating a definite preference to stay with her father. She indicated that she is happy in the family comprising her father, brother, grandmother and her aunt *(Bua)*. Surprisingly, she also indicated her disinclination to stay with her mother. The two children appear to be very comfortably settled in their father's home where they have a grandmother and also an aunt. Also, the evidence in whatever form it has come shows that the children are being looked after well in all the various facets of a healthy development - physical, mental, moral and comfortwise.

13. It is also clear that the education and moral training is fairly well taken care of. They are psychologically also in the secure atmosphere of a family. No doubt, the mother is not there but in the Court's opinion the balance to judge the children's welfare would tilt in favour of the father's family, given the totality of circumstances and also the minors' choice very eloquently expressed by the elder child, Aditya.

14. Smt. Priti Dwivedi, who is the minor's mother, cannot be altogether deprived of their company and the minors' her care and affection. In the opinion of this Court, Smt. Priti Dwivedi would have visitation rights from morning till evening twice a month. She would be entitled to visit the children at her husband's place from 9 o'clock in the morning to 5 o'clock in the evening on the first and the second Sunday of the month. This schedule can be adjusted by the parties according to their convenience, but not so as to reduce the visitation hours and the number of days that the mother is entitled to in a month.

15. It is ordered that the husband, Dilip Dwivedi and all his family members shall extend due courtesy to Smt. Priti Dwivedi when she visits the children and shall facilitate the children in meeting her.

16. This petition is **disposed of** in terms of the aforesaid orders.

(2020)12ILR A389
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.12.2020

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Habeas Corpus Writ Petition No. 458 of 2020

Javed Siddiqui ...Petitioner (In Jail)
Versus
Suptt. Dist. Jail, Jaunpur & Ors.
...Respondents

Counsel for the Petitioner:
Sri Chandrakesh Mishra, Sri Daya Shankar Mishra

Counsel for the Respondents:
A.G.A., Sri Prem Shanker Prasad, Sri Santosh Kumar Singh

A. Civil Law – Habeas Corpus Writ Petition - National Security Act: Section 3(2), 3(4), 3(5), 8, 10, 12, 14; Prevention of Damage to Public Property Act: Section 3; Epidemic Disease Act: Section 3; Disaster Management Act: Section 51; U.P. Gangster Act: Section 3(1).

Opportunity of hearing before the Advisory Board through legal representative – Article 22 of the Constitution of India does not provide any right in favour of detenue to be representaed through a legal practitioner. Section 11(4) of NSA clearly incorporates that the detenue is not entitled to be represented through a legal practitioner or advocate before Advisory Board - In this petition, it has been neither alleged nor shown by the petitioner that, at any stage, the State was assisted by any legal practitioner or advocate before the Advisory Board, therefore the petitioner is not entitled to be represented through legal practitioner or advocate. (Para 33, 35, 38)

B. Preventive detention of a person is possible for 'preventing him from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of public order....' - The grounds of detention disclose not only "law and order" problem, but also the problem of "public order" which is likely to be caused by the activities of the petitioner. It is trite to mention here that preventive detention is a device to offer protection to the society and the executive can always take recourse to it where it is satisfied that no other method would succeed in preventing a person from disturbing the "public order" situation. The subjective satisfaction of the detaining authority with regard to the action of preventive detention has to be taken keeping in mind the danger to liberties of the people and if the actions or the activities of the person have serious repercussions not merely on "law and order" but on "public order", the satisfaction so recorded cannot be lightly interfered by the Court of Law unless it is arbitrary or unreasonable.

In the case at hand, the grounds of detention elaborately narrate the facts leading to the order of detention and the grounds are precise, pertinent, proximate and relevant for recording subjective satisfaction and thus, it cannot be said that the detaining authority has not applied its judicious mind in coming to the conclusion that the activities of the petitioner are prejudicial in nature to the maintenance of "public order". (Para 32, 39, 40, 44)

To invoke the provision of Section 3(2) of NSA, the satisfaction of the State Government so to prevent a person from acting in a manner prejudicial to the maintenance of "public order" are two essential conditions.

C. Distinction between the two concepts of "public order" and "law and order" - In the case of "law and order", it affects specific individuals only, while in the case of "public order", it has the potentiality of disturbing the normal tempo of the life of the community. The true distinction between the areas of 'public order' and 'law and order' lies not in the nature or quality of the act, but in the degree and extent of its reach upon society. The distinction between the two concepts of 'law and order' and 'public order' is a fine one but this does not mean that there can be no overlapping. Acts

similar in nature but committed in different contexts and circumstances might cause different reactions. (Para 41, 42, 43)

D. Delay in forwarding representation - **Fair opportunity of hearing** - Admitted fact is that the detaining authority passed the detention order on 10.07.2020 against the petitioner and the petitioner gave his representation 20.07.2020 as stated in the counter affidavit of the State. The detention order was approved on 21.07.2020. It is evident that the representation so given by the petitioner was well within the prescribed period of 12 days. On 14.08.2020, his representation was rejected. Prior to that, the Advisory Board had already made recommendation for approval of the detention order on 12.08.2020. The record shows that the representation of the petitioner was not placed before the Advisory Board till 12.08.2020 even though the same was filed on 20.07.2020. It remained pending with the State Government and after 2 days from the date the Advisory Board sent the recommendation, the same was rejected. Representation of the petitioner was not processed expeditiously without any reasonable explanation, and was not even placed before the Advisory Board for consideration.

Delay in taking decision on representation and not placing the same before the Advisory Board are important factors to adjudicate upon the legality or illegality of the order of detention. But such delay is not exclusive factor and depends upon the facts and circumstances of each case and availability of cogent and reasonable explanation to explain the delay. What will be a reasonable explanation would always depend upon the factual situation in that particular case. (Para 46 to 51)

The representation was kept pending for more than 3 weeks and was never placed before the Advisory Board. After the recommendation was made by the Advisory Board on 12.08.2020, the representation was rejected by the Authority with explanation which speaks in volume about the reluctance on the part of opposite parties in delaying and keeping the representation pending and not placing the same before the Advisory Board. Even on the date when the case was fixed before Advisory Board, the authorities could have placed the representation of the petitioner before the Board. Thus, the Court concluded that no reasonable explanation has been given for delay and not placing the representation before the Board.

E. Constitution of India: Article 21 - Where the law confers extra-ordinary power on the executive to detain a person without recourse to the ordinary law of land and to trial by courts, such a law has to be strictly construed and the executive must exercise the power with extreme care. The law of preventive detention, though is not punitive, but only preventive, heavily affects the personal liberty of individual enshrined under Article 21 of the Constitution of India and, therefore, the Authority is under obligation to pass detention order according to procedure established by law and will ensure that the constitutional safeguards have been followed.

The inaction on the part of the authorities certainly resulted in deprivation on the right of the petitioner of fair opportunity of hearing and it also resulted in denial of the opportunity of fair hearing to the petitioner as provided under law. This is not permissible and is in gross violation of established legal and procedural norms and legal and constitutional protection.

Writ Petitions allowed. (E-4)

Precedent cited:-

1. Habeas Corpus Writ Petition No. 3293 of 2018 decided on 19.09.2018 (Para 20)

2. Habeas Corpus Writ Petition No. 3652 of 2018 decided on 01.02.2019 (Para 21)

3. Habeas Corpus Writ Petition No. 3653 of 2018 decided on 19.12.2018 (Para 21)

4. Habeas Corpus Writ Petition No. 58274 of 2017 decided on 30.03.2018 (Para 22)

5. Habeas Corpus Writ Petition No. 55243 of 2017 decided on 30.03.2018 (Para 23)

6. Lallan Goswami @ Ajaynath Goswami Vs Superintendent, Central Jail,Naini, Allahabad, 2002 (45) ACC 1089 (Para 25)

7. Inamul Haq Engineer Vs Superintendent Division/Sistrict Jail, Azamgarh, 2001 CBC 411 (Para 26)

8. Irfan alias Gama Vs St. of U.P., 1985 (Suppl) 195 (All) (Para 27)

9. Devendra Kumar Vs St., 1985 All. LJ 518 (Para 27)

10. Bundu Vs St. of U.P., 1985 All. LJ 515 (Para 28)

Precedent followed: -

1. Ashok Kumar Vs Delhi Administration, AIR 1982 SC 1143 (Para 41)

2. Smt. Angoori Devi for Ram Ratan Vs U.O.I., AIR 1989 SC 371 (Para 42)

3. Ayya alias Ayub Vs St. of U.P., AIR 1989 SC 364 (Para 43)

4. Abhay Shridhar Ambulkar Vs S.V. Bhave, (1991) 1 SCC 500 (Para 44)

5. Magan Gope Vs St. of W.B., (1975) 1 SCC 415 (Para 44)

6. Rajammalvs Vs St. of T.N., (1999) 1 SCC 417 (Para 24, 47)

7. Virendrs Kumar Nayak Vs The Superintendent of Naini Central Jail, Allahabad, 1982 Cri. L.J. 1 (Para 24, 47)

8. Satyapriya Sonkar Vs Superintendent Central Jail Naini, LAWS (ALL)- 1999-10-11 (Para 27, 47)

9. Bheem Singh Vs U.O.I., 1985 ALL. LJ 1404 (Para 28, 47)

10. Smt. Gracy Vs St. of Kerala, AIR 1991 SC 1090 (Para 28, 47)

11. K.M. Abdulla Kunhi & B.L. Abdul Vs U.O.I., AIR 1991 SC 574 (Para 29, 47)

12. Mohinuddin Vs District Magistrate, AIR 1987 SC 1977 (Para 30, 47)

Precedent distinguished: -

1. A.K. Roy Vs Union of India (1982) 1 SCC 271 (Para 20, 35, 36)

2. Choith Nankiram Harchandani Vs State of Maharashtra, (2015) 17 SCC 688 (Para 20, 35, 37)

3. Bittu Choith Harchandani Vs St. of Mah., (2018) 2 SCC (Cri) 403 (Para 20)

Present habeas corpus writ petition against the detention order passed on 10.07.2020, u/s 3(2) of the National Security Act.

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

1. Heard Sri Daya Shankar Mishra, learned Senior Advocate, assisted by Sri Chandrakesh Mishra, learned counsel for the petitioner, Sri Prem Shanker Prasad, learned counsel for Union of India and Sri Amit Sinha, learned A.G.A. for the State.

2. Petitioner, Javed Siddiqui has filed this habeas corpus writ petition against the detention order passed on 10.07.2020, under Section 3(2) of the National Security Act and requested to issue direction for producing the corpus in the Court and also for setting aside the impugned detention order.

3. The facts of the case are that the petitioner, along with 56 known and 25 other unknown persons, on 09.06.2020 at about 06:00 PM, came to the slum locality of Village Bhadethi, Police Station Saraikhwaza, District Jaunpur and committed rioting, arson, used castist words against the inhabitants of the slum locality, abused them and caused injuries by doing *maar-peet* by lathi and danda due to which many of the persons sustained injuries. The petitioner and other persons entered into the houses of inhabitants of slum locality, chased and assaulted themselves, caused damages to their households. Their houses were burnt and the cattle which were tied inside their

houses were also burnt and died. A serious law and order situation accrued at the place of occurrence and the inhabitants of slum locality out of terror and fear, in order to hide them, went to other villages.

4. Regarding incident complainant Rajesh, gave a written report in the concerned police station on the basis of which Crime No. 154 of 2020, under Sections 147, 148, 149, 307, 452, 323, 504, 506, 436, 427, 429/34, 188, 269 I.P.C. and 7 Criminal Law Amendment Act along with Section 3(2)(5) SC/ST Act, Section 3 of the Prevention of Damage to Public Property Act, Section 3 of the Epidemic Disease Act and Section 51 of the Disaster Management Act was registered against the petitioner and others.

5. According to the first information report, on 09.06.2010 at about 05:00 PM, when Ravi Kumar, Pawan and Atul were grazing their buffalos, one Tabiz and his three friends came there with their goats for grazing their cattle and asked them to look after the goats, so that they could not escape away and in case they do escape, they shall bring them back. This was refused by Ravi, Pawan and Atul at which Tabiz and his friends used castist words saying *"Sala Chamar Tum Logo Ka Dimag Kharab Ho Gaya Hai"*. This was refused by Ravi, Pawan and Atul, upon which Tabiz and his friends started beating them. They came back to their houses and complained about it. Soorsati, mother of Ravi, mother of Pawan, namely Satti Devi and brother of Atul, namely Virendra went and inquired about the incident from Tabiz and his friends and complained why did they beat their children. Tabiz and his friends became very angry and started abusing them and threatened them, hence, they came back to slum locality. At about 06:00 PM, petitioner and about 75 to 80 companions came in group with lathi, danda and weapons and attacked on the slum locality and used castiest words against everybody who came in the way and abused them. They chased the inhabitants of the slum locality, committed *maar-peet* after entering into their houses, damaged the household goods and lit fire in the houses. Consequently, many houses were burnt and certain cattle were also burnt. The accused persons were firing in order to kill the inhabitants of slum locality. The inhabitants of slum locality, due to apprehension from the accused, saved their lives by hiding themselves in neighboring villages. Thereafter also, the accused persons continued their lawless activities. In the incident, household goods of ten houses were burnt to ashes and goats and buffaloes were also burnt and died. Several persons, including Vinod Kumar, Kamlesh, Ratan Lal, Nand Lal, Firtu, Foolchand, Ravi, Kundan, Rajesh and other saw the incident. The incident created serious problem to law and order and peace and tranquility in the period of pandemic and several persons sustained injuries.

6. On the basis of written report given by Rajesh, the Investigating Officer entered into investigation and recorded the statements of the complainant and witnesses under Section 161 Cr.P.C. They specifically stated that the petitioner came with his associates along with lathi and danda and other weapons and created fearful situation in the inhabitants of slum locality by committing the aforesaid illegal and criminal acts. The witnesses stated that the whole offence was committed by accused Javed Siddiqui and his associates. They also stated that the petitioner Javed Siddiqui instigated his associates using castiest words to kill the inhabitants of

slum locality and to lit fire in their houses upon which the whole incident took place in which several persons sustained injuries, houses were burnt and cattle were also burnt and there became a completely lawless situation.

7. After the incident, the local police and senior police personnel, including SP, Jaunpur, DM, Jaunpur, IG Police, Lucknow Region and Commissioner, Varanasi inspected the place of occurrence and gave instruction in order to maintain peace and harmony. Huge number of police and P.A.C. personnel were deployed in the slum locality and efforts were made for restoration of law, order and peace and also to restore the confidence of inhabitants of slum locality, so that they could come back. After completion of the investigation, charge sheet was filed for the offences under the aforesaid sections.

8. The petitioner was released on bail in the aforesaid case on 20.06.2020 by the Special Judge, but he remained in jail under Crime No. 156 of 2020, under Section 3(1) U.P. Gangster Act. The District Magistrate found that the petitioner is making all efforts to obtain bail and it was felt by the DM that after coming out from jail, the petitioner will again start similar kind of lawless activities and it will not be possible to maintain law and order and communal harmony and, therefore, after being satisfied, it was decided to initiate action for preventive detention under Section 3(2) of the National Security Act.

9. By order dated 10.07.2020, the District Magistrate passed the detention order and directed the petitioner to be detained in district jail under Section 3(2) of the National Security Act. The petitioner was intimated by the preventive detention order that he has a right to give representation to the State Government against the detention order and also expected him to make such representation to the District Magistrate through the Jail Superintendent as early as possible and it was made clear that such representation, if received after expiry of 12 days from the date of order of detention or after approval by the State Government, the same shall not be considered. It was also made clear that if the petitioner wants to give a representation before State Advisory Board, Lucknow, he may give the representation as early as possible, through the Jail Superintendent. It was also made clear that under Section 10 of the National Security Act, the matter shall be referred to the Advisory Board within three weeks from the date of detention order and if the representation of the petitioner will not be given in time, the same shall not be considered. He was also informed about his right of personal hearing before the Advisory Board and for that he was expected to specifically mention this fact in the representation. He was also informed that he has right to give representation to the Central Government also through Secretary, Government of India, Home Ministry (National Security Department), North Block, New Delhi. This detention order was subsequently approved by the Central Government on the basis of recommendation made by the Advisory Board.

10. The submission of the learned counsel for the petitioner is that on 13.07.2020, the petitioner made a representation with a request to set aside the detention order and in the alternative, also made request to make available the relevant documents to him as early as possible. The submission of the learned

counsel for the petitioner is that despite he made representation against the detention order, the same was not forwarded in time and the same was rejected on the basis that it was not received in time. He was not supplied with relevant documents for which he made specific mention in his representation and therefore he could not make effective representation against the detention order. The offence on the basis of which, the National Security Act was imposed, he was released on bail by the Special Judge at district level. When the detention order was passed, it was not possible that soon the petitioner shall be released on bail as he was also detained under the UP Gangster Act.

11. It has been further submitted that the hearing before the Advisory Board was not fair and was in violation of the right of equality. He was not given opportunity to put his case before the Advisory Board through his legal adviser. The detention order is in complete violation of Articles 22(5), 14 and 21 of the Constitution of India and Section 3(2), 3(4), 3(5), 8, 10, 12 and 14 of the National Security Act and he is entitled for immediate release from jail. His representation was not disposed of in legal manner by the District Magistrate. The Central Government also disposed of his representation dated 27.07.2020 after much delay on 01.09.2020.

12. In the counter affidavit filed by the State, it has been mentioned that the detention order dated 10.07.2020 along with grounds of detention with other connected documents was forwarded by DM on the same day which was received by the State Government on 16.07.2020 and the detention order was approved on 20.07.2020 and the same was communicated to the petitioner on 21.07.2020 within 12 days from the date of detention as required under section 3(4) of the Act. Further, the detention order dated 10.07.2020 along with grounds of detention with other connected documents were also sent to the Central Government within seven days from the date of approval as required under section 3(5) of the Act. The copy of the petitioner's representation dated 27.07.2020 along with para wise comments was received in the concerned Section of State Government on 17.08.2020 along with letter of District Magistrate, Jaunpur dated 13.08.2020. The State Government sent the copy of representation and para wise comments thereon to the Central Government, New Delhi on 18.08.2020. The representation and para wise comments were not sent to the U.P. Advisory Board because hearing had already taken place on 12.08.2020. Thereafter the concerned Section of the State Government examined the representation on 19.08.2020. The Joint Secretary has examined the representation on 20.08.2020, the Special Secretary on 21.08.2020; 22.08.2020 and 23.08.2020 being holiday; the Secretary Government of U.P. examined the said representation on 24.08.2020 and thereafter the file was submitted to the higher authorities for final order and was finally rejected by the State Government on 25.08.2020. The information of rejection order was communicated to the petitioner through district authorities by the State Government Radiogram dated 26.08.2020. Thus, the representation of the petitioner was dealt with expeditiously at several stages of the State Government.

13. The U.P. Advisory Board, Lucknow, vide its letter dated 06.08.2020 informed the State Government that the case of the petitioner would be taken up for hearing on 12.08.2020 and directed that the

petitioner to be informed that, if he desires to attend the hearing before the U.P. Advisory Board along with his next friend (non-advocate), he could do so and he be allowed to take his next friend along with him. This was accordingly, communicated to the petitioner through the district authorities by radiogram dated 07.08.2020. The petitioner appeared for personal hearing before the U.P. Advisory Board on the date fixed for hearing on 12.08.2020. The Advisory Board heard the petitioner in person and submitted its report to the State Government that there is sufficient cause for the preventive detention of the petitioner under, the National Security Act. This report was received in the concerned Section on 20.08.2020 through the letter of Registrar, U.P. Advisory Board letter dated 19.08.2020 well within seven weeks from the date of detention of the petitioner as provided under Section 11(1) of the Act.

14. The State Government once again examined afresh the entire case of the petitioner along with the opinion of the U.P. Advisory Board and took decision to confirm the detention order for a period of three months at first instance from the date of actual detention of the petitioner i.e. since 10.07.2020. Accordingly, the orders of confirmation for petitioner's preventive detention for three months were issued by the State Government through radio-gram dated 01.09.2020.

15. On the report/recommendation dated 01.10.2020, received from the District Magistrate, Jaunpur, after taking into consideration the facts and circumstances of the case, the State Government was satisfied that it is necessary to extend the above detention period for further three months. Therefore, the State Government amended the above order and extended the detention for six months since 10.07.2020. Accordingly, the detention order dated 01.09.2020 was granted and the order was issued on 08.10.2020. The information of extension of detention period was communicated to the petitioner through district authorities by radiogram and letter dated 08.10.2020.

16. Respondent no.1, the Superintendent Jail, Jaunpur has submitted in his counter affidavit, that while the petitioner was in judicial custody vide order dated 10.06.2020/23.6.2020/06.07.2020 in Crime No. 154 of 2020, under Sections 147, 148, 149, 307, 452, 323, 504, 506, 436, 427, 429/34, 188, 269 I.P.C. and 7 Criminal Law Amendment Act along with Section 3(2)(5) SC/ST Act, Section 3 of the Prevention of Damage to Public Property Act, Section 3 of the Epidemic Disease Act and Section 51 of the Disaster Management Act, vide order dated 19.06.2020/18.08.2020, he was further sent to judicial custody in jail in crime no. 156 of 2020 under section 3(1) of UP Gangster Act. He was in jail, detention order dated 10.07.2020 was received on the same day which was served on the petitioner on the same day and was informed about the grounds of preventive detention and his right of representation to the different authorities and if he desires to give representation to DM, he should submit within 12 days or before approval of the detention order, whichever is earlier. On 20.07.2020, he submitted his representation of same date and on the same day, the representation was sent to DM. The detention order was approved by the State Government on 21.07.2020. Petitioner again submitted his representation on 27.07.2020 addressed to the Principal Secretary (Home), UP Government, Home

Government, New Delhi and Advisory Board, New Delhi which was sent to the above authorities through DM on 28.07.2020. Representation dated 20.07.2020 was rejected by DM on 15.08.2020 which was received and communicated by the Jail authority on the same day to the petitioner. The State Government rejected the representation on 26.08.2020 and the same was communicated to the petitioner on 27.08.2020. The Central Government rejected the representation on 01.09.2020 which was received and communicated on 03.09.2020 to the petitioner. The petitioner was informed about the date, time and place of hearing on 07.08.2020, which was 12.08.2020. No request for hearing was made through non advocate next friend. He was produced before the Advisory Board through video-conferencing. It has been further mentioned in the counter affidavit that in crime no. 154 of 2020, vide order dated 23.06.2020 and in crime no. 156 of 2020, vide order dated 26.08.2020, the petitioner has been released on bail.

17. Union of India/Respondent no.4 has filed counter affidavit stating that the report under Section 3(5) of Act and representation dated 27.07.2020 of the detenu with para-wise comments was forwarded on 13/14.08.2020, which was received on 21.08.2020 in the Ministry of Home Affairs and on 24.08.2020, the same was processed for consideration and on careful consideration, finding no justifiable ground for revocation of the detention order and 22nd, 23rd, 29th and 30th August, 2020 being holiday, with all promptitude, rejected the same on 01.09.2020 and communicated to the petitioner.

18. In the two rejoinder affidavits, the petitioner hss submitted that the State has extended the detention period for six months from 10.07.2020 vide order dated 08.10.2020. No hearing was given before extending and it was illegal to extend the period of detention for 6 months at a time on same ground on the basis of which, the original order was passed. The petitioner has denied the contents of counter affidavit filed by the Union of India and State and has stated that the mandatory requirement of Section 3(5) of the Act was not complied, nor relevant documents were not provided nor his representation was promptly disposed nor communicated to him. The detention order is in complete violation of Articles 21and 22(5) of the Constitution.

19. Arguments have been advanced by the learned counsel for the petitioner. The first one is that the representation of the petitioner was not forwarded in time, even though he had made the representation at an early date. It has further been submitted that the representation was dealt with by the State Government and Central Government in such a way that it would reach only after the recommendation of the Advisory Board and it gave rise to the preliminary rejection of the representation. Another submission is that the petitioner was not given adequate opportunity of hearing before the Advisory Board and his representation was not referred to the Advisory Board. He was also not given opportunity to put his case through a counsel or through a legal expert. Further submission is that, in the case on the basis of which the National Security Act has been imposed on the petitioner, the petitioner was granted bail by the Special Judge, District Jaunpur.

20. Several reference have been taken from the side of the petitioner in support of the the above arguments. The first

reference is **Habeas Corpus Writ Petition No. 3293 of 2018** decided by a coordinate Bench of this Court vide order dated 19.09.2018 in which on the basis of judgments of **A.K. Roy v Union of India (1982) 1 SCC 271** and **Choith Nanikram Harchandani v State of Maharashtra, 2015, volume 17 SCC 688** with **Bittu Choith Harchandani vs. State of Maharashtra (2018) 2 Supreme Court Cases (Cri) 403**, learned counsel for the petitioner has submitted that it is settled view of the Apex Court that the detenue has right to appear through legal practitioner in the proceedings before the Advisory Board, if so claimed by him and if the petitioner has not been allowed to be represented through legal practitioner despite request made by him before the Board, it is denial of the opportunity of fair hearing before the Advisory Board and is in violation of Article 14 of the Constitution of India and such detention order is not sustainable.

21. On the same point, another reference has also been taken which is **Habeas Corpus Writ Petition No. 3652 of 2018** decided by the coordinate Bench of this Court, vide its order dated 01.02.2019. In addition to above, this judgment has also been taken in support of the contention that despite the demand, the petitioner was not supplied with the documents, which have been required in his representation. Similar view has been taken in the **Habeas Corpus Writ Petition No. 3653 of 2018** decided by the coordinate Bench of this Court vide its order dated 19.12.2018.

22. The judgment of the Supreme Court in **Choith Nanikram Harchandani vs. State of Maharashtra** with **Bittu Choith Harchandani vs. State of Maharashtra (2018) 2 Supreme Court Cases (Cri) 403** and **(2015) 17 Supreme Court Cases 688** has also been referred on the point, submitting that if opportunity of fair hearing by not giving opportunity to the detenue to put his case through a counsel, is not given, the same shall be the violation of opportunity of fair hearing and such detention order shall not be sustainable. It is pertinent to mention that these judgments have been referred to in all the three cases decided by the coordinate Benches as referred above. The judgment of the coordinate Bench in **Habeas Corpus Writ Petition No. 58274 of 2017** decided on 30.03.2018 has also been referred in which, it has been held as under :-

*"An order of detention passed in respect of a person under judicial custody must satisfy the three conditions spelt out by the Apex Court in the case of **Kamarunnissa vs. Union of India and another, 1990 SCR Suppl (1) 457** and one of such conditions is that the authority passing the order of detention in respect of a person in custody should have the reason to believe that there was real possibility of his release on bail and further on being released, he would probably indulge in activities which are prejudicial to public order. The satisfaction that it is necessary to detain a person for the purpose of preventing him from acting in a prejudicial manner is thus, the basis of the order under Section 3(2) of the National Security Act and tis basis is clearly absent in the present case."*

23. Learned counsel for the petitioner has submitted that there is nothing on record to show that the above three conditions were objectively assessed by the District Magistrate before passing the detention order. Similar view has been taken by a subsequent judgment passed by

the coordinate Bench of this Court in **Habeas Corpus Writ Petition No. 55243 of 2017** decided on 30.03.2018.

24. In regard to the contention that where there is unexplained, unreasonable and improper delay in forwarding the representation of the detenue resulting in its rejection, such detention order shall be vitiated, the references of the judgment of Supreme Court in **Rajammalvs v State of Tamil Nadu (1999) 1 SCC 417** and **Virendrs Kumar Nayak v The Superintendent of Naini Central Jail, Allahabad, 1982 Cri. L.J. 1** have been taken.

25. Learned counsel for the petitioner has submitted that the representation of petitioner was rejected on a technical ground which is not permissible in law as opined in **Lallan Goswami @ Ajaynath Goswami vs. Superintendent, Central Jail, Naini, Allahabad, 2002 (45) ACC 1089**. The District Magistrate must apply his mind and decide the representation.

26. With reference to **Inamul Haq Engineer vs. Superintendent, Division/Sistrict Jail, Azamgarh, 2001 CBC 411**, it has been argued that if counter version of the case and bail order has not been placed before the detaining authority when the detention order was passed and in absence of such document the detention order has been passed, the same shall not be sustainable and shall be liable to be quashed.

27. The learned Senior Advocate has also submitted that in **Satyapriya Sonkar v Superintendent Central Jail Nani, LAWS (ALL) -1999-10-11**, it has been held that where the representation of the detenu was not placed before the Advisory Board, the detention is rendered invalid. Even a supplementary representation ought to be placed before the Advisory Board. This view has been further reiterated in **Irfan alias Gama v State of UP, 1985 (Suppl) 195 (All). In Devendra Kumar v State, 1985 All. LJ 518**, this Court observed as below:

"After examining the various provisions of the National Security Act, there is no doubt that the two obligations of the Government to refer the case of the detenu and his representation filed under S. 8 of the Act to the Advisory Board and to consider that representation on the other are two distinct obligations independent of each other. In view of S. 10, the representation of a detenu if filed within this stipulated period has to be placed before the Advisory Board within that period and it is not dependent on the decision of the appropriate authority of that representation."

28. The learned Senior Advocate has also referred to the judgment in **Bundu v State of UP, 1985 All.LJ 514** in which also similar observation has been made by this Court. In **Bheem Singh v Union of India,1985 All.LJ 1404**, where the representation of detenu was sent to the Advisory Board beyond 3 weeks of the date of detention, the provisions of Section 10 of the Act is clearly violated and the detention order is illegal. In **Smt Gracy v State of Kerala, AIR 1991 SC 1090**, the Supreme Court held:

"It being settled that this dual obligation flows from Art. 22(5) when only one representation is made and addressed to the detaining authority, there is no reason to hold that the detaining authority is relieved of this obligation merely

because the representation is addressed to the Advisory Board instead of the detaining authority and submitted to the Advisory Board during pendency of the reference before it. So long as there is a representation made by the detenu against the order of detention, the dual obligation under Article 22(5) arises irrespective of the fact whether the representation is addressed to the detaining authority or to the Advisory Board or to both."

29. Reiterating the same view, the Supreme Court laid down in **K.M. Abdulla Kunhi & B.L. Abdul v Union of India, AIR 1991 SC 574** that an unexplained delay in disposal of representation would be a breach of constitutional imperative and would render the detention illegal. It was also remarked that the representation might have been received after the case was referred to the Board, even then the same should be placed before the Board provided the proceeding was not concluded before the Board.

30. In **Mohinuddin v District Magistrate, AIR 1987 SC 1977**, reiterating that unexplained delay in disposal of representation would render the detention illegal, the Court said:

"When the life and liberty of a citizen is involved, it is expected that the Government will ensure that the constitutional safeguards embodied in Art. 22(5) are strictly observed. We say and we think it necessary to repeat that the gravity of the evil to the community resulting from anti-social activities can never furnish an adequate reason for invading the personal liberty of a citizen, except in accordance with the procedure established by the Constitution and the laws. The history of personal liberty is largely the history of insistence on observation of the procedural safeguards."

31. Now, in the background of the arguments advanced and case laws relied upon by the learned Senior Advocate, we roughly find certain issues which emerge in this case on the basis of which, this writ petition is required to be decided. The first issue is with regard to the plea of petitioner regarding non-supply of relevant documents even though he demanded the same. The counter affidavits filed on behalf of the respondents deny it and they have stated that the detention order was served on the petitioner along with all relevant papers. Neither in the petition nor in the rejoinder affidavits, the petitioner has made specific mention about those documents which were not given to him. The affidavits of the respondents, who are public officers cannot be easily disbelieved merely on the saying of the petitioner. We find no force in this argument advanced from the side of petitioner.

32. The second issue for determination is that the detaining authority did not consider the fact that the case on the basis of which NSA was imposed, in that case, the petitioner was already granted bail and even then there was no possibility of his early release as the offence under the UP Gangster Act was imposed on him and he was sent to judicial custody and was in jail when NSA was imposed on him. The detaining authority has mentioned in the detention order that in Crime no. 154 of 2020, the petitioner obtained bail from the court of Special Judge and there is every possibility that he will soon obtain bail in the case under the UP Gangster Act. Needless to mention that the petitioner was granted bail in crime no. 156 of 2020, under the UP Gangster Act vide order dated

26.08.2020. Therefore, the opinion of the detaining authority that there is every possibility that the petitioner will obtain bail very soon was based on sound apprehension. Taking into consideration all the facts and attending circumstances, the detaining authority was of the view that in order to prevent the petitioner from indulging in similar type of activities, his preventing detention was necessary. Therefore, this issue, in our view, is liable to be disposed against the petitioner.

33. The next issue is with regard to the opportunity of hearing before the Advisory Board through legal representative. It has been submitted that despite his request, he was denied this opportunity and it renders the detention illegal. The learned counsel for the respondents have referred to Article 22 of the Constitution which is as follows:

"22. Protection against arrest and detention in certain cases

(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate

(3) Nothing in clauses (1) and (2) shall apply -

(a) to any person who for the time being is an enemy alien; or

(b) to any person who is arrested or detained under any law providing for preventive detention

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless -

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clauses (b) of clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe -

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a

period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub clause (a) of clause (4)."

34. The NSA provides as follows:

"Section 11. Procedure of Advisory Board. -

(1) The Advisory Board shall, after considering the materials placed before it and, after calling for such further information as it may deem necessary from the appropriate Government or from any person called for the purpose through the appropriate Government or from the person concerned, and if, in any particular case, it considers it essential so to do or if the person concerned desires to be heard, after hearing him in person, submit its report to the appropriate Government within seven weeks from the date of detention of the person concerned.

(2) The report of the Advisory Board shall specify in a separate part thereof the opinion of the Advisory Board as to whether or not there is sufficient cause for the detention of the person concerned.

(3) When there is a difference of opinion among the members forming the Advisory Board, the opinion of the majority of such members shall be deemed to be the opinion of the Board.

(4) Nothing in this section shall entitle any person against whom a detention order has been made to appear by any legal practitioner in any matter connected with the reference to the Advisory Board; and the proceedings of the Advisory Board and its report, excepting that part of the report in which the opinion of the Advisory Board is specified, shall be confidential."

35. Article 22 of the Constitution does not provide any right in favor of detenue to be represented through a legal practitioner or advocate. Section 11(4) of NSA clearly incorporates that the detenue is not entitled to be represented through a legal practitioner or advocate before Advisory Board. He can be represented before the Advisory Board through a non-advocate next friend. The learned Senior Advocate has taken reference of certain judgments to support his argument that the detenue was entitled to be defended and represented through a legal practitioner or advocate. The judgments in **A.K. Roy vs. Union of India (1982) 1 SCC 271** and **Choith Nanikram Harchandani vs. State of Maharashtra, 2015, volume 17 SCC 688** have been referred to in support.

36. The issue, whether the detenu has right to appear through a legal practitioner in the proceedings before the Advisory Board stands settled by the decision of the Constitution Bench of the Apex Court in **A. K. Roy (supra)** where the Court held as below:

"We must therefore hold, regretfully though, that the detenu has no right to appear through a legal practitioner in the proceedings before the Advisory Board. It is, however, necessary to add an important caveat. The reason behind the provisions contained in Article 22 (3) (b) of the Constitution clearly is that a legal practitioner should not be permitted to

appear before the Advisory Board for any party. The Constitution does not contemplate that the detaining authority or the Government should have the facility of appearing before the Advisory Board with the aid of a legal practitioner but that the said facility should be denied to the detenu. In any case, that is not what the Constitution says and it would be wholly inappropriate to read any such meaning into the provisions of Article 22. Permitting the detaining authority or the Government to appear before the Advisory Board with the aid of a legal practitioner or a legal adviser would be in breach of Article 14, if a similar facility is denied to the detenu. We must therefore make it clear that if the detaining authority or the Government takes the aid of a legal practitioner or a legal adviser before the Advisory Board, the detenu must be allowed the facility of appearing before the Board through a legal practitioner."

37. Similarly, in **Choith Nanikram Harchandani (supra)** with **Bittu Choith Harchandani Vs. State of Maharashtra (2018) 2 SCC (Cri) 403, (2015) 17** Supreme Court Cases 688 it was held as under :

"In our considered opinion, since the detaining authority was represented by the officers at the time of hearing of the petitioner's case before the Advisory Board, the petitioner too was entitled to be represented through legal practitioner. Since no such opportunity was afforded to the petitioner though claimed by him, he was denied an opportunity of a fair hearing before the Advisory Board, which eventually resulted in passing an adverse order."

38. We find that, in this petition, it has been neither alleged nor shown by the petitioner that, at any stage, the State was assisted by any legal practitioner or advocate before the Advisory Board and in view of above referred judgments, the petitioner is not entitled to be represented through legal practitioner or advocate. This point is therefore disposed accordingly.

39. Next submission is that the satisfaction of the detaining authority is not based on sound reasons, as the alleged offence/case which was made basis for imposing NSA, in that offence/case, the petitioner was released on bail by Special Judge at district level and it goes to show that the alleged offence was not of that magnitude where bail could be denied. Section 3 of NSA is as follows:

*"**Section 3. Power to make orders detaining certain persons. -***

(1) The Central Government or the State Government may,--

(a) if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the defence of India, the relations of India with foreign powers, or the security of India, or

(b) if satisfied with respect to any foreigner that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India,

it is necessary so to do, make an order directing that such person be detained.

(2) The Central Government or the State Government may, if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of public order or from acting in any manner prejudicial to the

maintenance of supplies and services essential to the community it is necessary so to do, make an order directing that such person be detained.

Explanation.--For the purposes of this sub-section, "acting in any manner prejudicial to the maintenance of supplies and services essential to the community" does not include "acting in any manner prejudicial to the maintenance of supplies of commodities essential to the community" as defined in the Explanation to sub-section (1) of section 3 of the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980 (7 of 1980), and accordingly, no order of detention shall be made under this Act on any ground on which an order of detention may be made under that Act.

(3) If, having regard to the circumstances prevailing or likely to prevail in any area within the local limits of the jurisdiction of a District Magistrate or a Commissioner of Police, the State Government is satisfied that it is necessary so to do, it may, by order in writing, direct, that during such period as may be specified in the order, such District Magistrate or Commissioner of Police may also, if satisfied as provided in sub-section (2), exercise the powers conferred by the said sub-section:

Provided that the period specified in an order made by the State Government under this sub-section shall not, in the first instance, exceed three months, but the State Government may, if satisfied as aforesaid that it is necessary so to do, amend such order to extend such period from time to time by any period not exceeding three months at any one time.

(4) When any order is made under this section by an officer mentioned in sub-section (3), he shall forthwith report the fact to the State Government to which he is subordinate together with the grounds on which the order has been made and such other particulars as, in his opinion, have a bearing on the matter, and no such order shall remain in force for more than twelve days after the making thereof unless, in the meantime, it has been approved by the State Government:

Provided that where under section 8 the grounds of detention are communicated by the officer making the order after five days but not later than ten days from the date of detentions, this sub-section shall apply subject to the modification, that, for the words "twelve days", the words "fifteen days" shall be substituted.

(5) When any order is made or approved by the State Government under this section, the State Government shall, within seven days, report the fact to the Central Government together with the grounds on which the order has been made and such other particulars as, in the opinion of the State Government, have a bearing on the necessity for the order."

40. Thus, preventive detention of a person is possible for 'preventing him from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of public order....' In our opinion, the grounds of detention disclose not only "law and order" problem, but also the problem of "public order" which is likely to be caused by the activities of the petitioner. It is trite to mention here that preventive detention is a device to offer protection to the society and the executive can always take recourse to it where it is satisfied that no other method would succeed in preventing a person from disturbing the "public order" situation. The subjective satisfaction of the detaining authority with regard to the

action of preventive detention has to be taken keeping in mind the danger to liberties of the people and if the actions or the activities of the person have serious repercussions not merely on "law and order" but on "public order", the satisfaction so recorded cannot be lightly interfered by the Court of Law unless it is arbitrary or unreasonable.

41. Satisfaction of the State Government that it is necessary to detain a person in order to prevent him from acting in any manner prejudicial to the "public order" is an essential condition for passing such a preventive order. The "public order" has not been defined under the Act but it was a matter of consideration before the Apex Court in the case of **Ashok Kumar v Delhi Administration, AIR 1982 SC 1143** which was also a case under the aforesaid Act. The Court therein made a distinction between the two concepts of "public order" and "law and order" and held that in the case of "law and order", it affects specific individuals only, while in the case of "public order", it has the potentiality of disturbing the normal tempo of the life of the community. The Supreme Court observed as under:

"The true distinction between the areas of 'public order' and 'law and order' lies not in the nature or quality of the act, but in the degree and extent of its reach upon society. The distinction between the two concepts of 'law and order' and 'public order' is a fine one but this does not mean that there can be no overlapping. Acts similar in nature but committed in different contexts and circumstances might cause different reactions. In one case it might affect specific individuals only and therefore touch the problem of law and order, while in another it might affect public order. The act by itself therefore is not determinant of its own gravity. It is the potentiality of the act to disturb the even tempo of the life of the community which makes it prejudicial to the maintenance of public order."

42. The meaning of "public order" again came up for consideration in **Smt. Angoori Devi for Ram Ratan v Union of India, AIR 1989 SC 371** and it was opined that if the act is confined to individual without directly or indirectly affecting the life of the community, it may be a matter of "law and order" only but where the gravity of the act is otherwise and likely to endanger the public tranquility, it may fall within the orbit of "public order".

43. In **Ayya alias Ayub v State of UP, AIR 1989 SC 364** it was observed that what might be otherwise simple "law and order" situation, it might assume the gravity and mischief of "public order" by reason alone of the manner or circumstances in which it is carried out. In other words, at times even simple acts of "law and order" problem on account of their gravity and the manner or circumstances in which they occur may result in disturbing the "public order" if they create a sense of insecurity in the public mind. Therefore, to invoke the provision of Section 3(2) of the Act, the satisfaction of the State Government so to prevent a person from acting in a manner prejudicial to the maintenance of "public order" are two essential conditions. Therefore, we are of the view that the distinction between "law and order" and "public order" is very fine and at times it may be overlapping.

44. In the case at hand, the grounds of detention elaborately narrate the facts leading to the order of detention and the

grounds are precise, pertinent, proximate and relevant for recording subjective satisfaction and thus, it cannot be said that the detaining authority has not applied its judicious mind in coming to the conclusion that the activities of the petitioner are prejudicial in nature to the maintenance of "public order". Moreover, it has been settled in **Abhay Shridhar Ambulkar v S.V. Bhave, (1991) 1 SCC 500** and **Magan Gope v State of WB, (1975) 1 SCC 415** that subjective satisfaction of the detaining authority in passing the detention order cannot be lightly interfered with and the Court cannot go behind the satisfaction expressed on the face of detention order.

45. Another argument is that the detaining authority extended the detention order for 6 months at a time, which is illegal. It appears from the record that after taking into consideration the facts and circumstances of the case, the State Government was satisfied that it is necessary to extend the above detention period for further three months. Therefore, the State Government amended the above order and extended the detention for six months since 10.07.2020. Accordingly, the detention order on 08.10.2020. The information of extension of detention period was communicated to the petitioner through district authorities by radiogram and letter dated 08.10.2020. thus, it is not correct to say that the detention order was extended for six months. It was so extended for three months by order dated 08.10.2020 which means 6 months extension from the initial date of detention. Therefore, we do not find any force in this argument.

46. The last issue is with regard to the delay in forwarding representation of the petitioner and not placing the same before the Advisory Board. It has been submitted that no reasonable explanation has been given by the respondents. Case law has been referred to in support of this argument. The factual matrix in this regard needs to be mentioned and discussed at this stage. Admitted fact is that the detaining authority passed the detention order on 10.07.2020 against the petitioner and the petitioner gave his representation 20.07.2020 as stated in the counter affidavit of the State. The detention order was approved on 21.07.2020. It is evident that the representation so given by the petitioner was well within the prescribed period of 12 days. On 14.08.2020, his representation was rejected. Prior to that, the Advisory Board had already made recommendation for approval of the detention order on 12.08.2020. The record shows that the representation of the petitioner was not placed before the Advisory Board till 12.08.2020 even though the same was filed on 20.07.2020. It remained pending with the State Government and after 2 days from the date the Advisory Board sent the recommendation, the same was rejected. The submission of the learned Senior Advocate is that the representation of the petitioner was not processed expeditiously without any reasonable explanation, and was not even placed before the Advisory Board for consideration. This inaction on the part of authorities resulted in denial of fair opportunity of hearing and on this ground alone, the impugned detention order is vitiated.

47. We are of the view that delay in taking decision on representation and not placing the same before the Advisory Board are important factors to adjudicate upon the legality or illegality of the order of detention. But such delay is not exclusive factor and depends upon the facts and circumstances of each case and

availability of cogent and reasonable explanation to explain the delay. What will be a reasonable explanation would always depend upon the factual situation in that particular case. We are of the firm view that an uniform scale or parameter in this respect is not possible nor can be laid down. Therefore, without expressing a final opinion on law point on delay in such cases, on the basis of decision in **Rajammal (supra), Virendra Kumar Nayak (supra), Satyapriya Sonkar (supra), Bheem Singh (supra), Smt Gracy (supra), K.M. Abdulla Kunhi & B.L. Abdul (supra)** and **Mohinuddin (supra)**, which have been referred on behalf of petitioner and discussed by us here-in-above, in the factual context of this particular writ petition, we find that following observations made in the above referred judgments on the point of delay are relevant which can be taken into consideration for coming to a conclusion in this petition :

1. Where the representation of the detenue was not placed before the Advisory Board, the detention is rendered invalid. Even a supplementary representation ought to be placed before the Advisory Board.

2. Where there is unexplained, unreasonable and improper delay in forwarding the representation of the detenue resulting in rejection of the representation, such detention order shall be vitiated.

3. The representation should not be rejected on technical grounds and the detaining authority must apply his mind.

4. There are two obligations of the Government to refer the case of the detenue and his representation filed under S. 8 of the Act to the Advisory Board and to consider that representation independent of each other. In view of S. 10, the representation of a detenue if filed within stipulated period has to be placed before the Advisory Board within that period and it is not dependent on the decision of the appropriate authority of that representation."

5. Where the representation of detenu was sent to the Advisory Board beyond 3 weeks of the date of detention, the provisions of S.10 of the Act is clearly violated and the detention order is illegal.

6. When only one representation is made and addressed to the detaining authority, he is not relieved of the obligation merely because the representation is addressed to the Advisory Board instead of the detaining authority and submitted to the Advisory Board during pendency of the reference before it. So long as there is a representation made by the detenue against the order of detention, the dual obligation continues.

7. an unexplained delay in disposal of representation would be a breach of constitutional imperative and would render the detention illegal. Even if the representation might have been received after the case was referred to the Board, even then the same should be placed before the Board provided the proceeding was not concluded before the Board.

48. It needs to be pertinently mentioned that no judgment has been referred by the opposite parties in which any contrary observation has been expressed. Therefore, in view of the aforesaid observations, we find that in this instant case, a breach thereof is evident. The representation was kept pending for more than 3 weeks and was never placed before the Advisory Board. After the recommendation was made by the Advisory Board on 12.08.2020, the

representation was rejected by the Authority. In respect of delay in processing the representation, the counter affidavit contains the following explanation in para 26:

"That the contents of paragraph no.28 of the writ petition are false, hence denied. In reply, it is submitted that having received the representation same was sent to Superintendent of Police, Jaunpur for comments and on 24.07.2020 English Record Keeper was found corona positive and office was closed for 25.07.2020 and 26.07.2020 and thereafter, again on 27.07.2020, 5 employees and one official was found corona positive the office was again closed on 28.07.2020, 29.07.2020 Collectrate office was closed and 1st, 2nd and 3rd August, 2020 was government holiday and concerned employee was busy in B.ed examination 2020-22 on 09.08.2020, so could not put up the file and thereafter, on 3 days the file was delayed on the part of Officiating judicial Assistant Kamlesh Kumar Maurya, who was suspended for negligence and file was put up before deponent on 14.08.2020 and on the same day it was rejected and same was communicated to detenue on 15.08.2020 through Jail Authority "

49. In our view, the above explanation itself speaks in volume about the reluctance on the part of opposite parties in delaying and keeping the representation pending and not placing the same before the Advisory Board. The plea of Covid-19, officials suffering from pendemic, intervening holiday or negligence on the part of an official on account of which he was suspended, are no reason, which could be attributed towards any fault or lapse on the part of the petitioner. Even on the date when the case was fixed before Advisory Board, the authorities could have placed the representation of the petitioner before the Board. Thus, we find that no reasonable explanation has been given for delay and not placing the representation before the Board.

50. On the contrary, it is evident from the record that, while extra ordinary haste was shown in taking action against the petitioner, the authorities remained reluctant and there was complete inaction on their part causing unjustified delay in processing the representation of the detenue and in not placing the representation before the Advisory Board. This inaction on the part of the authorities certainly resulted in deprivation on the right of the petitioner of fair opportunity of hearing and it also resulted in denial of the opportunity of fair hearing to the petitioner as provided under law. This is not permissible and is in gross violation of established legal and procedural norms and legal and constitutional protection.

51. Where the law confers extra-ordinary power on the executive to detain a person without recourse to the ordinary law of land and to trial by courts, such a law has to be strictly construed and the executive must exercise the power with extreme care. The history of personal liberty is largely the history of insistence on observation of the procedural safeguards. The law of preventive detention, though is not punitive, but only preventive, heavily affects the personal liberty of individual enshrined under Article 21 of the Constitution of India and, therefore, the Authority is under obligation to pass detention order according to procedure established by law and will ensure that the constitutional safeguards have been followed.

52. In view of above discussion, we find that the impugned detention order dated 10.07.2020 and its subsequent extension orders passed against the petitioner is arbitrary and illegal and is liable to be quashed.

53. The writ petition is **allowed** and the impugned detention order of the petitioner **Javed Siddiqui** is quashed. The petitioner /detenue **Javed Siddiqui** is directed to be released forthwith, if not required in any other case.

54. The party shall file computer generated copy of this order downloaded from the official website of High Court Allahabad, self attested by the petitioners along with a self attested identity proof of the said person (s) (preferably Aadhar Card) mentioning the mobile number (s) to which the said Aadhar Card is linked.

55. The concerned Court/Authority/Official Shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

(2020)12ILR A408
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.10.2020

BEFORE

THE HON'BLE J.J. MUNIR, J.

Habeas Corpus Writ Petition No. 526 of 2020

Badri Yadav & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Rahul Srivastava

Counsel for the Respondents:
A.G.A.

A. Civil Law – Writ of Habeas Corpus– *Rule Nisi* – Illegal confinement - It is evident that the detenu is not at all in any kind of illegal confinement by or at the instance of Smt. Shanti Devi. He is staying, with Shanti Devi of his own accord. In the circumstances, the rule nisi issued by this Court cannot be made absolute. The Rule is discharged.

Writ Petition dismissed. (E-4)

(Delivered by Hon'ble J.J. Munir, J.)

1. In compliance with the *rule nisi* issued on 15.10.2020, the learned Chief Judicial Magistrate, Varanasi has executed the commission at Varanasi, to record the statement of Badri Yadav S/o the late Kharpattu Yadav in order to ascertain whether he is in illegal confinement of Smt. Shanti Devi W/o Surendra Yadav or anyone else acting on her behalf.

2. The learned Chief Judicial Magistrate, Varanasi has submitted his report dated 21.10.2020 along with his covering memo dated 22.10.2020. There is also a separate minutes of the commission executed by the learned Chief Judicial Magistrate dated 21.10.2020. The original has not yet arrived but the Court has received an e-mail copy of all these documents. This Court proceeds to act on the report of the commission. The report of the commission done by the learned Chief Judicial Magistrate, Varanasi dated 21.10.2020 reads as under:

"बययान बदद्री ययादव s/o स्व 0 खरपतत्तू ययादव

ददनयानांक 21.10.2020

मयाननद्रीय उच्च न्ययाययालय, इलयाहयाबयाद कके बन्दद्री प्रत्यकद्रीकरण

ररट सनांख्यया 526 सनन 2020 बदद्री ययादव एवनां एक अन्य बनयाम उतर प्रदकेश रयाज्य एवनां तद्रीन अन्य , मम मयाननद्रीय न्ययाययालय कके आदकेश ददनयानांदकत 15.10.2020 कके अननुपयालन मम म सनुरकेन्द म प्रतयाप ययादव, मनुख्य न्ययादयक वयारयाणसद्री नके बदद्री ययादव पनुत्र स्व 0 खरपतत्तू ययादव, उम्र 70 वरर लगभग मत्तूल दनवयासद्री हकेमई, थयानया ददोहरद्री घयाट, जजिलया मउ, उतर प्रदकेश कया बययान दनम्नजलजखत अनांदकत दकययया गययायप्रश्नय- आपकया नयाम क्यया हह? उतरय- बदद्री ययादव। प्रश्नय- आपकया मत्तूल दनवयासद्री कहयाहाँ कके ह?म उतरय- म गयाम हकेमई म , थयानया ददोहरद्री घयाट, जजिलया मउ कया मत्तूल दनवयासद्री हहहाँ। प्रश्नय- यह मकयान दकसकया हह? उतरय- यह मकयान मकेरके भयाई स्व 0 भदोलया कया हह, जजिनककी ममृत्य सनन नु 2011 मम हदो चनुककी हह, यहयानां पर मकेरके भयाई ककी पत्नद्री शयान्तद्री व उनकया पनुत्र रदव प्रकयाश रहतया हह। प्रश्नय- आप यहयाहाँ पर कब आयके थके? उतरय- म यहयानां पर म 23.09.2020 कदो आययया थया। प्रश्नय- आप यहयानां पर क्ययों आयके थके? उतरय- मम18 जसतम्बर कदो कयाफकी बद्रीमयार हदो गययया थया। गयानांव पर कदोई दकेखभयाल करनके वयालया नहहीं थया। मकेरद्री पत्नद्री खद बह नु हत कमजिदोर हह। तब मनके शयान्तद्री कदो फदोन म दकययया। तब शयान्तद्री वहयानां जियाकर पहलके मनुझके जसपयाह , मऊ मम फयाजलस वयालके डयाक्टर कदो ददखययायद्री दफर यहयानां पर ददनयानांक 23.09.2020 कदो लकेकर आयद्री और डयाक्टर कदो ददखययायया तब जियाकर मनुझके आरयाम हहआ। तब सके म यहद्री पर ह म हहाँ, यह लदोग मकेरद्री दकेखभयाल करतके ह।म प्रश्नय- क्यया आपकदो शयान्तद्री दकेवद्री ययया अन्य दकसद्री कके दयारया यहयानां पर जिबरदस्तद्री रदोककर अथवया बन्द करकके रखया गययया हह? उतरय- मनुझके यहयानां पर दकसद्री कके दयारया जिबरदस्तद्री रदोक कर नहहीं रखया गययया हह और न हद्री बन्द करकके रखया गययया हह। म यहयानां पर स्वकेच्छया सके इलयाजि करयानके कके जलए आययया म हहहाँ। यह लदोग मकेरद्री दकेखभयाल करतके ह।म प्रश्नय- शयान्तद्री दकेवद्री व अन्य दकसद्री नके आपकदो डरययाया धमकययाया तदो नहहीं हह? उतरय- मनुझके दकसद्री नके डरययाया धमकययाया नहहीं हह। प्रश्नय- आप मयानजसक रूप पत्तूणरतय स्वस्थ ह?म उतरय- जिद्री। हयानां। प्रश्नय- शयान्तद्री दकेवद्री आदद नके आप सके दकसद्री कयागजि पर अनांगत्तूठया / हस्तयाकर तदो नहहीं लगवययाया हह? उतरय- म पढया जलखया नहहीं ह म हहाँ। इन लदोगयों नके मनुझसके कहहीं भद्री कयागजि पर अनांगत्तूठया नहहीं लगवययाया हह। बययान मकेरके दयारया पढवयाकर , सनुनकर, समझकर, स्वस्थ मससस्तष्क सके समझकर तस्दद्रीक दकययया गययया।

ह 0 दन0 अनांगनुठया बदद्री ययादव

बययान मकेरके दयारया बदद्री कके बतयानके कके अननुसयार अनांदकत दकययया गह।

ह 0 अपदठत

दद0 21-10-2020
CJM, Varanasi."

3. Heard Sri Rahul Srivastava, learned counsel for the petitioners and Sri Indrajeet Singh, learned AGA appearing on behalf of the State.

4. A perusal of the statement of the detenu Badri Yadav S/o the late Kharpattu Yadav recorded on commission by the learned Chief Judicial Magistrate, Varanasi shows that the detenu called Smt. Shanti Devi himself over phone that he was unwell on 18.09.2020. He called Smt. Shanti Devi because the detenu's wife, according to him, is quite feeble. According to the detenu's stand, Smt. Shanti Devi is taking good care of detenu and has not

detained him against his will or wishes. It has come out clearly in the recorded statement of Badri Yadav that no one has threatened him or put him under any kind of duress. The detenu has also said that Smt. Shanti Devi has not taken his thumb impression on any paper. Going by the aforesaid stand of the detenu evident from his statement recorded by the learned Chief Judicial Magistrate, Varanasi, it is evident that the detenu is not at all in any kind of illegal confinement by or at the instance of Smt. Shanti Devi. He is staying with Shanti Devi of his own accord.

5. In the circumstances, the *rule nisi* issued by this Court cannot be made absolute. The Rule is discharged. Accordingly, this petition is **dismissed**.

6. This Court has carefully perused proceedings of the commission, including the minutes. This Court must record its appreciation for a very carefully done commission by Mr. Surendra Pratap Yadav, the learned Chief Judicial Magistrate, Varanasi.

(2020)12ILR A410
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.12.2020

BEFORE

THE HON'BLE J.J. MUNIR, J.

Habeas Corpus Writ Petition No. 861 of 2019

Smt. Meenakshi & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Sushil Kumar Sharma, Sri Mohit Kumar

Counsel for the Respondents:
G.A., Sri Amar Nath, Sri Shravana Kumar Yadav, Sri P.N. Tiwari

Minor in custody of father-mother claiming it-though father's custody cannot be termed illegal-but interest and welfare of minor is important over parents' rights-Here mother is far better educated than father-minor's interest is better secured with mother-custody granted to mother-Petition allowed.

Held, There is little doubt about the issue that though both the mother and the father are natural guardians, a writ of habeas corpus may issue, because the Court can still determine the legality of the custody with reference to the question of the minor's welfare. As it is said, it is not so much about the rights of the parents to an exclusive custody of the child, as it is about the child's welfare. It is, therefore, lawful for the Court to exercise its jurisdiction and issue a writ of habeas corpus to place the child in a custody, where his/ her welfare appears to the Court to have the best prospects. This petition is, therefore, held to be maintainable. **(Para18)**

Petition allowed. (E-9)

List of Cases cited:-

1. Syed Saleemuddin Vs Dr. Rukhsana & ors., (2001) 5 SCC 247

2. Nithya Anand Raghavan Vs State (NCT of Delhi) & anr. , (2017) 8 SCC 454

3. Tejaswini Gaud & ors.Vs Shekhar Jagdish Prasad Tewari & ors., (2019) 7 SCC 42

4. Yashita Sahu Vs St. of Raj. & ors., (2020) 3 SCC 67

5. Githa Hariharan (Ms) & anr. Vs R.B.I. & anr., (1999) 2 SCC 228

6. Nil Ratan Kundu & anr. Vs Abhijit Kundu, (2008) 9 SCC 413.

7. Tejaswini Gaud & ors.Vs Shekhar Jagdish Prasad Tewari & 15 ors., (2019) 7 SCC 42

8. Master Atharva (Minor& anr. Vs St. of U.P. & 7 ors., decided on 19.10.2020

(Delivered by Hon'ble J.J. Munir, J.)

1. A young child ought to be and has a right to be in the care and company of his parents. The parents together are a young child's world. It is together that they groom him into his youth. It is together that they ensure the over all development of his personality in its myriad facets. But marriage, like life, some time takes an unpleasant turn, where the spouses could turn into an estranged couple. It is here that a young child faces one of the biggest tragedies of his life. His/ her world comprising the two parents comes apart. It is in this situation that the Court, in the exercise of its *parens patriae* jurisdiction, called upon to perform the onerous task of keeping the young child's world, as much together as can be. The better the Court can bring this about, it could be some recompense to a child's devastated world. This petition for a writ of habeas corpus, instituted by Master Anav's mother, the first petitioner, asking the Court to liberate the minor from his father's custody by entrusting the minor into hers, is about a young child's devastated world.

2. The facts giving rise to this cause are these: Smt. Meenakshi, the first petitioner and Ram Narayan, the ninth respondent married according to Hindu rites on 20.04.2014. The couple lived together as man and wife for a period of about four years. Meenakshi says that she had a tumultuous marriage. In her husband's home, she stayed along with her in-laws. During her stay with her husband, she was tortured, both physically and mentally, in connection with dowry that was demanded. Meenakshi had lost her father some fifteen years ago. It was her mother, who had settled this marriage for her. Her mother had given in dowry all necessaries for a household apart from Rs.5 lakhs in cash, besides ornaments. During her stay at her husband's, Meenakshi came to know, as she alleges, that her husband had an amorous relationship with his sister-in-law *(bhabhi)* and another girl from the village, to which she objected in vain. She claims that this further accentuated her torture by her husband and in-laws, forcing her to abandon her marriage and go back to her mother's home. She went back to her mother on 04.06.2018. A son, named Anav, was born of this rather short lived wedlock of parties. He was born on 20.09.2016. For the present, Anav is aged about 4 hours.

3. It is also claimed by Meenakshi that after her initial exit from the matrimonial home on 04.06.2018, she attempted reproachment a number of times. She went back to her husband's home, but on each occasion found herself unwelcome. There was a concerted effort to jettison the from her matrimonial home by her husband and the in-laws. The discord between parties was mediated by kinsmen, which resulted in what Meenakshi claims to be a mutual divorce. It is a private settlement, engrossed on a stamp paper, worth Rs.100/- and notarized. It is a document dated 04.12.2018, executed at Panipat, Haryana. Apart from parties, it is attested by witnesses, who appear to be the mediators or *panchas* of some kind.

4. This Court does not wish to comment about the obvious effect in law of this settlement dated 04.12.2018, which Meenakshi believes to be a divorce by mutual consent. In terms of this settlement, the parties convenated to withdraw pending cases and Meenakshi agreed to stay with her mother.

5. It is claimed by Meenakshi that she went back to her mother's home along with her young son, Anav. After lapse of

sometime, matters took an unpleasant turn for Meenakshi and her young son, Anav. It is claimed that there was an unholy alliance between Meenakshi's brother, Sunny and her estranged husband, Ram Narayan with the two making it common cause to oust her minor son from her mother's home. This came about between Sunny and Ram Narayan for very different reasons of their own. While Ram Narayan wanted his son to stay with him, Sunny who is arrayed as the sixth respondent to this petition, wanted the child out of his mother's home, where Meenakshi stays, because he thought Meenakshi may claim a share for her son in her ancestral property. It is claimed that Ram Narayan, in connivance with Meenakshi's brother, Sunny, besides Vinod and Robin, both natives of Village Toli, threatened Meenakshi that they would not permit her son to live with her. It is asserted that Sunny, Vinod and Robin, respondent nos. 6, 7 and 8, in that order, beat up Meenakshi and her mother, telling her that she would not be given a penny of the inheritance. In furtherance of this common interest between Ram Narayan and Sunny, in the evening of 06.04.2019, respondent nos. 6, 7 and 8, beat up Meenakshi. It is also claimed that they opened fire, but Meenakshi's mother came to her rescue. Respondent nos. 6, 7 and 8 beat up Meenakshi's mother also and snatched away her son, locking up Meenakshi and her mother inside a room. Respondent nos.6 to 8, in this manner, kidnapped the minor, Anav and handed him over to Meenakshi's husband, Ram Narayan.

6. The fact that the child had been handed over to his father, was disclosed to Meenakshi by respondent nos.6 to 8. It is also asserted that Meenakshi approached the Police Station Nakud, but the police did not register an FIR. Meenakshi lodged her complaint regarding the kidnapping of her son and also about the incident of being beaten up and subjected to a life threat, to the Inspector General of Police, the Deputy Inspector General of Police, the District Magistrates of Saharanpur and Shamli, the Senior Superintendent of Police, Saharanpur and Station House Officer, Police Station Nakud, District Saharanpur. On 13.04.2019, Meenakshi sent her complaint as aforesaid by registered post. A copy of her complaint along with postal receipts of dispatch to two of the Authorities above detailed, are on record.

7. It is Meenakshi's further case that respondent nos. 6 to 9 promised that Anav, the minor, would be returned to her care and custody by 1st June, 2019, if she relinquishes her claim to her family property and undertakes to leave her native village, along with her mother. It was also put as a condition that she withdraws her pending case in the Court of A.C.J.M.-II, Saharanpur. Surprisingly, there is a written settlement dated 30.05.2019 made before the Station House Officer, Police Station Nakud, Saharanpur, indicating that there was some issue concerning her minor son, Anav between Smt. Meenakshi on the one hand and respondent no.6, her brother, Sunny, Robin and Vinod on the other, regarding which she had lodged a complaint. It is said in the settlement that some respectable persons of the Village and relatives had brought about an amicable settlement between parties, in terms whereof, Meenakshi would be handed back the custody of her minor son on 01.06.2019. It is said that the settlement between parties may be accepted. It is made out that this settlement was never honoured and Meenakshi was not given back the custody of her minor son, who

was allegedly kidnapped. Meenakshi then pressed the police to lodge her FIR, regarding which she also approached higher police officers, but to no avail.

8. In the circumstances, an application under Section 156(3) Cr.P.C. was instituted by Meenakshi before the Additional Chief Judicial Magistrate-II, Saharanpur, requesting that a case be ordered to be registered against respondent nos. 6 to 9 for offences punishable under Sections 364, 307, 343, 323 & 120-B IPC. This Application has been numbered on the file of the Magistrate concerned as Case no.123 of 2019 initially, and re-numbered as Case no.1325 of 2019. The Magistrate by his order dated 13.05.2019 has treated the said application, under Section 156(3) Cr.P.C. as a complaint and order it to proceed. A copy of the Magistrates's order dated 13.05.2019 is on record.

9. It is further made out on behalf of the first petitioner that the minor has risk to his life at the hands of respondent nos. 6, 7 and 8 on the one hand because the three of them are after the ancestral property, whereas the safety and welfare of the child is in jeopardy with the father, because he is into an amorous relationship with his sister-in-law, and at the same time, with another woman from the village. It was also pointed out that the fact that the father got his own son kidnapped, in connivance with the first petitioner's brother and the other two respondents, tells much on his conduct, *vis-a-vis* the child's welfare.

10. It is to be noticed here that on behalf of the husband, Ram Narayan, an affidavit dated 02.01.2020 has been filed, styled as a supplementary affidavit. It speaks about the same compromise dated 04.12.2018, upon which the petitioner has relied as proof of a divorce by mutual consent between parties. A closer perusal of this settlement/ compromise shows that it embodies terms about withdrawal of pending litigation between parties and records the fact that the wife has received from the husband, in settlement of all her claims, a lump sum of Rs.15,30,000/-. It is also a term of this settlement that the parties' minor son, Anav would live with his mother. It is shown in the supplementary affidavit filed on behalf of the husband that a petition for divorce, under Section 13(1) of the Hindu Marriage Act, 1955 filed on behalf of the wife before the Additional District Judge, Panipat has been dismissed as withdrawn, and a copy of the order of the learned Additional District Judge, dated 04.12.2018 is on record, annexed to the supplementary affidavit under reference. Along with the affidavit also, annexed is a copy of the order of the Judicial Magistrate at Panipat, dismissing the wife's application for maintenance, under Section 125 Cr.P.C., on the basis of her statement recorded by the Magistrate. The Magistrate's order is also dated 04.12.2018.

11. A joint counter affidavit has been filed on behalf of respondent nos.6, 7 and 8, where all allegations about kidnapping of Meekashi's son have been denied. It has been made out that Meekashi's son is not in the custody of respondent nos.6, 7 and 8, and further that they were not parties to the settlement recorded between the husband and wife. There is an averment that these respondents never told the first petitioner (incorrectly mentioned as deponent) that her child would be returned to her by 01.06.2019, if she forsakes her claim in the ancestral property of respondent no.6 and herself. It has also been asserted in paragraph 16 that the minor is in his

father's custody and, therefore, this petition for a writ of habeas corpus is not maintainable. The first petitioner ought to proceed under the Guardians and Wards Act, 1890 (for short, 'the Act of 1890').

12. This Court has given a thoughtful consideration to the rival submissions and perused the record. In addition, the Court has interacted with the minor's mother, Smt. Meenakshi. The endeavour, to ascertain the minor's wish in this case, does not appear to be very relevant because the minor is a boy of four years, and in the assessment of this Court, too young to express his intelligent preference about his choice for a guardian.

13. Before the Court determines the cause on merits, it is necessary to dispose of the plea, taken in the affidavit filed on behalf of respondent nos.6, 7 and 8, to the effect that the mother ought to ask for the minor's custody, by moving the Court of competent jurisdiction, under the Act of 1890, and not through a writ of habeas corpus. This plea, though figures in the affidavit filed on behalf of respondent nos.6, 7 and 8, has been pressed before the Court on behalf of respondent no.9, Ram Narayan, the minor's father.

14. It is argued by Mr. P.N. Tiwari that the first petitioner and respondent no.9, being both natural guardians under the Hindu Minority and Guardianship Act, 1956 (for short, 'the Act of 1956'), the minor's custody with the father cannot be termed unlawful. It is then urged that the minor's custody with father, being not unlawful, it is not a case, where a writ in the nature of habeas corpus ought to issue. It is a dispute between the parents for the child's custody, pure and simple, that ought to be determined, under the Act of 1890 by the Court of competent jurisdiction. This question, whether a custody dispute between a parent and some other kindred or between the two parents, is by now fairly well settled. This question came up for consideration before the Supreme Court in **Syed Saleemuddin vs. Dr. Rukhsana and Others, (2001) 5 SCC 247**. It was held in **Syed Saleemuddin** (supra):

"11. From the principles laid down in the aforementioned cases it is clear that in an application seeking a writ of Habeas Corpus for custody of minor children the principal consideration for the Court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that present custody should be changed and the children should be left in care and custody of somebody else. The principle is well settled that in a matter of custody of a child the welfare of the child is of paramount consideration of the Court. Unfortunately, the Judgment of the High Court does not show that the Court has paid any attention to these important and relevant questions. The High Court has not considered whether the custody of the children with their father can, in the facts and circumstances, be said to be unlawful. The Court has also not adverted to the question whether for the welfare of the children they should be taken out of the custody of their father and left in the care of their mother. However, it is not necessary for us to consider this question further in view of the fair concession made by Shri M.N. Rao that the appellant has no objection if the children remain in the custody of the mother with the right of the father to visit them as noted in the judgment of the High Court, till the Family Court disposes of the petition filed by the appellant for custody of his children."

15. The question again came up before the Supreme Court in **Nithya Anand Raghavan vs. State (NCT of Delhi) and Another, (2017) 8 SCC 454**. In **Nithya Anand Raghavan** *(supra)*, it was held:

"44. The present appeal emanates from a petition seeking a writ of habeas corpus for the production and custody of a minor child. This Court in Kanu Sanyal v. District Magistrate, Darjeeling [Kanu Sanyal v. District Magistrate, Darjeeling, (1973) 2 SCC 674 : 1973 SCC (Cri) 980] , has held that habeas corpus was essentially a procedural writ dealing with machinery of justice. The object underlying the writ was to secure the release of a person who is illegally deprived of his liberty. The writ of habeas corpus is a command addressed to the person who is alleged to have another in unlawful custody, requiring him to produce the body of such person before the court. On production of the person before the court, the circumstances in which the custody of the person concerned has been detained can be inquired into by the court and upon due inquiry into the alleged unlawful restraint pass appropriate direction as may be deemed just and proper. The High Court in such proceedings conducts an inquiry for immediate determination of the right of the person's freedom and his release when the detention is found to be unlawful.

45. In a petition for issuance of a writ of habeas corpus in relation to the custody of a minor child, this Court in Sayed Saleemuddin v. Rukhsana [Sayed Saleemuddin v. Rukhsana, (2001) 5 SCC 247 : 2001 SCC (Cri) 841] , has held that the principal duty of the court is to ascertain whether the custody of child is unlawful or illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person. While doing so, the paramount consideration must be about the welfare of the child. In Elizabeth [Elizabeth Dinshaw v. Arvand M. Dinshaw, (1987) 1 SCC 42 : 1987 SCC (Cri) 13] , it is held that in such cases the matter must be decided not by reference to the legal rights of the parties but on the sole and predominant criterion of what would best serve the interests and welfare of the minor. The role of the High Court in examining the cases of custody of a minor is on the touchstone of principle of parens patriae jurisdiction, as the minor is within the jurisdiction of the Court [see Paul Mohinder Gahun v. State (NCT of Delhi) [Paul Mohinder Gahun v. State (NCT of Delhi), 2004 SCC OnLine Del 699 : (2004) 113 DLT 823] relied upon by the appellant]. It is not necessary to multiply the authorities on this proposition.

46. The High Court while dealing with the petition for issuance of a writ of habeas corpus concerning a minor child, in a given case, may direct return of the child or decline to change the custody of the child keeping in mind all the attending facts and circumstances including the settled legal position referred to above. Once again, we may hasten to add that the decision of the court, in each case, must depend on the totality of the facts and circumstances of the case brought before it whilst considering the welfare of the child which is of paramount consideration. The order of the foreign court must yield to the welfare of the child. Further, the remedy of writ of habeas corpus cannot be used for mere enforcement of the directions given by the foreign court against a person within its jurisdiction and convert that jurisdiction into that of an executing court. Indubitably, the writ petitioner can take recourse to such

other remedy as may be permissible in law for enforcement of the order passed by the foreign court or to resort to any other proceedings as may be permissible in law before the Indian Court for the custody of the child, if so advised.

47. In a habeas corpus petition as aforesaid, the High Court must examine at the threshold whether the minor is in lawful or unlawful custody of another person (private respondent named in the writ petition). For considering that issue, in a case such as the present one, it is enough to note that the private respondent was none other than the natural guardian of the minor being her biological mother. Once that fact is ascertained, it can be presumed that the custody of the minor with his/her mother is lawful. In such a case, only in exceptionable situation, the custody of the minor (girl child) may be ordered to be taken away from her mother for being given to any other person including the husband (father of the child), in exercise of writ jurisdiction. Instead, the other parent can be asked to resort to a substantive prescribed remedy for getting custody of the child."

16. A milestone decision, on the issue, is the relatively recent pronouncement of their Lordships of the Supreme Court in **Tejaswini Gaud and Others v. Shekhar Jagdish Prasad Tewari and Others, (2019) 7 SCC 42**. In **Tejaswini Gaud**, it was held:

"19. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the Court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.

20. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus."

17. The Supreme Court, still later, considered the question in **Yashita Sahu vs. State of Rajasthan and Others, (2020) 3 SCC 67**, where it was held :

"10. It is too late in the day to urge that a writ of habeas corpus is not maintainable if the child is in the custody of another parent. The law in this regard has developed a lot over a period of time but now it is a settled position that the court can invoke its extraordinary wirt jurisdiction for the best interest of the child. This has been done in Elizabeth Dinshaw v. Arvand M. Dinshaw, Nithya Anand Raghavan v. State (NCT of Delhi) and Lahari Sakhamuri v. Sobhan Kodali among others. In all these cases, the writ petitions were entertained. Therefore, we reject the contention of the appellant wife that the writ petition before the High Court of Rajasthan was not maintainable."

18. There is little doubt about the issue that though both the mother and the father are natural guardians, a writ of habeas corpus may issue, because the Court can still determine the legality of the custody with reference to the question of the minor's welfare. As it is said, it is not so much about the rights of the parents to an exclusive custody of the child, as it is about the child's welfare. It is, therefore, lawful for the Court to exercise its jurisdiction and issue a writ of habeas corpus to place the child in a custody, where his/ her welfare appears to the Court to have the best prospects. This petition is, therefore, held to be maintainable.

19. It must be remarked here that the mother has come up with serious allegations about her son being kidnapped by force, by none else than her brother and being delivered into her husband's custody. In their counter affidavit, filed by respondent nos. 6 to 8, that allegation has been vociferously denied. Meenakshi's attempts to put the process of criminal law in motion with regard to her allegations about the minor's kidnapping have failed with the police, and the Judicial Magistrate too, has declined to order the police to register and investigate the case; the Magistrate has directed the matter to proceed as a complaint case. Meenakshi's brother and husband have both denied allegations about the minor being kidnapped. So far as this Court is concerned, there is no tangible evidence about the minor's alleged forcible removable from the mother's custody. This Court is not inclined to probe the matter further, bearing in mind the relationship between parties, and the minor's welfare.

20. Now, the minor is a young child of tender years. He is just four years old. The Court did not find him capable of expressing an intelligent preference between his parents, in whose custody, he would mostly like to be.

21. The Court has spoken to the minor's father, Ram Narayan. He says that he is a farmer. His annual income is Rs.1.50 lakhs. He also says that he does not pay income tax. He has informed the Court that he has passed his Class-XII examination. Ram Narayan is part of a family where he has his father and mother, besides his elder brother. His elder brother is married and has a son. The minor, Anav is reported to be receiving his education at a certain Adarsh Vidya Public School, Village Sahpat, Tehsil Kairana, District Shamli. The School is located in the village, where Ram Narayan lives. The village does have a hospital. The village has a population of about 2000 - 2200 residents.

22. The mother, on the other hand, says that she is a Post Graduate in Education. She has earned her M.A. Degree

in Education from the Chaudhary Charan Singh University, Meerut. She stays in her native village with her mother. Her village is called Toli, located within Tehsil Nakud in the district of Saharanpur. She informed the Court that there are number of schools in the vicinity, mostly in town Fandpuri. The mother says that she does not work, but has sufficient agricultural income. She told the Court that their family own 40 *bighas* of land. She has asserted that she is competent to raise her son well.

23. Amongst many things that this Court noticed is the fact that the father is not, particularly, interested in raising the minor. Rather, the supplementary affidavit dated 2nd January, 2020, that he has filed, annexes a photostat copy of the settlement between parties, dated 04.12.2018, already spoken of. A perusal of the settlement shows that apart from a covenant there, that parties have emancipated themselves mutually of the marital bond and are free to marry elsewhere, there is a specific term in the settlement that the minor, Anav, then aged two and a half years, would stay in his mother's custody. This discloses the disinclination of the father to bear a whole-time responsibility for the minor's custody and the complementary inclination of the mother to take that responsibility. This settlement between parties, sworn before a Notary Public and arrived at with the mediation of some kind of a *Panchayat*, may carry some terms that the law does not acknowledge, but the settlement about the minor's custody is certainly an enforceable term. The father does not deny that the settlement was recorded and the mother also acknowledges it.

24. This Court also notices that a divorce petition, brought by the mother and proceeding under the Protection of Women from Domestic Violence Act, 2005, besides those for maintenance, under Section 125 Cr.P.C., were all withdrawn by the mother, acting on this compromise. It is not so much about the legal effect of this compromise on the minor's custody that this Court has to take it into consideration. It is to judge the inclination of the two parents, *vis-a-vis* the minor's custody that this Court has looked into the settlement.

25. No doubt, the father and the mother, are both natural guardians, if one goes by Section 6(a) of the Act of 1956. The mother's right and that of the father, under Section 6(a) as to guardianship has been considered at par by the Supreme Court in **Githa Hariharan (Ms) and another vs. Reserve Bank of India and another, (1999) 2 SCC 228**. So far as custody goes, as distinct from guardianship, between the two natural guardians, the mother is to be preferred by virtue of the proviso to Section 6(a) of the Act of 1956, in the case of a child below five years of age.

26. What is important while deciding the issue of custody between two natural guardians, is where the minor's welfare would be best secured. The statute indicates a preference for the mother, so far as a child below five years is concerned. But, that legislative edict though a strong indicator, is not to be construed as an inflexible rule to be mechanically applied. The question of a child's welfare is always a matter for the Court's decision, based on varied factors.

27. The statutes, like Section 17 of the Act of 1890 or Section 13 of the Act of 1956, only indicates some of the relevant parameters that the Court must be mindful of while deciding the question of the

minor's welfare. Every case has individual features of its own, where the Court has to think for itself, at a human level with all experiences at its command, where the minor's welfare would be best secured. No straitjacket formula, as it is proverbially said, can be devised or applied to decide the human problem of a child's welfare. In this connection, reference may be made to the decision of the Supreme Court in **Nil Ratan Kundu and another vs. Abhijit Kundu, (2008) 9 SCC 413**. It is held in **Nil Ratan Kundu**:

"52. In our judgment, the law relating to custody of a child is fairly well settled and it is this: in deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a human problem and is required to be solved with human touch. A court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor."

28. In the same vain are the remarks of the Supreme Court in **Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others, (2019) 7 SCC 42**. In **Tejaswini Gaud**, it has been held by their Lordships of the Supreme Court:

"35. The welfare of the child has to be determined owing to the facts and circumstances of each case and the Court cannot take a pedantic approach. In the present case, the first respondent has neither abandoned the child nor has deprived the child of a right to his love and affection. The circumstances were such that due to illness of the parents, the appellants had to take care of the child for some time. Merely because, the appellants being the relatives took care of the child for some time, they cannot retain the custody of the child. It is not the case of the appellants that the first respondent is unfit to take care of the child except contending that he has no female support to take care of the child. The first respondent is fully recovered from his illness and is now healthy and having the support of his mother and is able to take care of the child."
(Emphasis by Court)

29. Generally speaking, however, the custody of a minor child of tender years, below the age of five years, ought to be with the mother. There could be exceptions to the Rule as the Court has indicated above. Human affairs can never be disposed of by a rubber stamp approach or the application, virtually of mathematical formulae. But, the general rule about custody of a child, below the age of five years, is not to be given a go-by. If the mother is to be denied custody of a child, below five years, something exceptional derogating from the child's welfare is to be shown.

30. I had occasion to consider the legal position in this regard in **Master Atharva (Minor) and another vs. State of U.P. And 7 others, decided on 19.10.2020.** In **Master Atharva (Minor)**, it was held:

"9. A reading of the terms of the proviso to Section 6 shows that quite apart from the question of natural guardianship, the custody of a minor, who has not completed the age of five years, is to be ordinarily with the mother. The only niche, therefore, so far as the statue goes, is the word "ordinary". The word "ordinary" signifies that as a matter of rule, children up to the age of five years are to be left with their mothers, but there could be exceptions as well. Those exceptions could be where the mother is demonstrably leading an immoral life or may have remarried, where in her new home, the child from her earlier alliance has no place, or where the mother is convicted of a heinous offence etc. In the present case, no such circumstance has been indicated, much less pleaded and proved so as to place the mother in that exceptional category where she may be deprived of the custody of her young child, who is still well below the age of five years.

10. It must also be remarked that even after the child turns five, it is not that the mother becomes disentitled. She still would be the best person to tender a child and groom him into an adult. In this connection, reference may be made to the decision of the Supreme Court in Roxann Sharma vs. Arun Sharma, (2015) 8 SCC 318, where it has been held:

"13. The HMG Act postulates that the custody of an infant or a tender aged child should be given to his/her mother unless the father discloses cogent reasons that are indicative of and presage the likelihood of the welfare and interest of the child being undermined or jeopardised if the custody is retained by the mother. Section 6(a) of the HMG Act, therefore, preserves the right of the father to be the guardian of the property of the minor child but not the guardian of his person whilst the child is less than five years old. It carves out the exception of interim custody, in contradistinction of guardianship, and then specifies that custody should be given to the mother so long as the child is below five years in age. We must immediately clarify that this section or for that matter any other provision including those contained in the G and W Act, does not disqualify the mother to custody of the child even after the latter's crossing the age of five years."

31. In the present case also, Ram Narayan, the father has not come up with any such case, where the mother may be judged unsuitable to raise the minor. There is nothing on record to show that her case falls into that kind of an exceptional category, where she may be deprived of the minor's care and custody. To the contrary, this Court finds that the mother is an educated woman and a Post Graduate in Education. She is far better educated than the father. The welfare of the young child is not dependent on material resources alone. It requires a lot more. Literal and then intellectual guidance, besides moral training are important facets of a child's grooming. This Court finds that all these would be better secured with the mother than the father. So far as the financial support is concerned, that in any case, would be the father's responsibility and the law would take care of it.

32. Quite apart, it must be assumed that the parties have settled their monetary

issues in terms of the settlement agreement dated 04.12.2018. The mother has indicated that she has the necessary wherewithal to raise the minor. The mother, being found fit to have the minor's custody, it cannot be the best arrangement to secure the child's welfare, or so to speak, repair his devastated world. He must have his father's company too, as much as can be, under the circumstances. This Court must, therefore, devise a suitable arrangement, where the minor can meet his father in an atmosphere, that is reassuring and palliative. The father must, therefore, have sufficient visitation while the minor stays with his mother.

33. In the result, this habeas corpus writ petition succeeds and is **allowed**. It is ordered that the minor, Anav, who is presently in the custody of his father, Ram Narayan, shall be delivered into the custody of his mother, Smt. Meenakshi within three days of receipt of a copy of this judgment. In case, the minor's custody is not made over to his mother within that time, the learned Chief Judicial Magistrate, Shamli and the Superintendent of Police, Shamli, acting in aid of the learned Chief Judicial Magistrate, Shamli, shall cause the minor to be delivered into the custody of his mother, Smt. Meenakshi, after taking him out of his father, Ram Narayan's custody. And for the purpose, if so required, necessary force may be employed. The father will have visitation rights to meet his son, Anav at Smt. Meenakshi's home. The father, Ram Narayan shall be permitted by Smt. Meenakshi to meet their son, Anav twice a month on the second and fourth Sundays of each month between 10:00 a.m. to 2:00 p.m. During these visitations, Smt. Meenakshi shall ensure that due courtesy is extended to Ram Narayan and the meeting between the father and the son is facilitated.

34. It is, in these terms, that the *rule nisi* is made **absolute**. Costs shall go easy.

35. Let a copy of this order be sent to Ram Narayan s/o Bhujendra @ Pintu, respondent no. 9 by the Joint Registrar (Compliance) through the learned Chief Judicial Magistrate, Shamli. A copy of this order be also sent by the Joint Registrar (Compliance) to the learned Chief Judicial Magistrate, Shamli and the Superintendent of Police, Shamli for compliance. A copy of this order be also sent to the learned District Judge, Shamli for his record.

(2020)12ILR A421
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.12.2020

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Misc. Single No. 20779 of 2020

Saliha Khan ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Rahul Tripathi, Sandeep Sharma

Counsel for the Respondents:
C.S.C., A.S.G., Shashank Bhasin

A. Constitution of India–Article 226-Examination -Challenge to Answer key - Interference- only where it is found that the answer keys are *demonstrably wrong* -that is to say, it cannot be such as no reasonable body of men, well versed in the particular subject, would regard it as correct - in that event Court exercise its writ jurisdiction to ensure that the error is rectified (Para 16)

B. Constitution of India – Article 226 - Challenge to Answer key - No Interference when - once the objections invited against the proposed answer key have been considered by the subject experts and

they do not found any substance in the objections - Writ Court can not examine the correctness of the questions and the answer key - to come to a conclusion different from that of the subject experts - merely because a candidate or some of the candidates are disappointed or dissatisfied by the answers - writ-petition liable to be dismissed (Para 17)

C. National Eligibility-cum-Entrance Test (NEET) Examination UG - 2020 - Provision made in Information Bulletin (NEET) (UG) 2020 in Cl.15 (2)(d) provides that "No individual candidate will be informed about acceptance / non-acceptance of his / her challenge"-*Held*-No mandate to communicate to the petitioner specific reasons given by subject experts for rejection of the objections of the petitioner (Para 18)

Writ Petition dismissed. (E-5)

List of Cases cited: -

1. Saumitra Gigodia Vs U.O.I. & ors. Civil Misc. Writ Petition No.28568 of 2017

2. Vikesh Kumar Gupta & anr. Vs The St. of Raj & ors. Civil Appeal 4 Nos.3649-3650 of 2020

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

1. Heard, Shri Sandeep Sharma, learned counsel for the petitioner, Shri Shashank Bhasin, learned counsel for the opposite party no.4, Shri Anand Dwivedi, learned counsel for the opposite parties no.1 & 3 and Shri Savitra Vardhan Singh, learned counsel for the opposite party no.2.

2. This petition has been filed for a direction to the respondent no.4 to consider the answers given by the petitioner of question nos.19 and 148 and revise the final answer key and Score Card of the petitioner, published by the National Testing Agency on 16.10.2020 and for passing the New Answer Key with New Score Card considering representation filed by the petitioner on 27.09.2020.

3. The brief facts of the case are that the National Testing Agency invited online applications for National Eligibility-cum-Entrance Test (NEET) (UG)- 2020. The petitioner had applied against the public notice. The examination was initially scheduled on 03.05.2019 through public notice dated 02.12.2019 but due to pandemic of Covid-19, the same was rescheduled from 26.07.2020 to 13.09.2020. The National Testing Agency issued the proposed advance answer keys for all the sets of question papers on 26.09.2020 and invited the objections vide notification dated 27.09.2020. In response thereof the petitioner had submitted objections in regard to question nos.19 and 148 of booklet no.G-4 and deposited the requisite fees. But without considering the objections, the final answer key was published. The answers were not changed and the result was also declared. Hence the petitioner approached this Court by means of the present writ petition.

4. Learned counsel for the petitioner submitted that the petitioner had appeared in the National Eligibility cum Entrance Test (NEET) (UG)-2020 and submitted objections on the advanced answer key in regard to question nos.19 and 148 on 27.09.2020 and deposited Rs.2,000/-, the requisite fees for the same. Thereafter the final answer key and the result was declared on 16.10.2020 without considering the objections of the petitioner as the final answer key does not show any change in the answer of question nos.19 and 148. As per opposite party no.4 the answer of the question no.19 was 1-G1 Phase while as per the petitioner it should have been 4-M Phase of booklet no.G-4.

The answer of question no.148 was shown as 3- Collusion Frequency while as per the petitioner it should have been 1-Reaction.

5. He further submitted that the opposite party no.4, though has disclosed in paragraph-8 of the counter affidavit that the objection was considered by the subject experts but the same was neither communicated to the petitioner nor specific reasons have also been given for rejection of the objections of the petitioner. The answers which have been examined and approved by the subject experts could not have been for the question nos.19 and 148 which were in G-4 booklet and if the same answers are correct then the questions should have been constructed in a different manner, which have been disclosed by the petitioner in paragraph-17 of the rejoinder affidavit.

6. On the basis of above, learned counsel for the petitioner submitted that the objections of the petitioner has not been considered in accordance with law. He relied on paragraph-22 of the judgment and order dated 10.08.2017 passed by a Division Bench of this Court in the case of **Saumitra Gigodia Vs. Union of India and others; in Civil Misc. Writ Petition No.28568 of 2017**.

7. On the other hand, learned counsel for the opposite party no.4 submitted that in response to the proposed answer key, 9760 objections were received from the candidates including the petitioner. The said objections were placed before the respective subject experts who were Professors of IIT's and reputed universities for verification. The concerned subject experts, after examining the objections / challenges, considered each and every aspect of the objections / challenges and after examining carefully neither found any merit in the objections nor any discrepancy in the provisional answer key to the questions including question nos.19 and 148 of booklet no.G-4 and rejected the objections / challenges received from the candidates including 549 candidates made in G-4 series. Accordingly the final answer key was published on 16.10.2020 and the result was declared accordingly.

8. He further submitted that it was provided in clause 15 (2) (d) under Chapter 15 of the Information Bulletin of Neet (UG)- 2020 that no individual candidate will be informed about the acceptance / non-acceptance of his / her challenge. Therefore, the same is not required to be communicated to the petitioner as it was already provided in the information bulletin.

9. He further submitted that the subject experts have scrutinized the challenges to the question nos.19 and 148 and opined that the answers are correct relying on NCERT, Class-11, Biology Text Book which has also been relied by the petitioner and details have been given in paragraph-8 of the counter affidavit.

10. He, relying on a latest judgment of Hon'ble Supreme Court dated 07.12.2020 in the case of **Vikesh Kumar Gupta and Another Vs. The State of Rajasthan and Others; in Civil Appeal Nos.3649-3650 of 2020** submitted that once the objections have been considered by the subject experts challenge to the same is not maintainable. The writ-petition is liable to be dismissed.

11. I have considered the submissions of learned counsel for the parties and perused the record.

12. The petitioner had applied for National Eligibility-cum-Entrance Test (NEET) (UG)- 2020 against the invitation of applications by the National Testing Agency. The entrance test was initially scheduled on 03.09.2020 which was rescheduled from 26.07.2020 to 13.09.2020. The petitioner appeared in the test. After the test Advance Answer Key for all sets including booklet no.G-4 was published on 26.09.2020 and the objections were invited vide public notice dated 27.09.2020. In response thereof the petitioner submitted her objections against the proposed answers of question nos.19 and 148 and deposited the requisite fees. Thereafter the final answer key was published on 16.10.2020. On the basis of which the result was also declared on the same date. The petitioner, being aggrieved by not change of the answers as objected by the petitioner, have approached this Court by means of the present writ petition.

13. In regard to the submission of learned counsel for the petitioner that the objections raised by the petitioner in regard to the question nos.19 and 148 of booklet no.G-4 have not been considered, learned counsel for the opposite party no.4 submitted that the objections submitted by the petitioner have duly been considered by the subject experts and after scrutinizing the objections to the question nos.19 and 148, the subject experts did not find any merit in the objections or any discrepancy in the provisional answer keys to the said questions and rejected the objections / challenges made by the candidates including the petitioner. The subject experts have given opinion on the basis of NCERT, Class-11 Biology Text Book which has also been relied by the petitioner. The details have been given in paragraph-8 of the counter affidavit, which is extracted below:-

"(8) That the contents of paragraph 12 and 13 of the writ petition are not admitted as stated. It is submitted that the Subject Experts have scrutinized the challenges to question no.19 and 148. The Subject Expert did not find any merit in the objection or any discrepancy in the Provisional Answer Keys to the said question and rejected the challenges made by the candidates including the petitioner in G4 Series. It is pertinent to mention here that the Subject Experts opined that "G1" is the correct answer to the question : "some dividing cells exit the cell cycle and enter vegetative inactive stage. This is called quiescent stage (GO). This process occurs at the end of:" and relied upon the page 164 of the NCERT Class XI Biology textbook, which has also relied upon by the petitioner page 105-109 of the writ petition. The Biology NCERT Class XI Book at page 164 (page 109 of the petition) provides that "... these cells that do not divide further exit G1 phage to enter into an inactive stage called quiescent stage (GO) of the cell cycle". The Subject Expert with respect to question no.148 also opined that as Heat of Reaction (reaction Enthalpy) is always measured in Kj/mol. Therefore, Collusion frequency is correct. In view of the above, it is humbly submitted that the claim of the petitioner is misconceived, highly unfounded and is hence liable to be dismissed at the first instance."

14. In view of above, the contention of the learned counsel for the petitioner is misconceived and not tenable that the objections have not been considered by the subject experts. While the same have been considered by the Subject Experts, who are Professors from IIT's and reputed Universities as disclosed in paragraph 3(xiv) of the counter affidavit filed on behalf of opposite party no.4.

15. The contention of the learned counsel for the petitioner that if the answers as accepted by the subject experts are true, the questions should have been framed in a different manner which has been disclosed by her in the rejoinder affidavit can not be accepted because it is for the subject experts as to how the questions are to be framed and once the subject experts have examined the objections and came to the conclusion that the objections are not sustainable and proposed answers are the correct answers, this Court can not examine the same over and above the opinion of the subject experts.

16. The judgment and order dated 10.08.2017 passed in the case of **Saumitra Gigodia Vs. Union of India and others (Supra)** is of no assistance to the petitioner. It provides that where it is found that the answer keys are demonstrably wrong, that is to say, it cannot be such as no reasonable body of men, well versed in the particular subject, would regard it as correct, in that event the Court should exercise its writ jurisdiction and ensure that the error is rectified. The learned counsel for the petitioner has failed to demonstrate it. The paragraph-22 of the judgment is extracted below:-

"22. Normally, the Court should be cautious in interfering with the opinion of the expert but where it is found that the answer keys are demonstrably wrong, that is to say, it cannot be such as no reasonable body of men, well versed in the particular subject, would regard it as correct, in that event the Court should exercise its writ jurisdiction and ensure that the error is rectified.

17. It is settled proposition of law that once the objections invited against the proposed answer key have been considered by the subject experts and they do not found any substance in the objections, this Court can not examine the correctness of the questions and the answer key, to come to a conclusion different from that of the subject experts merely because a candidate or some of the candidates are disappointed or dissatisfied by the answers. It is for the subject experts to consider the objections and evaluate as to whether the objections have any substance or not because they have experties to evaluate or scrutinize the answers. This view is fortified by judgment and order 07.12.2020 passed in **Vikesh Kumar Gupta and Another Vs. The State of Rajasthan and Others (Supra)** by the Hon'ble Apex Court. The relevant paragraphs 10, 11, 12 and 13 are extracted below:-

"10. The point that arises for the consideration of this Court is whether the revised Select List dated 21.05.2019 ought to have been prepared on the basis of the 2nd Answer Key. The Appellants contend that the Wait List also should be prepared on the basis of the 3 rd Answer Key and not on the basis of the 2 nd Answer Key. The 2nd Answer Key was released by the RPSC on the 10 basis of the recommendations made by the Expert Committee constituted pursuant to the directions issued by the High Court. Not being satisfied with the revised Select List which included only a few candidates, certain unsuccessful candidates filed Appeals before the Division Bench which were disposed of on 12.03.2019. When the Division Bench was informed that the selections have been finalized on the basis of the 2 nd Answer Key, it refused to interfere with the Select List prepared on 17.09.2018. However, the Division Bench examined the correctness of the questions and Answer Keys pointed by

the Appellants therein and arrived at a conclusion that the answer key to 5 questions was erroneous. On the basis of the said findings, the Division Bench directed the RPSC to prepare revised Select List and apply it only to the Appellants before it.

11. Though re-evaluation can be directed if rules permit, this Court has deprecated the practice of re- evaluation and scrutiny of the questions by the courts which lack expertise in academic matters. It is not permissible for the High Court to examine the question papers and answer sheets itself, particularly when the Commission has assessed the inter se merit of the candidates (Himachal Pradesh Public Service Commission Vs. Mukesh Thakur & Anothers)1. Courts have to show deference and consideration to the recommendation of the Expert Committee who have the expertise to evaluate and make recommendations 2. Examining the scope of judicial review with regards to re-evaluation of answer sheets, this Court in Ran Vijay Singh & Others Vs. State of Uttar Pradesh & Others3 held that court should not re-evaluate or scrutinize the answer sheets of a candidate as it has no expertise in the matters and the academic matters are best left to academics. This Court in the said judgment further held as follows:

"31. On our part we may add that sympathy or compassion does not play any role in the matter of directing or not directing re-evaluation of an answer sheet. If an error is committed by the examination authority, the complete body of candidates suffers. The entire examination process does not deserve to be derailed only because some candidates are disappointed or dissatisfied or perceive some injustice having been caused to them by an erroneous question or an erroneous answer. All candidates suffer equally, though some might suffer more but that cannot be helped since mathematical precision is not always possible. This Court has shown one way out of an impasse -- exclude the suspect or offending question.

32. It is rather unfortunate that despite several decisions of this Court, some of which have been discussed above, there is interference by the courts in the result of examinations. This places the examination authorities in an unenviable position where they are under scrutiny and not the candidates. Additionally, a massive and sometimes prolonged examination exercise concludes with an air of uncertainty. While there is no doubt that candidates put in a tremendous effort in preparing for an examination, it must not be forgotten that even the examination authorities put in equally great efforts to successfully conduct an examination. The enormity of the task might reveal some lapse at a later stage, but the court must consider the internal checks and balances put in place by the examination authorities before interfering with the efforts put in by the candidates who have successfully participated in 13 the examination and the examination authorities. The present appeals are a classic example of the consequence of such interference where there is no finality to the result of the examinations even after a lapse of eight years. Apart from the examination authorities even the candidates are left wondering about the certainty or otherwise of the result of the examination -- whether they have passed or not; whether their result will be approved or disapproved by the court; whether they will get admission in a college or university or not; and whether they will get recruited or not. This unsatisfactory situation does not work to anybody's advantage and such a state of

uncertainty results in confusion being worse confounded. The overall and larger impact of all this is that public interest suffers."

12. In view of the above law laid down by this Court, it was not open to the Division Bench to have examined the correctness of the questions and the answer key to come to a conclusion different from that of the Expert Committee in its judgment dated 12.03.2019. Reliance was placed by the Appellants on Richal & Others Vs. Rajasthan Public Service Commission & Others. 4 In the said judgment, this Court interfered with the selection process only after obtaining the opinion of an expert 4 committee but did not enter into the correctness of the questions and answers by itself. Therefore, the said judgment is not relevant for adjudication of the dispute in this case.

13. 13. A perusal of the above judgments would make it clear that courts should be very slow in interfering with expert opinion in academic matters. In any event, assessment of the questions by the courts itself to arrive at correct answers is not permissible. The delay in finalization of appointments to public posts is mainly caused due to pendency of cases challenging selections pending in courts for a long period of time. The cascading effect of delay in appointments is the continuance of those appointed on temporary basis and their claims for regularization. The other consequence resulting from delayed appointments to public posts is the serious damage caused to administration due to lack of sufficient personnel."

18. The contention of the learned counsel for the petitioner that the opinion of the subject experts has not been provided to the petitioner is misconceived and not tenable in view of expressed provision made in the Information Bulletin (NEET) (UG) 2020 in clause 15 (2)(d) which provides that "No individual candidate will be informed about the acceptance / non-acceptance of his / her challenge". Otherwise also if it is accepted the process of selection may take very long time.

19. In view of above, this Court is of the considered opinion that once the subject experts have examined the objections of the petitioner and opined that the proposed answers are the correct answers and the final Answer Key has been issued accordingly, this Court can not examine the correctness of the answers, or framing of questions. The writ petition is misconceived and lacks merit.

20. It accordingly, **dismissed**. No order as to costs.

(2020)12ILR A427
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.12.2020

BEFORE

THE HON'BLE RITU RAJ AWASTHI, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Misc. Bench No. 22007 of 2020

Master @ Ramzan & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Asim Kumar Singh

Counsel for the Respondents:
G.A.

Criminal Law - U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 - Section 3(1) - G.O. Dt. 2.1.2004 - Circular

Dt. 24.10.2003 - provides - only those criminal cases shall be included in the gang chart in which the police has prepared the chargesheet and the same has been filed before the court concerned (Para 11)

In the gang chart, three criminal cases shown against petitioner - In one case petitioner was granted bail whereas in two other cases police not filed any chargesheet in the concern court - gang chart prepared on the wrong information - F.I.R. & Gang Chart quashed

Writ Petition allowed. (E-5)

(Delivered by Hon'ble Ritu Raj Awasthi, J.
& Hon'ble Mrs. Saroj Yadav, J.)

(By Oral order)

1. Heard Asim Kumar Singh, learned counsel for the petitioners and Shri Shachindra Pratap Singh, learned A.G.A. for the respondent State.

2. The writ petition has been filed challenging the impugned F.I.R. No.0430 of 2020 dated 13.10.2020, under Section 3(1) of the U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986 (for short '***Gangsters Act***') registered at Police Station Kotwali Dehat, District Gonda.

3. The petitioners have also prayed for quashing of the Gang Chart prepared under the U.P. Gangsters and Anti Social Activities (Prevention) Act, Police Station Kotwali Dehat, District Gonda and commanding the opposite parties to drop the proceedings under Section 3(1) of Gangsters Act registered at Police Station Kotwali Dehat, District Gonda, with all consequential reliefs.

4. Learned counsel for the petitioners submits that the impugned F.I.R. has been lodged in a most arbitrary and illegal manner without proper application of mind.

5. It is also submitted that in the gang chart, three criminal cases have been shown against petitioner no.2. In case bearing Case Crime No.156/2019, he has been granted bail whereas so far Case Crime No.312 of 2019 and Case Crime No.406 of 2020 are concerned, the police has not yet filed any chargesheet in the concerning court.

6. Similarly, in the gang chart, two criminal cases have been shown against petitioner no.1. In one case bearing Case Crime No.156/2019, he has been granted bail whereas in other case, chargesheet has not been filed by the police as yet.

However, on the basis of the wrong information furnished in the gang chart, the impugned F.I.R. has been lodged against the petitioners.

7. It is stated that as per the Government Order dated 2.1.2004 as well as Circular issued by the Director General of Police dated 24.10.2003, only those criminal cases in which chargesheets have been filed, shall be taken into consideration for the purpose of invoking Gangsters Act, 1986.

8. Learned A.G.A. was granted time to seek instructions. Learned A.G.A. on the basis of the instructions, has filed short counter affidavit, which is taken on record.

9. In paragraphs 5,6 and 7 of the short counter affidavit, it has been stated that the police after completing investigation, had filed the chargesheet in Case Crime No.156 of 2019 before lodging of impugned F.I.R., however in Case Crime No.312 of 2019, the chargesheet has been prepared by the

police and has been submitted in the concerning court on 4.12.2020. Similarly, in Case Crime No.406 of 2020, the police has prepared the chargesheet which has been submitted before the court concerned on 4.12.2020. The relevant paragraphs are reproduced as under :-

"5. That it is relevant to mention here that after completion of investigation in Case Crime No.156 of 2019 registered at Police - Kotwali Dehat, District Gonda under Sections 323, 504, 307 and 302 IPC, 7 CLA Act, charge sheet dated 31.05.2019 was forwarded and received by the concerned Court on 12.06.2019.

6. That in Case crime No.312 of 2019, registered at Police Kotwali Dehat, District Gonda, under Sections 504, 506 IPc, chargesheet dated 30.11.2020 was forwarded and received by the concerned court on 04.12.20202. Phototstat copy of the receipt dated 04.12.2020 is being filed herewith as Annexure No.SCA-1 to this Short Counter Affidavit.

7. That in Case Crime No.406/2020, registered at Police - Kotwali Dehat, District Gonda, under Sections 352, 504 and 506 IPC, charge sheet dated 29.09.2020 was forwarded and received by the concerned Court on 04.12.2020. Photostat copy of the receipt dated 04.12.20202 is being annexed as Annexure No.SCA-2to this Short Counter Affidavit."

10. As such, it is evidently clear that in Case Crime No.312 of 2019 as well as Case Crime No.406 of 2020, the chargesheets against the petitioners have been filed in the court after lodging of the impugned F.I.R. under Section 3(1) of the Gangsters Act, 1986.

11. It is to be noted that the Government Order dated 2.1.2004 specifically provides that only those criminal cases shall be included in the gang chart in which the police has prepared the chargesheet and the same has been filed before the court concerned.

12. It has also been mentioned in the said Government Order that in case of any misuse by the authorities, the concerning incharge of the police station as well as Senior Superintendent of Police/ Superintendent of Police Incharge of the concerned Districts shall be held responsible.

13. Paragraphs 5 and 10 of the Government Order dated 2.1.2004 are relevant. Paragraphs 5 and 10 of the Government Order dated 2.1.2004 are reproduced :-

"5. *किसी भी गिरोह के विरूद्ध कार्यवाही करने के लिए, उसके विरूद्ध केवल उन्हीं मामलों को आपराधिक सूची में सम्मिलित मानना चाहिए, जिन मामलों में पुलिस द्वारा विवेचना के उपरान्त आरोप पत्र प्रेषित किया जा चुका है। जिन मामलों में अन्तिम रिपोर्ट प्रेषित की जा चुकी है या न्यायालय द्वारा विचारण के उपरान्त अभियुक्त को दोषमुक्त किया जा चुका है, उसे*

आपराधिक विवरण में सम्मिलित न किया जाये।

10. यहाँ यह भी स्पष्ट किया जाता है कि यदि किसी जनपद में इस अधिनियम में दिये गये प्राविधानों के सम्बन्ध में किसी अधीनस्थ अधिकारी द्वारा अपने कर्तव्य पालन की उपेक्षा करने अथवा अपने अधिकार का दुरूपयोग का कोई मामला प्रकाश में आता है तो सम्बन्धित थाना प्रभारी एवं दोषी पाये गये अधिकारी के अलावा जनपद के वरिष्ठ पुलिस अधीक्षक/ पुलिस अधीक्षक प्रभारी भी उत्तरदायी माने जायेंगे।"

14. It is also to be noted that vide Circular dated 24.10.2003, Director General of Police, U.P. has issued the directions similar to the Government Order dated 2.1.2004 as noted above.

Relevant paragraph 2 of Circular dated 24.10.2003 is reproduced as under :-

"2- *किसी भी गिरोह के विरूद्ध कार्यवाही करने के लिए उसके विरूद्ध केवल उन्हीं मामलों को आपराधिक सूची में सम्मिलित मानना चाहिए जिन मामलों में पुलिस द्वारा विवेचना के उपरान्त आरोप–पत्र प्रेषित किया जा चुका है, जिन मामलों में अन्तिम रिपोर्ट प्रेषित की जा चुकी है या न्यायालय द्वारा विचाराण के उपरान्त अभियुक्त को दोषमुक्त किया जा चुका है, उसे आपराधिक विवरण में सम्मिलित न किया जाये।*"

15. In view of the above, we are of the considered view that the gang chart dated 9.10.2020, copy of which is annexed as Annexure No.2 to the writ petition was prepared on the wrong information with respect to the filing of the chargesheets in the case crime numbers mentioned therein.

16. The impugned F.I.R. on the basis of the aforesaid gang chart as such was lodged on the basis of the wrong information furnished in the gang chart as noted above.

17. As such the writ petition in the given facts and circumstances is hereby **allowed**.

The impugned F.I.R. No.0430 of 2020 dated 13.10.2020, under Section 3(1) of the U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986 registered at Police Station Kotwali Dehat, District Gonda as well as gang chart dated 9.10.2020, copy of which are annexed as Annexure Nos.1 and 2 to the writ petition are hereby quashed.

18. However, since it is submitted by learned A.G.A. that now chargesheets in Case Crime No.312 of 2019 and Case Crime No.406 of 2020 against petitioners have already been prepared and filed before the court concerned meaning thereby that in all the criminal cases as mentioned in the gang chart, chargesheets against both the petitioners have been filed as such we hereby give liberty to the competent authority to take a fresh decision in this regard and do the needful.

(2020)12ILR A430
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.12.2020

BEFORE

THE HON'BLE JASPREET SINGH, J.

Misc. Single No. 22981 of 2019
&
Misc. Single No. 7563 of 2020

Smt. Jasoda Singh @ Yasoda Singh ...Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Hemant Kumar Mishra, Arti Ganguly

Counsel for the Respondents:
C.S.C., Janardan Singh, Ravindra Kumar Singh

Constitution of India - Article 227 - U.P. Revenue Code, 2006 - Section 116, Suit for division of holding - Section 207, First Appeal - S. 214, Applicability of Code of Civil Procedure - Petitioner prayed that partition suit filed u/s 116 filed by the opposite parties be set aside & also the interim order be quashed - *Held* - Alternate Remedy - adequate efficacious statutory remedy of appeal is available under Revenue Code against interim order passed in partition suit - grounds urged in petition under Article 227 can also be urged before the Revenue court, who has ample power to deal with the same & if necessary has the power to reject the

plaint in terms of the order 7 Rule 11 C.P.C. - No interference under Article 227 (Para 32)

Writ Petition disposed Off. (E-5)

List of Cases cited: -

1. Jacky Vs Tiny @ Antony & ors. 2014 (6) SCC 508

2. Virdudhunagar Hindu Nadargal Dharma Paribalana Sabai & ors. Vs Tuticorin Educational Society & ors. 2019 (9) SCC 538

(Delivered by Hon'ble Jaspreet Singh, J.)

1. Heard Sri Hemant Kumar Mishra, learned counsel for the petitioner and Mrs. Bulbul Godiyal, Senior Counsel assisted by Sri Janardan Singh on behalf of contesting opposite party nos. 6 and 7.

2. The opposite parties nos. 6 and 7 of W.P. No. 22981 (MS) of 2019 namely Smt. Prabhawati and Vijay Kumar have instituted a petition under Article 227 of the Constitution of India bearing No. 7563 (MS) of 2020 wherein a limited prayer has been made that the Sub Divisional Magistrate, Tehsil Tarabganj, District Gonda be directed to expeditiously decide the case bearing No. T201908300603097; under Section 116 of the U.P. Revenue Code, 2006 (Smt. Prabhawati Singh and Another Vs. Amar Bahadur Singh and other) preferrably within a period of 3 months. In the aforesaid petition, Smt. Jasoda Singh (the petitioner in the instant petition) has been impleaded as opposite party no. 4. Thus the said petition has been connected with W.P. No. 22981 (MS) of 2019. Since the issue involved in present petition will impact the grant of relief in the other petitions, hence, both the petitions are being decided by this common judgment for the convenience the facts are being noticed from W.P. No. 22981 of 2019.

3. The petitioner assails the order dated 26.06.2019 passed by the SDM, Tahsil, Tarabganj, District Gonda whereby the Suit of the opposite party nos. 6 and 7 has been registered, notices were issued to the defendants of the suit and further as an interim measure, the parties have been directed not to change the nature of the property in question and also under challenge is the institution of the suit itself before the SDM under Section 116 of the U.P. Revenue Code, 2006.

4. Primarily, it is the entire proceedings which are under challenge, however, for the sake of convenience, the three main prayers sought by the petitioner in the W.P. No. 22981 (MS) of 2019 are reproduced for ready reference.

"(a) To issue a writ order or direction in the nature of Certiorari for quashing of the impugned order dated 26.06.2019 passed by the opposite party no. 2 and 3 on the application for interim relief filed along with application moved under Section116 of the Revenue Code contained as Annexure No. 1 to the writ petition.

(b) To issue a writ order or direction in the nature of mandamus commanding the opposite party no. 2 and 3 to forthwith cancel/terminate the pending proceeding initiated on the basis of application moved by the Opposite Party No. 6 and 7 under Section 116 of the Uttar Pradesh Revenue Code, 2006 on the ground that they had sold their right and title of their part of Gata No. 291 situated in Village Baghusra, pargana Mahadeva, Tehsil Tarabganj, District Gonda after executing sale deed in favour of the Nandini Committee of the Nandini Mahavidyalaya, run by the powerful politician through registered sale deed dated 02.07.2019.

(c) To issue a writ order or direction in the nature of Mandamus commanding the Opposite Party No. 2 to 5 to not restrain the petitioner under the garb of the order dated 26.06.2019 and allow the petitioner to complete his roof work of the constructed building."

5. The proposition canvassed by Sri Hemant Mishra is two fold. Firstly, it is alleged that the suit under Section 116 of the U.P. Revenue Code, 2006 was not maintainable at the behest of the opposite party nos. 6 and 7 in light of the averment contained in the suit itself and more particularly in paragraph 4. The paragraph 4 of the plaint in suit (a copy of which has been brought on record as Annexure No. 2) is reproduced as under:-

"धारा ४. यह की वादीगण एवं प्रतिवादीगण अपने अंश के मुताबिक वह भी बाँट के अनुसार काबिज दखिल चले आ रहे हैं I"

6. It has been submitted that once the opposite party nos. 5 and 6 in the suit itself stated that on the basis of an oral settlement/partition, parties were in possession of their respective shares, hence, there was no question of the suit being maintainable for partition.

7. The other ground urged by Sri Mishra has further two limbs (i) the opposite party nos. 6 and 7 had already sold their share in the property in question in favour of a Society which is controlled by an influential Member of Parliament and thus, the opposite parties nos. 6 and 7 having alienated and transferred, their right were no more the Bhumidhar of the land in question, accordingly, the suit filed by them in terms of under Section 116 of the U.P. Revenue Code, 2006 could not proceed as the suit can only be prosecuted by a bhumidhar against his co-sharers (ii) the other limb on which Sri Mishra has stressed is that the land in question in respect of which the opposite party nos. 6 and 7 had filed the suit, of which the petitioner was also a co-sharer and the petitioner had got her share declared as non-agricultural in terms of Section 80 of the U.P. Revenue Code, 2006, hence, once the land had lost the character of being an agricultural land, therefore, the partition /division of such property cannot be done under Section 116 of the U.P. Revenue Code, 2006 rather the opposite party nos. 5 and 6 ought to have taken recourse before some other forum.

8. On the strength of the aforesaid propositions, it has been urged by Sri Mishra that for all the aforesaid reasons, the suit filed before the SDM was neither maintainable nor could proceed, hence, the SDM, Tahsil, Tarabganj, District Gonda exceeded his jurisdiction in entertaining the suit and in passing an interim order on the very first day.

9. It has further been alleged that all this has been done only at the behest of the influential Member of Parliament and in the aforesaid circumstances, the proceedings being de-hors, the provisions of law cannot sustain for a minute, accordingly, not only the impugned order dated 26.06.2019 deserves to be quashed but so also the entire proceedings in the shape of the pending suit under Section 116 of the U.P. Revenue Code, 2006 be terminated/set aside.

10. Mrs. Bulbul Godiyal, learned Senior Counsel while refuting the submissions of the learned counsel for the

petitioner has submitted that relying upon para 4 alone of the suit filed before the SDM is quoting the actual facts out of context. It is the complete and full plaint which is to be read as a whole in order to determine the nature of the cause of action and the relief which has been prayed.

11. Mrs. Bulbul Godiyal has further alleged that neither the suit is barred, inasmuch as, on the date of the institution of the suit, the opposite party nos. 6 and 7 were the Bhumidhar and the recorded owners of the land in question and any subsequent change or transfer of title is not going to affect the suit. She has also urged that merely because a declaration is issued under Section 80 of the U.P. Revenue Code, 2006 it would not change the nature of the land in so far as the applicability of Section 116 of the U.P. Revenue Code, 2006 is concerned. Moreover, the petitioner while filing the instant writ petition did not disclose the fact that the alleged order by which the petitioner had got the land declared as non-agricultural in terms of Section 80 of the U.P. Revenue, 2006 had already been stayed by the Commissioner by means of order dated 03.10.2019.

12. It has also been submitted that the petitioner is filing multiple petitions only to harass the opposite party nos. 6 and 7 and in the said petitions, the opposite party nos. 6 and 7 were not impleaded as a party. It has been submitted that the land belonging to opposite party nos. 6 and 7 is situated towards the main road which has a higher value and the petitioner in the garb of raising constructions attempted to encroach upon and usurp the land of the opposite parties nos. 6 and 7 which prompted them to institute a suit seeking a division. Since the suit was registered and notices were issued, the court concerned was well within its domain and jurisdiction in the facts and circumstances to pass an order directing the parties not to change the nature of the land. Such an order did not adversely affect the rights of any of the parties rather it protected the same, accordingly, the order dated 26.06.2019 does not suffer from any error and has been passed in sound exercise of jurisdiction, whereas the petitioner has a right to assail the aforesaid order before the Court concerned.

13. Thus, it has been urged that the petition filed by the petitioner deserves to be dismissed whereas the petition filed by the opposite parties nos. 6 and 7 under Article 227 of the Constitution of India bearing W.P. No. 7563 (MS) of 2020 be allowed and the proceedings before the SDM, Tehsil, Tarabganj, District Gonda be expedited.

14. Sri Mishra in reply to the aforesaid submissions has drawn the attention of the Court to an order passed by a Division Bench of this Court dated 18.07.2019 in W.P. No. 19436 (MS) of 2019. Sri Mishra has also taken the Court through various orders which are said to have been passed in a PIL (Civil) Petition No. 14756 of 2018 which have been filed with the writ petition and referring to the aforesaid, it has been urged that the entire State actually is working in cahoots with the Member of the Parliament who is very influential in the area and is running as many as 54 educational institutions managed by various societies which are under his control and tutelage. In the aforesaid backdrop, it has been submitted by Sri Mishra that he has no faith of getting any justice from the Court of the SDM, Tehsil, Tarabganj, District Gonda. For all the aforesaid reasons, he has prayed that not only the impugned order dated

26.06.2019 be set aside but also the proceedings in the shape of the Suit under Section 116 of the U.P. Revenue Code, 2006 be terminated/quashed.

15. The Court has heard the learned counsel for the parties at length and carefully perused the record.

16. Before dealing with the respective contentions, it will be apposite to note relevant facts leading up to the writ petition No. 22981 (MS) of 2019 which are relevant for effective adjudication of the controversy in between the parties.

17. Admittedly, one Sri Pateshwari Singh was the recorded tenure holder of the land in question. Sri Pateshwari Singh in his lifetime had executed various sale deeds in favour of different persons in respect of his land holding of Gata No. 291. He also executed a sale deed in favour of Sri Paras Nath, the husband of the petitioner for an area of 0.200 hectares. Later, Sri Paras Nath Singh transferred the aforesaid property in favour of his wife Smt. Jasoda Singh by means of a sale deed executed on 19.08.2014 and thus, the present petitioner became the owner in respect of 0.0200 hectares of Gata No. 291.

18. Similarly, Sri Pateshwari Singh had executed sale deeds in favour of the other persons who have been impleaded as opposite party nos. 1 to 6 in the suit. After his death his remaining share in the property devolved upon his wife and son who are the opposite party nos. 6 and 7 and who have a share of 0.1845 hectares which is joint with the petitioner and opposite party nos. 4, 6 to 9 of this petition.

19. From the record, it transpires that the petitioner had made an application under Section 80 of the U.P. Revenue Code, 2006 for declaring her share as non-agricultural. The SDM concerned by means of an order dated 20.05.2019 declared the land of Gata No. 291 admeasuring 0.020 hectares as non-agricultural.

20. It is further pleaded that after the land was declared as non-agricultural, the petitioner had put a tin shed on certain part of her land and was raising constructions to complete her house and only the roof was to be placed over the structure, however, in the meantime, the SDM concerned on the suit filed by the opposite party nos. 6 and 7 passed the ex-parte order dated 26.06.2019 and though it only directed the parties not to change the nature of the land in question, however, by using the influence, the opposite party nos. 2 and 3 in connivance with the opposite party no. 6 and 7 stopped the construction of the petitioners.

21. It has also been submitted that the opposite party nos. 6 and 7 in connivance with the Member of Parliament as well as with the aid of State Machinery is trying to implement the order dated 26.06.2019 and in the garb thereof intend to demolish the construction of the petitioner. It has also been pleaded that the petitioner had earlier preferred a Writ Petition before a Division Bench of this Court bearing W.P. No. 19436 (MB) 2019 wherein the Court as an interim measure granted the aforesaid protection, the relevant portion thereof reads as under:-

"6. We hereby direct Superintendent of Police Gonda and District Magistrate Gonda to ensure that appropriate security, as required by facts and circumstances, is provided to the petitioner so that her rights on the property, in case established, are

protected. Not only life and liberty of the petitioner is required to be protected but also use of her property is required to be protected. In this regard relevant order be passed/issued within three days of receipt of certified copy of this order."

Shri Raj Baksh Singh shall convey the order to Superintendent of Police Gonda and District Magistrate Gonda for immediate compliance."

22. It further transpires that the aforesaid writ petition came to be allowed finally by means of judgment dated 23.01.2020 and the relevant portion of the said judgment dated 23.01.2020 reads as under:-

"35. The order quoted above was passed by this court in the given circumstances and shows specific direction on Superintendent of Police and the District Magistrate, Gonda to ensure appropriate security. It is not only protection of life and liberty to the petitioner but for use of property. The official respondents were expected to comply the directions aforesaid but they initiated proceedings under Section 145 (1) Cr.P.C. This is sufficient to show their involvement thus, proceedings under Section 145 Cr.P.C. were stayed by the Single Judge in Writ Petition No.22981 (M/S) of 2019. The fact given above shows intervention of the court against the action of official respondents for resorting to the proceedings under Section 145 Cr.P.C. instead of giving protection to the petitioner and her family members pursuant to the order of this court dated 18.7.2019. It is alleged to be for the reason that respondent no.11 is sitting Member of Parliament and belongs to Ruling party. Even if the allegation aforesaid are ignored, the fact remains that the official respondents have not acted in consonance to the order passed by this court on 18.9.2019 and aforesaid is sufficient to substantiate the allegation made by the petitioner against them.

36. Taking overall facts into consideration, we find merit in the writ petition to direct the official respondents to give an adequate protection to the petitioner and their family members to save their life and liberty.

37. The order given hereinabove is not to affect any of the proceedings pending before the revenue or civil court rather those would be decided independent to it based on the evidence lead by the parties therein and for that any observations or finding herein would not bind the court. The observations herein have been made only to see whether the case is made out for grant of relief to the petitioner."

23. It is in the aforesaid backdrop that the petitioner being aggrieved by filing of the suit under Section 116 of the U.P. Revenue Code, 2006, coupled with the grant of exparte interim order has preferred the instant petition. A coordinate Bench of this Court by means of order dated 29.08.2019 had passed an order staying the operation and effect of the order dated 26.06.2019 passed by the SDM concerned and also directed that the proceedings initiated under Section 145 Cr.P.C. also be kept in abeyance.

24. Though various allegations and counter allegations have been leveled by the parties during the course of hearing and the petitioner has chosen not to mince any word in criticizing the SDM who has been impleaded in his personal capacity as opposite party no. 3 as well as the SHO, Police Station, Wazirganj, District Gonda

as opposite party no. 5. However, the allegations relates to mal-administration and using of political influence at the behest of the Member of Parliament, however, surprisingly, the said Member of Parliament has not been impleaded as a party, though, it has been alleged by Sri Mishra that the opposite party nos. 6 and 7 have also sold their share in respect of the property in favour of a Society and a copy of the sale deed has also been brought on record as Annexure No. 9, however, the said Society has also not been impleaded as a party in the present petition.

25. Be that as it may, the point for consideration before this Court is (i) whether this Court in exercise of powers under Article 226 can quash the order passed by the SDM concerned so also the entire proceedings of the suit filed under Section 116 of the U.P. Revenue Code, 2006.

26. Before answering the aforesaid issue, it will be relevant to notice the decision of the Apex Court in the case of ***Jacky Vs. Tiny Alias Antony and Others reported in 2014 (6) SCC 508*** wherein the issue before the Apex Court was whether in exercise of the powers under Article 226 and 227 of the Constitution of India can a plaint be set aside.

27. The Apex Court considering the earlier judgments of the Apex Court on the aforesaid points in paragraphs 13 and 15 has held as under:-

"13. The nature and scope of power under Article 227 of the Constitution of India was considered by this Court in Jai Singh v. MCD [(2010) 9 SCC 385 : (2010) 3 SCC (Civ) 782] . In the said case, this Court held: (SCC pp. 390-91, para 15)

......"15. We have anxiously considered the submissions of the learned counsel. Before we consider the factual and legal issues involved herein, we may notice certain well-recognised principles governing the exercise of jurisdiction by the High Court under Article 227 of the Constitution of India. Undoubtedly the High Court, under this article, has the jurisdiction to ensure that all subordinate courts as well as statutory or quasi-judicial tribunals, exercise the powers vested in them, within the bounds of their authority. The High Court has the power and the jurisdiction to ensure that they act in accordance with the well-established principles of law. The High Court is vested with the powers of superintendence and/or judicial revision, even in matters where no revision or appeal lies to the High Court. The jurisdiction under this article is, in some ways, wider than the power and jurisdiction under Article 226 of the Constitution of India. It is, however, well to remember the well-known adage that greater the power, greater the care and caution in exercise thereof. The High Court is, therefore, expected to exercise such wide powers with great care, caution and circumspection. The exercise of jurisdiction must be within the well-recognised constraints. It cannot be exercised like a "bull in a china shop', to correct all errors of judgment of a court, or tribunal, acting within the limits of its jurisdiction. This correctional jurisdiction can be exercised in cases where orders have been passed in grave dereliction of duty or in flagrant abuse of fundamental principles of law or justice."

"15. A petition under Article 226 or Article 227 of the Constitution of India can neither be entertained to decide the landlord-tenant dispute nor is it maintainable against a private individual

to determine an intense dispute including the question whether one party is harassing the other party. The High Court under Article 227 has the jurisdiction to ensure that all subordinate courts as well as statutory or quasi-judicial tribunals, exercise the powers vested in them within the bounds of their authority but it was not the case of the 1st respondent that the order passed by the Munsif Court was without any jurisdiction or was so exercised exceeding its jurisdiction. If a suit is not maintainable it was well within the jurisdiction of the High Court to decide the same in appropriate proceedings but in no case power under Articles 226 and 227 of the Constitution of India can be exercised to question a plaint."

28. The aforesaid issue regarding the power of the High Court under Article 226 and 227 of the Constitution of India in respect of vacating interim order passed by the Civil Courts also came up before the Apex Court in the Case of ***Virdudhunagar Hindu Nadargal Dharma Paribalana Sabai and Others Vs. Tuticorin Educational Society and Others*** reported in ***2019 (9) SCC 538*** wherein in paragraph nos. 10, 11 and 13, the Apex Court has held as under:-

"10. Primarily the High Court, in our view, went wrong in overlooking the fact that there was already an appeal in CMA No. 1 of 2018 filed before the Sub-Court at Tuticorin under Order 41, Rule 1(r) of the Code, at the instance of the fifth defendant in the suit (third respondent herein), as against the very same order of injunction and, therefore, there was no justification for invoking the supervisory jurisdiction under Article 227.

11. Secondly, the High Court ought to have seen that when a remedy of appeal under Section 104(1)(i) read with Order 43, Rule 1(r) of the Code of Civil Procedure, 1908, was directly available, Respondents 1 and 2 ought to have taken recourse to the same. It is true that the availability of a remedy of appeal may not always be a bar for the exercise of supervisory jurisdiction of the High Court. In A. Venkatasubbiah Naidu v. S. Chellappan [A. Venkatasubbiah Naidu v. S. Chellappan, (2000) 7 SCC 695] , this Court held that "though no hurdle can be put against the exercise of the constitutional powers of the High Court, it is a well-recognised principle which gained judicial recognition that the High Court should direct the party to avail himself of such remedies before he resorts to a constitutional remedy".

"13. Therefore wherever the proceedings are under the Code of Civil Procedure and the forum is the civil court, the availability of a remedy under the CPC, will deter the High Court, not merely as a measure of self-imposed restriction, but as a matter of discipline and prudence, from exercising its power of superintendence under the Constitution. Hence, the High Court ought not to have entertained the revision under Article 227 especially in a case where a specific remedy of appeal is provided under the Code of Civil Procedure itself."

29. Thus, in the backdrop of the aforesaid decisions, if the submissions of the learned counsel for the petitioner is noticed, it would indicate that the petitioner has prayed that the suit filed by the opposite parties nos. 6, 7 be set aside and also the interim order dated 26.06.2019 be quashed.

30. The U.P. Revenue Code is a self-contained Act and Section 214 of the U.P.

Revenue Code, 2006 deals with the applicability of the Code of Civil Procedure and it reads as under:-

"214. Applicability of Code of Civil Procedure, 1908 and Limitation Act, 1963.- *Unless otherwise expressly provided by or under this Code, the provisions of the Code of Civil Procedure, 1908 and the Limitation Act, 1963 shall apply to every suit, application or proceedings under this Code.*

31. Similarly, Section 207 of the U.P. Revenue Code, 2006 deals with the First Appeal in respect of final order/decree and certain orders and aforesaid section reads as under:-

"207. First Appeal:- (I) *Any party aggrieved by a final order or decree passed in any suit, application or proceeding specified in [column 2] of the Third Schedule, may refer a first appeal to the Court or officer specified against it in [Column 4], where such order or decree was passed by a Court or officer specified against it in (Column 3) thereof*

(2) A first appeal shall also be against an order of the nature specified-

(a) in Section 47 of the Code of Civil Procedure, 1908; or

(b) in Section 104 of the said Code; or

(c) In Order XLIII, Rule 1 of the First Schedule to the said Code.

(3) The period of limitation for filing a first appeal under this Section shall be thirty days from the date of the order or decree appealed against.

32. Thus, from the conjoint reading of the aforesaid provisions, it is clear that in so far as the first relief claimed by the petitioner regarding quashing of the interim order dated 26.06.2019 is concerned, the petitioner has an adequate efficacious statutory remedy of appeal. In so far as the quashing of the suit is concerned on the grounds urged by the learned counsel for the petitioner and noticed hereinabove, this Court is of the opinion that the aforesaid grounds can also be urged before the court concerned who has ample power to deal with the same and if necessary has the power to reject the plaint in terms of the order 7 Rule 11 C.P.C.

33. In view of the aforesaid, this Court deems appropriate not to deal with and give any finding on the merits of the submissions and propositions canvassed by the learned counsel for the parties lest it may adversely affect or prejudice the rights of either of the parties before the Trial Court.

34. The learned counsel for the petitioner could not dispute the aforesaid legal proposition in so far as availability of adequate statutory remedy and the applicability of C.P.C. proceedings under the U.P. Revenue Code, 2006 is concerned.

35. The apprehension of the petitioner in respect of opposite party nos. 2 and 3 can also be ventilated before the appropriate authorities in accordance with law as the U.P. Revenue Code confers powers including the power to transfer proceedings from one Court to another and even from one District to another.

36. Thus, taking a complete and holistic view of the entire matter including the directions given by the Division Bench of this Court in para 37 of its judgment dated 23.01.2020 passed in W.P. No. 19436 (M/B) of 2019, this Court is of the considered opinion that the relief as prayed

by the petitioner cannot be granted at this stage and the petitioner shall be at liberty of appearing before the Court concerned and raising all the objections before the Court concerned. In case if any such objections are taken by the petitioner, it is expected that the opposite party no. 2 shall consider and decide the matter expeditiously by providing a complete opportunity of hearing to the parties and decide it strictly in accordance with law.

37. In light of the aforesaid, the Writ Petition No. 22981 (MS) of 2019 stands dismissed and the Writ Petition No. 7563 (MS) of 2020 is disposed of in terms of this order.

(2020)12ILR A439
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.09.2020

BEFORE

THE HON'BLE SHASHI KANT GUPTA, J.
THE HON'BLE PIYUSH AGRAWAL, J.

Writ - C No. 12338 of 2020

Shiv Kumar Pandey ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sachin Mishra, Sri Ram Vishal Mishra

Counsel for the Respondents:
C.S.C., Sri Arun Kumar

(A) Civil law - U.P. Urban Planning & Development Act, 1973 - Section 27 (1) - Order of demolition of building - Section 43 - Services, of notices - mere possession of a property for a long period will not clothe the possessor with any legal right that the possession is under a grant from the State which is resumable - once resumption of a Nazul property has been made by the State, no person has any right to occupy a Nazul property without prior permission of the State. (Para -12,14)

A small piece of land occupied by petitioner without any authority of law - lease made in favour of the Company -expired number of decades ago - never executed in favour of petitioner or his grand father - land stood resumed and the resumption of the said property was held to be legal and valid on 26.11.2015 by the Apex Court. (Para -12)

HELD :- Petitioner does not have any right, title or interest over the property in question. Petitioner has failed to show his continuous possession over the land in dispute. Demolition of 2 tin-shed rooms illegally constructed by the petitioner has been rightfully done after following the due procedure provided under law. (Para - 14)

Writ Petition dismissed. (E- 7)

List of Cases cited:-

1. Ravinder Kaur Grewal & ors. Vs Manjit Kaur & ors. , Civil Appeal No. 7764 of 2014

2. Orissa Vs Ram Chandra Dev & an., AIR 1964 SC 685

3. State of Uttar Pradesh & ors. Vs United Bank of India & ors., Civil Appeal No. 5254 of 2010

(Delivered by Hon'ble Shashi Kant Gupta, J. & Hon'ble Piyush Agrawal, J.)

1. This writ petition has been, inter alia, filed for the following relief:-

"i. Issue a suitable writ, order or direction in the nature of mandamus directing the respondents to restore the construction of the house and pay compensation, which was illegally demolished on 11.8.2020 at 4 p.m. by the respondents in regard to the house of the petitioner situated at 19 Clive Road Civil Lines Prayagraj/Prayagraj."

2. Heard learned counsel for the petitioner, Sri Arun Kumar, learned counsel for the Prayagraj Development Authority, learned Standing Counsel for the State and perused the record.

3. Learned counsel for the petitioner has submitted that the petitioner had been occupying 2 tin-shed rooms, part of the Premises No. 19, Clive Road, Prayagraj, since long. However, without giving any opportunity of hearing or issuing any notice, the said structure has been demolished by Prayagraj Development Authority (in short 'PDA') illegally and arbitrarily.

4. Per contra, Sri Arun Kumar, learned counsel for the PDA while placing the original records pertaining to demolition proceedings of the disputed structure has submitted that land in question measuring about 100 square yards was illegally occupied by the petitioner, without any right, title or interest. The petitioner has never paid rent/damages whatsoever. It was further submitted that the complaint was received by the PDA with regard to the illegal construction raised by the petitioner on 2.6.2020 on the alleged land. Upon inquiry it was revealed that illegal construction was raised over 100 square yard of land comprising two tin-shed rooms by the petitioner and further construction of walls was also being raised by the petitioner surreptitiously. Notice was issued under Section 27 (1) of the U.P. Urban Planning & Development Act, 1973 (in short 'Act, 1973). When the Development Authority failed to serve the notice upon the petitioner, the notice was affixed in accordance with Section 43 of the Act, 1973 on 4.6.2020 for showing cause, but the petitioner failed to file any reply to the said notice. Thereafter, again the notices were issued on 15.6.2020 & 26.6.2020 but the petitioner failed to respond. Ultimately, the demolition of disputed structure was carried out in accordance with law.

5. It was further submitted by the learned counsel for PDA that earlier, a lease deed with respect to Plot No. 19, Clive Road was executed in favour of M/s Amrit Bazar Patrika Pvt. Ltd. (in short "the Company") by means of a registered deed on 25.7.1949 by the State of Uttar Pradesh for 50 years from the first day of September 1937. United Bank of India (in short "the Bank") had advanced credit facilities to the Company and the Company allegedly mortgaged the immovable property situated at 19 Clive Road, Prayagraj, which was earlier leased out by the State Government to it. Since the Company failed to repay the loan, the Bank, for recovery of its dues, filed a Suit No. 510 of 1990 in the Civil Court in the capacity of the mortgagee of the various properties of the said Company including the property situated at 19, Clive Road, Prayagraj, which was held by the Company, allegedly, as lessee. The said suit was decreed on 9.10.1991 in favour of the Bank. It is notable that the paramount title holder namely the State of Uttar Pradesh, was not made a party to the suit. Ultimately, the matter reached the Apex Court in Civil Appeal No. 5254 of 2010 (State of Uttar Pradesh and others Vs. United Bank of India and others) along with other similar civil appeals arising out of the common judgment and order passed by the court below. The Apex Court allowed the Civil Appeal No. 5254 of 2010 filed by the State of Uttar Pradesh and the impugned judgment and order dated 3.11.2009 passed by the High Court was set aside, inter alia, holding that mortgage

done by the lessee Company in favour of the Bank is bad in law, and was in clear violation of the terms of the lease deed i.e. mortgage of the Nazul land without previous sanction in writing of the State.

6. Mr. Arun Kumar, learned counsel for the PDA, in support of his contention, has referred to Paragraphs 38 and 45 of the judgment and order passed in the aforesaid Civil Appeal No. 5254 of 2010 by the Apex Court with respect to premises No. 19, Clive Road Room (disputed structure 2 tin-shed rooms is a part of the said premises) which was earlier allotted to the Company, which are quoted hereinbelow:

Paragraph 38

"In the present case there was nothing on the record to show that the lessee i.e. (ABP) has obtained any written sanction from the lessor i.e. Government before mortgaging his leasehold interest in the Nazul Land. Meaning thereby the mortgage done by the lessee in favour of the Bank itself is bad in law, which was done in clear violation of the terms of the lease deed i.e. mortgage of the Nazul land without previous sanction in writing of the State."

Paragraph 45

"45. After considering the entire facts of the case and the submissions made by learned counsel appearing for the parties, we come to the following conclusion:-

(i) Indisputably, the property in question i.e. Premises No.19, Clive Road, Prayagraj is a Nazul land governed by the Government Grants Act, 1895 and Nazul Rules.

(ii) The property was given on lease by the State of U.P.to Mrs. Mortha Anthony and second time the lease was renewed in favour of Ms. Verna Anthony and Ms. Leena Anthony for a further period of 50 years which was valid up to 31.8.1987.

(iii) During the subsistence of lease, the leasehold interest was transferred in 1945 in favour of ABP Co. and on the basis of the said transfer a lease was executed in 1949 by the State of U.P. in favour of ABP Co. for the remaining period of lease which expired in 1987.

(iv) As against the loan taken by the Company from the Bank, a mortgage was created in respect of the property by the Company in favour of Bank. The lease in respect of the leasehold interest in the property admittedly expired in 1987.

(v) The mortgage so created by the Company in favour of the Bank in respect of Nazul land without the sanction of the State of Uttar Pradesh in terms of the lease, is ab initio void, hence no right was created in favour of the Bank by reason of the said mortgage.

(vi) Consequently, a mortgage decree obtained by the Bank on the basis of settlement, in absence of and behind the back of the State of U.P. could not have been enforced against the State. The subsequent proceedings of transferring the decree to the Debt Recovery Tribunal and again passing an order for auction sale of the property on the basis of settlement is wholly illegal and without jurisdiction.

(vii) The appellant Bank has no right, title or interest in the property so as to claim a right of conversion of the property into a freehold property.

(viii) The impugned notice issued by the State of U.P. directing resumption of the property is legal and valid and cannot be quashed at the instance of the Bank."

7. Learned counsel for the PDA while referring to the above judgment has contended that the Apex Court has very categorically held that the notice issued by the State of Uttar Pradesh directing resumption of the property is legal and valid and the property could not have been mortgaged by the Company in favour of the bank. The land in dispute over which the alleged construction has been raised, comprising of 100 square yards is a part and parcel of the premises situated at 19 Clive Road, Prayagraj, which was earlier leased out in favor of the Company and was later on resumed by the State. It was further submitted by the learned counsel for the PDA that premises No. 19 Clive Road, Prayagraj admeasuring 24280.34 square meter of land, out of which the petitioner was illegally occupying 100 square yards of land by making illegal constructions over it. Due to the illegal occupation of the petitioner over the land in dispute, the development of the entire land demised in 19 Clive Road, Prayagraj was stalled. It has also been brought to our knowledge that the said premises at 19 Clive Road has been allotted to the Allahabad High Court for the purpose of constructing the residential houses of the High Court Judges.

8. Learned counsel for the petitioner has raised the plea of adverse possession and in support of his contention has placed reliance upon the judgment and order dated 7.8.2019 passed by the Apex Court in **Civil Appeal No. 7764 of 2014 (Ravinder Kaur Grewal and Ors. Vs. Manjit Kaur & Ors.)** and submitted that the petitioner has acquired title by virtue of adverse possession.

9. We have carefully perused the aforesaid judgment and we are sorry to say that the judgment is not at all applicable to the facts of the present case. The observation made by the Apex Court is with regard to the private property, and it has been held that a person in possession cannot be ousted by another person except by due procedure of law and once the 12 year period of adverse possession is over, even the owner's right to eject him is lost and the possessory owner acquires right, title and interest possessed by the outgoing person/owner, as the case may be. In the aforesaid judgment, in Paragraph 60, the Apex Court has also held that law of adverse possession as has developed vis-a-vis to property dedicated to public use, courts have been loath to confer the right by adverse possession. In such cases, on the land reserved for public utility, it is desirable that rights should not accrue. The law of adverse possession may cause harsh consequences. Hence, the Apex Court held that it would be advisable that concerning such properties dedicated to public cause, it is made clear in the statute of limitation that no rights can accrue by adverse possession.

10. For ready reference, Paragraph 60 of the judgment and order dated 7.8.2019 passed in **Civil Appeal No. 7764 of 2014 (Ravinder Kaur Grewal & Ors. Vs. Manjit Kaur & Ors.)** by the Apex Court is quoted hereinbelow:-

"60. When we consider the law of adverse possession as has developed vis-a-vis to property dedicated to public use, courts have been loath to confer the right by adverse possession. There are instances when such such properties are encroached upon and then a plea of adverse possesion is raised. In such cases on the land reserved for public utility, it is desirable that rights should not accrue. The law of adverse possession may cause

harsh consequences, hence, we are constrained to observe that it would be advisable that concerning such properties dedicated to public cause, it is made clear in the statute of limitation that no rights can accrue by adverse possession."

11. In support of his contention, Sri Arun Kumar, learned counsel for the PDA has further referred to the Paragraph 12 of the judgment passed by the Apex Court in the case of State of **Orissa Vs. Ram Chandra Dev and another, AIR 1964 SC 685**, which is quoted hereinbelow:-

12. Mr. Tatachari, however, has contended that the right on which the petitions of the respondents are founded is a right flowing from the respondents continuous possession of the properties for many years, and he argues that if such a right is proved, the High Court would be justified in issuing a writ protecting that right. This argument is clearly fallacious. Mere possession of the property for however long a period it may be, will not clothe the possessor with any legal right if it is shown that the possession is under a grant from the State which is resumable. Such long possession may give him a legal right to protect his possession against third parties, but as between the State and the grantee, possession of the grantee under a resumable grant cannot be said to confer any right on the grantee which would justify a claim for a writ underArticle 226where the grant has been resumed. In dealing with this argument, we have assumed without deciding that though a suit under Section 9 of the Specific relief Act would have been incompetent against the appellant, a similar relief can be claimed by the respondents against the appellant under Article 226. Even on that assumption, no right can be claimed by the respondents merely on the ground of their possession, unless their right to remain in possession is established against the appellant, and this can be done if the grant is held to be not resumable.

12. A perusal of the aforesaid judgment clearly indicates that the Apex Court has very categorically held that mere possession of a property for a long period will not clothe the possessor with any legal right that the possession is under a grant from the State which is resumable. In the present case, the situation of the petitioner is even worse. Firstly, lease was never executed in favour of petitioner or his grand father. Lease was executed in favour of the Company, wherein a small piece of land was occupied by him without any authority of law. It may be again reiterated that the lease whatsoever made in favour of the Company had expired number of decades ago and the land stood resumed and the resumption of the said property was held to be legal and valid on 26.11.2015 by the Apex Court in **Civil Appeal No. 5254 of 2010 (State of Uttar Pradesh and others Vs. United Bank of India and others).**

13. The area of the land in question over which the illegal construction has been raised by the petitioner is a very small fraction of the total land leased out earlier to the Company. Petitioner claims himself to be merely the grand son of an employee of Amrit Bazar Patrika Company. According to him, since his grand father was an employee of the Company, was permitted to occupy certain portion (about 100 square yard) of the land for residential purpose by the lessee Company. Thus, first of all, the Company had no legal right to part away with certain portion of the land

in favour of the third party, as it was in clear violation of the terms of the lease deed. Secondly, the property in question has already been resumed by the State Government and the said resumption has been held legal and valid by the Apex Court. Thirdly, petitioner cannot take the plea of adverse possession against a property of the State and moreso, no continuous possession over the property in dispute has been established by the petitioner.

14. Further contention of the learned counsel for the petitioner is that the grand father of the petitioner was an employee in the Company at Prayagraj and he was allotted vacant land measuring about 100 square yard in the year 1955-56 by the alleged Company. After the death of his father, he was occupying the house in question but the petitioner failed to show any document as to how he is having his legal right over the land in dispute. Apart from it, the petitioner failed to show any document to the effect that even a single penny was ever paid to any authority concerned. In fact the petitioner should be made liable to pay damages for illegally occupying the land in dispute and creating obstacle in the development activity. Admittedly, the land in question is a Nazul land and the Apex Court has already held that the mortgage done by the lessee Amrit Bazar Patrika in favour of the Bank itself is bad in law, which was done in clear violation of the terms of the lease deed i.e. mortgage of the Nazul land without previous sanction in writing of the State. The Apex Court has very categorically held that impugned notice issued by the State of U.P. directing resumption of the land in dispute on 9.5.2005 is legal and valid and cannot be quashed at the instance of the Bank, as such, once resumption of a Nazul property has been made by the State, no person has any right to occupy a Nazul property without prior permission of the State. Petitioner does not have any right, title or interest over the property in question. Petitioner has failed to show his continuous possession over the land in dispute. Perusal of the original record placed before us clearly reveals that the demolition of 2 tin-shed rooms illegally constructed by the petitioner has been rightfully done after following the due procedure provided under law. A perusal of the record further reveals that opportunity was given to the petitioner to show cause but he failed to avail the opportunity and therefore the Development Authority had no other option but to demolish the disputed structure. Moreso, the petitioner has not come with clean hands, and no relief can be granted to him under Article 226 of the Constitution of India. Any indulgence would result in perpetuating illegality.

15. The contention of the learned counsel for the petitioner that interim orders have been passed by this High Court in various matters, restraining the authorities concerned from demolishing any property during Covid-19 pandemic is misconceived and has no force as the order of this Court was only with respect to those matters where orders were already passed by the Court staying the demolition and such orders were expiring due to pandemic. Here, in the present case, no such stay order was ever passed by any Court. Petitioner has failed to place any such interim order on record.

16. In view of the above, the writ petition is devoid of merit and is hereby dismissed.

(2020)12ILR A445
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.11.2020

BEFORE

THE HON'BLE YASHWANT VARMA, J.

Writ - C No. 12711 of 2020

C/M Subhash Chandra Bose Smarak Vidyalaya Isipur, Pratapgarh & Anr. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Arpan Srivastava, Sri H.N. Singh

Counsel for the Respondents:
C.S.C., Sri Gulab Anand, Sri Rahul Mishra

(A) Civil Law - Societies Registration Act, 1860 - Sections 4, 4A and 4B - role and the jurisdiction assigned to the Assistant Registrar - Assistant Registrar is not envisaged to act as a mere rubber stamp liable to accept and register all or any returns that may be presented before him - Section 25 - Prescribed Authority for adjudication - Mere suspicion or scepticism cannot be recognised in law as sufficient parameters to uphold allegations of fraud. (Para - 6,10)

The Assistant Registrar Firms, Societies and Chits accepts the objections taken by the private respondents denying and refuting their alleged resignations and the consequential changes in the list which came to be registered - private respondents approached the second respondent - allegation - proceedings of the Society were forged and a fabrication of the records - their signatures on the resignation letters and the affidavits submitted in connection therewith were forgeries and that they had never tendered their resignations as alleged. (Para -2,3)

Held: - The doubt or uncertainty which the Assistant Registrar harboured cannot be countenanced in law to warrant an *"inherent power"* of recall or review being exercised quite apart from being clearly insufficient to sustain an allegation of fraud and fabrication. The Assistant Registrar is directed to refer the issue of the alleged resignation of the private respondents for the consideration of the Prescribed Authority in accordance with the provisions made in Section 25 of the 1860 Act. (Para - 11,13)

Writ Petition allowed . (E-7)

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

1. Heard Sri H.N. Singh learned Senior Counsel for the petitioner and Sri Rahul Mishra for the contesting private respondents.

2. The petitioners impugn the order dated 17 March 2020 passed by the Assistant Registrar Firms, Societies and Chits, the second respondent herein. In terms of the aforesaid order the second respondent has recalled his order of 3 July 2018 registering the list of office bearers of the Society for the year 2018-19. The order essentially accepts the objections taken by the private respondents denying and refuting their alleged resignations and the consequential changes in the list which came to be registered.

3. The private respondents who were office bearers are stated to have submitted their resignations which came to be accepted by the Society and an amended list of office bearers consequently submitted and registered on 3 July 2018. The private respondents thereafter approached the second respondent alleging that the proceedings of the Society stated to have been held on 7 November 2017 and 10 April 2018 were forged and a fabrication of the records. It was alleged that their signatures on the resignation

letters and the affidavits submitted in connection therewith were forgeries and that they had never tendered their resignations as alleged. It is this dispute which fell for adjudication before the second respondent and has culminated in the passing of the impugned order.

4. Sri Singh learned senior counsel appearing in support of the writ petitioners contends that the second respondent has clearly transgressed the jurisdiction conferred upon him under the **Societies Registration Act, 1860** [hereinafter referred to as "the Act"] in proceeding to rule upon the validity or otherwise of the resignation of the respondents. It is his submission that once a dispute of the present nature arose before the second respondent, it was incumbent upon him to refer the dispute to the Prescribed Authority for adjudication under Section 25 of the Act. It was further submitted that once the list had been registered by the Assistant Registrar, no power stood vested upon him to recall or review that action and on this ground also the impugned order is liable to be set aside.

5. Sri Mishra, learned counsel appearing for the contesting respondent, refuting those submissions contended that once it was brought to the attention of the second respondent that fraud had been committed, he had the inherent power to recall his order registering the list of office bearers. He further submitted that the private respondents had categorically denied having resigned from their offices before the Assistant Registrar and in view thereof he was fully justified in delving into that issue. Sri Mishra has taken the Court through the order impugned to contend that the private respondents had categorically denied having resigned from their offices or having appended their signatures on any letter or affidavit submitted in connection therewith. He would thus submit that the Assistant Registrar was clearly justified in recalling his earlier order. It is these rival submissions which fall for determination.

6. Before the Court it is not disputed that where a serious or substantial dispute with regard to election or continuance of an office bearer or member of a Society arises, it is incumbent upon the Assistant Registrar to refer the matter for the consideration of the Prescribed Authority in terms of the provisions made in Section 25 of the Act. The forum created in terms of Section 25 in facts deals specifically with such disputes and issues. Viewed in that sense the Assistant Registrar has a limited role to play while registering a list of office bearers that may be submitted before him for registration. The role and the jurisdiction assigned to the Assistant Registrar in this regard stands duly enumerated in Sections 4, 4A and 4B of the Act. However, and as is well settled, the Assistant Registrar is not envisaged to act as a mere rubber stamp liable to accept and register all or any returns that may be presented before him. While registering a list, it is incumbent upon the Assistant Registrar to summarily scrutinise the documents submitted in order to examine their veracity and to ensure a compliance with the statutory requirements placed by the Act and the Byelaws of the society. The limited jurisdiction which stands conferred upon the Registrar at this juncture also does not require him to undertake a detailed or in depth enquiry or enter the arena of a definitive adjudication.

7. Notwithstanding the limited scope of the jurisdiction which the Assistant Registrar has been recognised to wield at

this stage, the Courts have also taken the consistent view that in a case where forgery or fabrication is alleged or where it be found ex facie that the documents are not compliant with the statutory requirements placed under the Act, he would be well within his right to refuse to register the returns upon being duly satisfied in that regard. Fraud and fabrication as has been repeatedly said unravel the most solemn of acts. Viewed in that sense the Assistant Registrar theoretically and in principle must be held empowered to examine such allegations albeit bearing in mind the constraints of the summary character of the jurisdiction which is otherwise conferred upon him.

8. The limited question which consequently arises for consideration in the present petition is whether fraud or forgery had been duly established impelling the Registrar to recall the act of recordal of the return submitted by the petitioners. As this Court reads the order impugned it finds that the second respondent has failed to record or return any conclusive or authoritative findings on this score.

9. The Assistant Registrar while taking note of the allegation of the private respondents in this respect seems to have been swayed by the fact that the letters of resignation were undated and appeared to have been accepted belatedly. While holding that the genuineness of the signatures of the respondents on the alleged letters of resignation would be a question which would have to be decided by a court of competent jurisdiction, he proceeds to refer to a perceived facial discrepancy in the signatures of the respondents as appearing on the resignation letter and the affidavits submitted by them. The finding on this aspect as with others is described as "prima facie", "doubtful" and "dubious".

10. However a finding of fraud or forgery cannot be sustained or rest on such a nebulous pedestal. A prima facie view cannot sustain an allegation of fraud or fabrication. Mere suspicion or scepticism cannot be recognised in law as sufficient parameters to uphold allegations of fraud. Bearing in mind the seriousness of such an allegation, they must be established conclusively and found to have been definitively committed. "Prima facie", an oft utilised phrase, merely means an impression gathered or an opinion formed on first impressions and initial observation. A prima facie view by its very nature requires and mandates a further enquiry and examination before a definitive ruling or finding can be entered.

11. In the considered view of this Court, the doubt or uncertainty which the Assistant Registrar harboured cannot be countenanced in law to warrant an *"inherent power"* of recall or review being exercised quite apart from being clearly insufficient to sustain an allegation of fraud and fabrication. The Court is of the firm opinion that if the Assistant Registrar was prima facie satisfied with regard to the allegation of fraud and fabrication or if he were of the opinion that the circumstances surrounding the alleged resignation of the respondents cast a credible doubt on a resignation in fact having been tendered, the only course of action available to him was to refer parties to the Prescribed Authority.

12. The Prescribed Authority constituted under Section 25 of the Act, as is manifest from a reading of that provision, is empowered to rule not just upon disputes connected with elections but also consider questions relating to the right of "continuance" of office bearers or

members of a society. Resignation, therefore, was clearly a question which related to the continuance of the private respondents as office bearers of the Society. For the aforesaid reasons the Court finds itself unable to sustain the order impugned.

13. The writ petition is accordingly **allowed**. The impugned order dated 17 March 2020 is hereby quashed and set aside. The Assistant Registrar is directed to refer the issue of the alleged resignation of the private respondents for the consideration of the Prescribed Authority in accordance with the provisions made in Section 25 of the 1860 Act. The Prescribed Authority shall endeavour to conclude proceedings with due notice to all concerned parties with expedition and preferably within a period of three months from the date of presentation of a duly authenticated copy of this order.

(2020)12ILR A448
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.09.2020

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ - C No. 13427 of 2020

Krishna Nand Rai ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Syed Wajid Ali, Rachna Vyas

Counsel for the Respondents:
C.S.C.

(A) Civil law - Principles of natural justice - 'useless formality' theory - cases where despite non-observance of the principles of natural justice, the ultimate result is bound to remain the same - where there is no other view possible even if opportunity of hearing is afforded to the aggrieved parties - such are the cases where impugned action cannot be struck down on ground of violation of principles of natural justice nor are such cases required to be remitted back to the authorities for a fresh decision after giving show cause notice or opportunity of hearing - it will be an empty formality, a mere ritual.(Para - 6)

District Magistrate cancelled petitioner's certificate of being a dependent of freedom fighter - ground - petitioner is great grandson of a freedom fighter - benefit of being dependent of freedom fighter is available only to descendants up to the stage of grandson and not beyond it, i.e. a great grandson or descendants lower in line would not come within the definition of 'dependent of freedom fighter'. (Para-1)

Held: - No purpose will be served in remitting the matter back to the authority for decision afresh after providing opportunity of hearing to the petitioner, in as much as the defect is incurable; no amount of explanation can change the ultimate result, being a *fait accompli*. Petitioner can by no means negate the admitted fact that being great grandson of a 'freedom fighter', he is beyond the purview of the definition of 'dependent of freedom fighter'. (Para - 9)

Writ Petition dismissed . (E-7)

List of Cases cited:-

1. Dattu Namdev Thakur Vs St.of Mah. & ors. , 2012 AIR SCW 203

2. Uma Nath Pandey. & ors. Vs St. of U.P. & anr., 2009 AIR SCW 3200

3. Asit Kumar Kar Vs St. of W.B. & ors., (2009) 2 AWC 1628

4. A.R. Antuley Vs R.S. Nayak & anr., (1988) 2 SCC 602

5. M.C. Mehta Vs U.O.I. & ors., (1999) 6 SCC 237

6. Haryana Financial Corporation & anr. Vs Kailash Chandra Ahuja, (2008) 9 SCC 31

7. Aligarh Muslim University Vs Mansoor Ali Khan, (2000) 7 SCC 529

(Delivered by Hon'ble Manoj Kumar Gupta, J. & Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. The instant petition has been filed challenging the order dated 24.6.2020, passed by District Magistrate, Gorakhpur (respondent no. 2 herein), whereby the petitioner's certificate of being a dependent of freedom fighter dated 6.9.2001 has been cancelled. The order records that the petitioner is great grandson of late Ram Chandra Rai, who was a freedom fighter. The benefit of being dependent of freedom fighter is available only to descendants upto the stage of grandson and not beyond it, i.e. a great grandson or descendants lower in line would not come within the definition of 'dependent of freedom fighter'.

2. The sole contention of learned counsel for the petitioner is that the impugned order has been passed without any notice or opportunity of hearing to the petitioner.

3. On query made by the Court as to how the petitioner would come within the definition of 'dependent of freedom fighter', Sri Syed Wajid Ali, learned counsel for the petitioner very fairly admitted that the petitioner would be beyond the sweep of the definition of dependent of freedom fighter as defined in Government Orders issued in this regard. He only reiterated his contention that since the impugned order has been passed without notice to the petitioner, therefore it is illegal.

4. Learned counsel for the petitioner has placed reliance upon judgments of the Supreme Court in **Dattu Namdev Thakur vs. State of Maharashtra and Others, 2012 AIR SCW 203; Uma Nath Pandey and Others vs. State of U.P. and Another, 2009 AIR SCW 3200** and **Asit Kumar Kar vs. State of West Bengal and others, 2009 (2) AWC 1628** in submitting that the impugned order, being in violation of principles of natural justice, is liable to be quashed.

5. In **Asit Kumar Kar** (supra), the Supreme Court re-emphasised that an order having adverse consequences should not be passed without hearing the person affected thereby. Reliance was placed on the Seven Judge Constitution Bench judgement in **A.R. Antuley vs. R.S. Nayak and another, 1988 (2) SCC 602**, where in paragraph 55, the Supreme Court observed as follows :-

"so also the violation of the principles of natural justice renders the act a nullity".

6. The next judgement of the Supreme Court in **Uma Nath Pandey (supra)**, while considering the principles of natural justice also took note of the 'useless formality' theory. The observations made in earlier judgement in **M.C. Mehta vs. Union of India and others, 1999 (6) SCC 237** were alluded to. The 'useless formality' theory stipulates that in cases where despite non-observance of the principles of natural justice, the ultimate result is bound to remain the same; where there is no other view possible even if opportunity of hearing is afforded to the aggrieved parties, then such are the cases where impugned action cannot be struck down on ground of violation of principles of natural justice nor are such cases required to be remitted back to the authorities for a fresh decision after

giving show cause notice or opportunity of hearing, as it will be an empty formality, a mere ritual. After taking notice of the said doctrine, it was observed as follows :-

"Thus, in relation to cases other than those relating to admitted or indisputable facts, there is a considerable divergence of opinion whether the applicant can be compelled to prove that the outcome will be in his favour or he has to prove a case of substance or if he can prove a 'real likelihood' of success or if he is entitled to relief even if there is some remote chance of success. We may, however, point out that even in cases where the facts are not all admitted or beyond dispute, there is a considerable unanimity that the courts can, in exercise of their 'discretion', refuse certiorari, prohibition, mandamus or injunction even though natural justice is not followed."

7. The Apex Court in its judgment in the case of **Haryana Financial Corporation and another vs. Kailash Chandra Ahuja** reported in **(2008) 9 SCC 31** has considered in great detail the consequence of non-observance of principles of natural justice. The Apex Court has held that the recent trend of judgments is that unless prejudice is shown, the impugned order or action cannot be struck down. It has been observed as under:-

"The recent trend, however, is of "prejudice". Even in those cases where procedural requirements have not been complied with, the action has not been held ipso facto illegal, unlawful or void unless it is shown that non-observance had prejudicially affected the applicant.

In Malloch Vs. Abendeen Corpn., Lord Reid said : (All ER p. 1283a-b)

"....it was argued to have afforded a hearing to the applicant before dismissing him would have been a useless formality because whatever he might have said could have made no difference. If that could be clearly demonstrated it might be a good answer". (emphasis supplied)

Lord Guest agreed with the above statement, went further and stated: (All ER p.1291b-c)

"...A great many arguments might have been put forward but if none of them had any chance of success then I can see no good reason why the respondents should have given the appellant a hearing, nor can I see that he was prejudiced in any way".

8. In **Aligarh Muslim University vs. Mansoor Ali Khan, (2000) 7 SCC 529**, the Court held that though the rules of natural justice have been violated but the order impugned cannot be set aside as no prejudice has been caused. Referring to several cases, and after considering the theory of "useless" or "empty formality" and noting "admitted or undisputed" facts, the Court held that the only conclusion which could be drawn was that "had the petitioner been given notice", it "would not have made any difference" and, hence, no prejudice has been caused.

9. In the instant case as well, no purpose will be served in remitting the matter back to the authority for decision afresh after providing opportunity of hearing to the petitioner, in as much as the defect is incurable; no amount of explanation can change the ultimate result, being a *fait accompli*. For the petitioner can by no means negate the admitted fact that being great grand son of a 'freedom fighter', he is beyond the purview of the definition of 'dependent of freedom fighter'.

Consequently, even if opportunity of hearing would have been given to the petitioner, it would not have improved the situation, a fact clearly admitted by learned counsel for the petitioner.

10. Coming to the next judgement cited by learned counsel for the petitioner in **Dattu Namdev Thakur** (supra), it is pertinent to note that in the said case, the Supreme Court did not interfere with the findings of the High Court upholding order of the Caste Scrutiny Committee cancelling the caste certificate of the petitioners. However, while dismissing the Special Leave Petition, the Supreme Court issued certain directions to safeguard the interest of the petitioners before it by observing thus :-

"9. Accordingly, while dismissing all the three Special Leave Petitions, we direct that whatever advantage the three petitioners in the three Special Leave Petitions, may have derived on the basis of their 'Caste Certificates', shall not be disturbed and the cancellation of their respective 'Caste Certificates' will not deprive them of the benefits which they have already enjoyed. However, we also make it clear that none of the three petitioners in the three respective Special Leave Petitions, will be entitled to take any further advantage of reservation in future, either for studies or for employment. Following the judgment in Swati's case, we also direct that if the petitioners in the 2nd and 3rd Special Leave Petitions, have obtained any concession by way of reduction in fees, as a reserved candidate, they will have to make good the same by paying the difference in fees that is being paid by general candidates. Such payment has to be made within a period of six months and in default of such payment, this order will cease to have any effect."

11. The petitioner, it seems, is working as Assistant Teacher in a Primary School run by Basic Shiksha Parishad. If any action is taken by the employer on the ground of cancellation of the certificate of 'dependent of freedom fighter', it would always be open to the petitioner to press for extending the benefit of the judgement of the Supreme Court in **Dattu Namdev Thakur** being given to him. Since at this stage, the only order challenged before us is that of cancellation of the certificate, therefore, with the above liberty reserved in favour of the petitioner, the instant petition stands dismissed.

(2020)12ILR A451
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.11.2020

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ - C No. 14091 of 2020

Rinki Gupta ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vinay Kumar Mishra

Counsel for the Respondents:
C.S.C., Sri Chandra Bhushan Yadav, Sri Tapan Kumar Mishra, Sri Vikas Budhwar, Sri Vivekanand Yadav

(A) Constitution of india-Article 226-fundamental rights -locus standi - Petitioner has no fundamental or statutory right to stop another operator coming in business near his petrol pump. (Para - 6)

Dispute relating to opening the petrol pump near to the petrol pump of the petitioner. (Para - 4)

Held: - Petitioner has no locus standi to maintain the writ petition. Declined to exercise discretionary jurisdiction where the claim of the petitioner is essentially aimed at eliminating healthy competition and for perpetuating his monopoly in the area. (Para - 9,10)

Writ Petition is dismissed. (E-7)

List of Cases cited: -

1. D.C.M. Shri Ram Industries Ltd. & anr. Vs St. of U.P. & ors., 2007 4 ADJ 150

2. M/s. Luheta Urja Kendra & anr.Vs U.O.I. & ors., Civil Misc. Writ Petition No.54670 of 2009

3. Jas Bhai Moti Bhai Desai Vs Roshan Kumar, (1976) 1 SCC 671

4. Mithilesh Garg & ors. Vs U.O.I. & ors., (1992) 1 SCC 168

5. Nagar Rice and Flour Mills Vs N.T. Gowda, (1970) 1 SCC 575

(Delivered by Hon'ble Surya Prakash Kesarwani, J. & Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard learned counsel for the petitioner, learned standing counsel for the State - respondents, Sri Vikas Budhwar, learned counsel for the respondent no.2 and Sri C.B. Yadav, learned Senior Advocate, assisted by Sri Vivekanand Yadav, learned counsel for the respondent no.5.

2. The petitioner is running a retail outlet of Indian Oil Corporation in Village - Bodarwar, Tehsil - Hata, District - Kushinagar. The petitioner is challenging the opening of another retail outlet at a nearby place by Bharat Petroleum Corporation Ltd. which is to be run by allottee i.e. the respondent no.5.

3. Learned counsel for the respondent nos.2 and 5 have raised a preliminary objection as to the maintainability of the writ petition on the ground that the petitioner has no locus standi and being a rival, the writ petition is not maintainable at his behest. In support of their submissions they relied upon a Division Bench Judgment of this Court in **D.C.M. Shri Ram Industries Ltd. and another vs. State of U.P. and others, 2007 4 ADJ 150 (para 26)** and judgment **dated 13.5.2011 in Civil Misc. Writ Petition No.54670 of 2009 (M/s. Luheta Urja Kendra and another Vs. Union of India and others.**

4. Learned counsel for the petitioner submits that the petitioner is an aggrieved person inasmuch the respondent nos. 2 and 5 are opening the petrol pump near to the petrol pump of the petitioner.

5. We have carefully considered the submissions of learned counsels for the parties on the preliminary objection.

6. Admittedly, the petitioner is running a petrol pump. By means of present writ petition he is opposing the establishment of another petrol pump near his petrol pump. Thus, the whole effort of the petitioner by means of this writ petition is to stop a new operator coming in the field as his competitor. The petitioner has no fundamental or statutory right to stop another operator coming in business near his petrol pump.

7. In **Nagar Rice and Flour Mills Vs. N.T. Gowda (1970) 1 SCC 575** it was held that a rice mill owner has no locus standi to challenge under Article 226 the setting up a new rice mill by another for the reason that none of his vested rights are infringed.

8. A similar view was taken in the decisions in **Jas Bhai Moti Bhai Desai Vs. Roshan Kumar (1976) 1 SCC 671 and**

Mithilesh Garg and other Vs. Union of India and others (1992) 1 SCC 168.

9. We are not inclined to exercise our discretionary jurisdiction where the claim of the petitioner is essentially aimed at eliminating healthy competition and for perpetuating his monopoly in the area.

10. For all the reasons aforestated, the writ petition is **dismissed** on the ground that petitioner has no locus standi to maintain the writ petition.

(2020)12ILR A453
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.10.2020

BEFORE

THE HON'BLE MUNISHWAR NATH BHANDARI, J.
THE HON'BLE PIYUSH AGRAWAL, J.

Writ - C No. 14553 of 2020

M/s Dilip Singh Contractor, Mainpuri ...Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Siddharth Khare, Sri Ashok Khare

Counsel for the Respondents:
C.S.C.

(A) Civil law- Mines & Minerals (Development & Regulation) Act, 1957 - section 21(5) - Uttar Pradesh Minor Minerals (Concession) Rules, 1963 - Rules 57 & 58 - deduction, to the extent of five times of the royalty amount - It is taken to be price of the mineral used without payment of royalty. (Para -16)

Challenged the Government Order and the order of the Engineer-in-Chief (Development & Head of Department), Public Works Department - Petitioner is "A" class Contractor - executing work of Public Works Department - using the minerals for execution of contract work - deduction of royalty six times to the amount of royalty pursuant to the Government Order - direction given to deduct the amount of royalty to the extent of five times to the royalty amount in case it is found that the mineral has been used without a valid transit pass on Form MM-11 - deduction amount to be from the bills of the Contractor. (Para - 2)

Held: - This Court may not cause interference in the impugned circular and otherwise, the petitioner is one who has come with premature writ petition having not suffered any deduction, till date. Thus, it seems to be a writ petition in anticipation to evade the royalty and to safeguard the consequences. (Para - 9)

Writ Petition dismissed. (E-7)

List of Cases cited: -

1. Ayodhya Prasad Mishra Vs St. of U.P. & ors. , 2016 (11) ADJ 607 (DB)

2. St. of Raj. & anr. Vs Deep Jyoti Company & anr. , (2016) 6 SCC 120

3. Abhimanyu Singh & 12 ors. Vs St. of U.P. & 9 ors. , Writ C No. 1510 of 2016

(Delivered by Hon'ble Munishwar Nath Bhandari, J. & Hon'ble Piyush Agrawal, J.)

1. We have heard Shri Ashok Khare, learned Senior Counsel assisted by Shri Siddharth Khare, counsel appearing for the petitioner; and Shri Pradeep Kumar Tripathi, learned Standing Counsel appearing for the State – respondents.

2. By this writ petition, a challenge has been made to the Government Order dated 15.10.2015 and the order of the Engineer-in-Chief (Development & Head of Department), Public Works Department dated 26.08.2019.

3. It is stated that the petitioner is "A" class Contractor, executing work of Public

Works Department, apart from others. He is using the minerals for execution of contract work. It is after compliance of the provisions of Uttar Pradesh Minor Minerals (Concession) Rules, 1963 (hereinafter referred to as, 'the Rules of 1963'). He may be subjected to deduction of royalty six times to the amount of royalty pursuant to the Government Order of 15.10.2015. The direction has been given therein to deduct the amount of royalty to the extent of five times to the royalty amount in case it is found that the mineral has been used without a valid transit pass on Form MM-11. The deduction amount to be from the bills of the Contractor.

4. The counsel for the petitioner states that in case a Contractor fails to produce required documents to prove payment of royalty, it cannot suffer with payment of royalty apart from an amount five times to the royalty in absence of any provision under the Rules. Thus, the order dated 15.10.2015 and the consequential order of Engineer-in-Chief are illegal, thus deserve to be set aside.

5. The writ petition has been contested by the side opposite. It is submitted that the issue raised in this writ petition is not open for debate having been decided by this Court in the case of ***Ayodhya Prasad Mishra Vs. State of U.P. & Others*** [reported in 2016 (11) ADJ 607 (DB)]. Therein, the same circular was challenged. The writ petition, therein, was dismissed, though with certain clarifications. A reference of the judgement of the Apex Court in the case of ***State of Rajasthan & Another Vs. Deep Jyoti Company & Another*** [(2016) 6 SCC 120] has also been given to show that similar circulars were not interfered by the Apex Court.

6. Clarifying the fact, it is submitted that anyone using the mineral is under an obligation to see that it is royalty paid. The obligation for payment of royalty is on the lease-holder and whenever mineral is transported, it should be under the valid transit permit on the required form and thereupon only, the mineral can be used by the Contractor. In case of default in making the payment of royalty and thereby, valid transit pass could not obtain by the transporter yet mineral is used by the Contractor, he is made liable to payment of royalty to the extent of five times by way of deduction in the bills. The five times to the royalty is nothing but the value of the mineral used without the payment of royalty amount. The deduction, to the extent of five times, is only to recover the value of mineral used without the payment of royalty amount, as it is the property of the Government, but can be used, subject to payment of royalty.

7. The basis of five times royalty is in reference to section 21(5) of the Mines & Minerals (Development & Regulation) Act, 1957, has been given and for ready reference, the said provision is quoted hereunder:-

"Section 21. Penalties:-

(5) Whenever any person raises, without any lawful authority, any mineral from any land, the State Government may recover from such person the mineral so raised, or, where such mineral has already been disposed of, the price thereof, and may also recover from such person, rent, royalty or tax, as the case may be, for the period during which the land was occupied by such person without any lawful authority.] 6[(6) Notwithstanding anything contained in the Code of Criminal

Procedure, 1973 (2 of 1974), an offence under sub-section (1) shall be cognizable."

8. The Government has taken five times to the royalty to be the price of the mineral.

9. In view of the above, this Court may not cause interference in the impugned circular and otherwise, the petitioner is one who has come with premature writ petition having not suffered any deduction, till date. Thus, it seems to be a writ petition in anticipation to evade the royalty and to safeguard the consequences. The prayer is, accordingly, to dismiss it with appropriate clarifications.

10. We have considered the rival submissions of the parties and perused the record.

11. A challenge to Government Order dated 15.10.2015 has been made and it is more specifically to no. 3 of the said order. It is quoted hereunder for a ready reference:-

(3) यदि सार्वजनिक निर्माण कार्यों में कार्यदायी संस्था से संबन्धित ठेकेदार द्वारा किसी भी उपखनिज का प्रयोग बिना वैध अभिवहन प्रपत्र (एम0एम0–11) के किया जाता है, तब प्रयुक्त उपखनिज की रायल्टी के साथ–साथ खनिज मूल्य (सामान्यतः रायल्टी का पांच गुना) की कटौती ठेकेदार के बिल से करते हुए निर्धारित लेखा शीर्षक ''0853–अलौह'' खनन तथा धातुकर्म उद्योग–102 खनिज रियारत शुल्क किराया और स्वत्व शुल्क में जमा करा लिया जाय तथा ट्रेजरी चालान की एक प्रति जिलाधिकारी को भेज दी जाय।

12. The para aforesaid is applicable only when a Contractor fails to show use of mineral after its transportation through transit pass under Form MM-11, and not otherwise. The para, quoted above, has no application in those cases where required documents to prove payment of royalty and valid transportation thereupon has been shown.

13. The question for our consideration is as to whether such a condition can be imposed by the Public Works Department when, according to the petitioner, not provided under the Rules, and for that, Rules 57 & 58 of the Rules of 1963 have been referred. The aforesaid issue needs to be decided in reference to the earlier judgement of this Court as well as the Apex Court. The Government Order dated 15.10.2015 was subject matter of the writ petition in the case of ***Ayodhya Prasad Mishra*** (supra). Paragraphs 26 to 29 make a discussion on the issue and for ready reference, they are quoted hereunder:-

"26. The purpose of issuance of impugned Government Order is just and valid and has been issued in public interest. The Government Order has been issued to ensure that royalty is paid and that the royalty paid material is used for construction work in the government department. Such intention is laudable. The requirement of Form MM-11/Form-C is a proof that royalty has been paid and the material is purchased from an authorized source either from a holder of a mining lease or from a licence storage holder. The Government Order imposing such conditions is required only for the purpose of undertaking of that work, which is awarded by the Government and its department, for which purpose, the conditions imposed in the Government Order is fair and reasonable and is not arbitrary. The purpose is to ensure that no mineral is excavated/transported and used without payment of royalty. The purpose of

providing Form MM-11/Form-C is to ensure that the material and minerals etc. used by the contractors in the construction works, are royalty paid. It only indicates that such material, which is purchased by the contractors, is legally mined on which royalty has been paid. The object behind the issuance of the Government Order is to see that illegally mined material is not purchased by the contractors and used in the construction works, which is awarded by the Government and its department. This, in our view, is a laudable object and such a stipulation contained in the Government Order is to check the illegal mining. Consequently, the Government Order dated 15th of October 2015 directing further that if mineral is not purchased from a valid source and without production of From MM-11, the cost of material to the extent of five times royalty would become payable by the contractors. This imposition is in terms of Section 21 (5) of the Act of 1957. The said provision clearly indicates that where any person raise without any lawful authority, any mineral from any land, then such person would be liable to pay not only the royalty but also the price thereof. The word 'raise' means 'move' and therefore, if any person moves any mineral without a valid Form MM-11 or Form-C in which case the person would not only be liable to pay royalty but would also be liable to pay the price of the material. In the instant case, by the Government Order, the price of the material is equivalent to five times the royalty, which is not arbitrary.

27. The submission of the learned counsel for the petitioners that they are purchasing raw-material from the stone crushers, who are purchasing the same from the holders of a mining lease/mining permit through From MM-11 and that these stone crushers cannot further issue any Form MM-11 to the petitioners is misconceived inasmuch as the stone crushers are liable to take a licence for storage of minerals under the Rules of 2002. Once the stone crushers obtain a licence for storage of minerals, they would be obliged to issue Form-C under Rule 5 of the Rules of 2002 after obtaining necessary book of transit pass from the appropriate authority under Rule 4.

28. We find that a similar circular was issued by the State of Rajsthan for deduction of royalty from the bills of contractors, who were using minerals without submitting proof of the fact that royalty was paid on such minerals. The said circular was held to be a valid circular issued in public interest by the Supreme Court in State of Rajsthan and another Vs. Deep Jyoti Company and another reported in (2016) 6 SCC 120. In paragraph 11, the Supreme Court held as under:-

"11. The minor minerals removed from the quarries, admittedly are the property of the Government and the same cannot be removed and used without payment of royalty. It is, therefore, the duty of the Government to ensure that only royalty paid minerals are used in the work and the purpose of issuing such Circular was to avoid pilferage/leakage of revenue because royalty can be very conveniently evaded by the contractors either by not purchasing the material from the mining leaseholders or obtaining it from unauthorised excavators. In case, if the contractor purchases the material from unauthorised person who has not paid royalty, there would be loss to the public exchequer and the circular was issued to check evasion or loss to the public exchequer. Such condition cannot be said to be unreasonable and arbitrary and therefore, no prejudice could be said to have been caused to the contractors."

29. In the light of the aforesaid, reliance placed by the petitioners of the decision of the Division Bench of this Court in Abhimanyu Singh and 12 others (supra) is misconceived. The contention that the Division Bench held that the payment of royalty to the extent of five times is illegal, is misconceived. The Division Bench had only noted the submission of the petitioner and held that there was no illegality in the Government Order and that it would be the responsibility on the part of the contractors to ensure that minerals are purchased through the authorized mining lease holder/suppliers on which royalty has been paid. The Division Bench also held that the petitioner of that writ petition should ensure that the royalty has been paid and copy of the Form MM-11 should be provided, failing which, they would have to pay the penalty. The Government Order dated 15th October 2015 only provides for obtaining Form MM-11. We are of the opinion that if a contractor purchases royalty paid minor minerals from a licence holder for storage of minerals against Form-C, the same should be accepted by the authority as an evidence showing the payment of royalty."

14. In the paras quoted above, the Division Bench did not accept the same issue, as raised herein. It in reference to the same Government Order and the grounds. A reference of the judgement of the Division Bench of this Court in the case of ***Abhimanyu Singh & 12 Others Vs. State of U.P. & 9 Others*** (Writ C No. 1510 of 2016, decided on 14.03.2016) has also been given. The circular under challenge was taken to be in public interest and basically, to ensure that royalty paid mineral is used by the Contractor.

15. In view of the above, we are not convinced with the argument in reference to the Rules of 1963. The condition imposed by the respondents is in public interest, thus we do not find any illegality therein. The similar condition regarding recovery of the amount from the bills imposed by the State of Rajasthan was held to be valid by the Apex Court in the case of ***Deep Jyoti Company & Another*** (supra). Therein, challenge to the order for deduction of amount was accepted by the High Court, but on an appeal, the judgement of the High Court was reversed by the Apex Court. The relevant paras 8 to 12 are quoted hereunder for a ready reference:-

"8. The circular dated 06.10.2008 came to be issued by the State Government which provides the procedure for payment of royalty by the contractors who have been given the works contract by department of government. According to the appellants, the said circular was issued in order to ensure the payment of royalty and that the royalty paid mineral is used for construction work. As noticed earlier, clause (2) of the circular provides that before starting the work, the contractor was to obtain short term permit and rawanna book and contractor was also required to submit an affidavit to that effect that he had obtained the short term permit for mining the required mineral and rawanna book. Clause (3) of the said circular provides that if the contractor fails to produce copy of the short term permit, the works department will withhold the payment of bills. Clause (3) of the said circular further provided that in case, the government department which allots the work to the contractor makes the payment of contract bills without obtaining the copy of short term permit and rawanna book, then the works department shall be liable to deposit the cost of the mineral. Thus in terms of clauses (2) and (3), it is incumbent upon the works contractor to obtain short term permit before starting the work.

9. Some of the fundamental aspects, while dealing with the validity of the aforesaid circular dated 06.10.2008, need to be kept in mind. The said circular which mandates the contractors to obtain short- term permit fess is meant for those contractors who are registered as "A' class contractors with various departments of Government of Rajasthan. Such registration qualifies them to bid for and obtain Government contracts, which are construction contracts. The circular dated 06.10.2008 imposing the conditions, thus, is required only for the purpose of undertaking that work which is awarded by the Government/Government Departments etc. Otherwise, there is no such requirement or obligation on the part of contractors while doing any other private work. It is trite that for awarding Government work, it can impose and stipulate conditions, eligibility criteria as well as terms and conditions on which the contract would be executed. If any person wants to bid for or undertake the work, such persons has to fulfill those conditions. The only limitation is that conditions so imposed should meet the test of fairness and reasonableness and such conditions should not be arbitrary or contrary to any law. The question, therefore, is as to whether imposition of the condition to obtain short-term permit as provided in circular dated 06.10.2008 is reasonable and not arbitrary.

10. In so far as the contention that in terms of the circular there is compulsion to obtain short term permit, in our view, as such there is no such compulsion. It is only to ensure that no mineral is excavated and used without payment of royalty. The purpose of short-term permit is to ensure that the material and minerals etc. used by the contractor in the construction work are royalty paid. It only means that such material is purchased by the contractor from the market which is legally mined and on which due royalty is paid. In other words, the objective is to see that illegally mined mineral/material is not purchased by the contractor and used in the construction work which is awarded by the Government. Not only it is a laudable object, such a stipulation is inserted in order to check illegal mining which unfortunately has assumed serious proportions in the recent past. Otherwise, the respondents herein do not stand to loose anything inasmuch as the moment evidence is produced to the effect that royalty was paid on the minerals by the leaseholder which was used in the construction, the construction contractor like the respondents would be refunded the royalty so paid by it in terms of circular dated 06.10.2008. In terms of clauses (5) and (7) of the said circular, the contractor has to pay royalty at the rates specified in the circular depending upon the nature of work and on production of bills showing payment of royalty, the contractor can get refund of royalty. There is, thus, no financial burden on the respondents of any nature. The purpose which is sought to be achieved, viz., non-royalty paid mineral (which would naturally be illegally mined mineral) is not used in the execution of the Government work and it cannot be treated as unreasonable or arbitrary. In our view, there is a complete justification for providing such a provision.

11. The minor minerals removed from the quarries, admittedly are the property of the government and the same cannot be removed and used without payment of royalty. It is therefore the duty of the government to ensure that only royalty paid minerals are used in the work and the purpose of issuing such circular was to avoid pilferage/leakage of revenue because royalty can be very conveniently

evaded by the contractors either by not purchasing the material from the mining leaseholders or obtaining it from unauthorized excavators. In case, if the contractor purchases the material from unauthorized person who has not paid royalty, there would be loss to the public exchequer and the circular was issued to check evasion or loss to the public exchequer. Such condition cannot be said to be unreasonable and arbitrary and therefore no prejudice could be said to have been caused to the contractors.

12. Learned counsel for the respondents contended that the royalty can be levied in respect of the mineral removed or consumed from lease areas at the rates prescribed in Mines and Mineral (Development and Regulation) Act 1957 and any such levy can only be by a legislation and not by any circular and the impugned circular dated 06.10.2008 which is in the nature of levy of royalty was rightly quashed by the High Court and the impugned orders warrant no interference. The clauses stipulating deduction of royalty payable to the mineral department at the rates stipulated in the circular cannot be said to be a levy. As noticed earlier, the circular stipulates that the royalty is deducted at the rates prescribed in the circular, on production of bills by the contractor to the mining department showing that they had purchased the royalty paid mineral from the leaseholder and thus it only provides the procedure for collection of royalty. The circular only provides the procedure for payment of royalty for the minerals used by the contractors who have been given the works contract by the government department. The High Court did not keep in view the object of the circular and erred in quashing the impugned circular. "

16. Learned counsel for the side opposite has, otherwise, made it clear as to why deduction, to the extent of five times of the royalty amount, has been made. It is taken to be price of the mineral used without payment of royalty. The circular has been issued for justifiable purposes and otherwise, petitioner could not show reasons to justify delay in challenge to the order issued in the year 2015, as for that, petition has been filed in the year 2020. It more so, when the petitioner is an "A" class Contractor undertaking the work of the Department regularly.

17. For all the reasons given above, the writ petition fails and is dismissed.

(2020)12ILR A459
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.10.2020

BEFORE

THE HON'BLE ABHINAVA UPADHYA, J.
THE HON'BLE PRAKASH PADIA, J.

Writ - C No. 15691 of 2020

Ram Bhajan Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Prabhat Kumar Singh, Sri Anil Kumar Tiwari

Counsel for the Respondents:
C.S.C., Sri Brijesh Kumar Mishra

(A) Civil law - Uttar Pradesh Parks, Play-grounds and Open Spaces (Preservation and Regulation) Act, 1975 - Section 2, Section 3, Sections 5 - Variation or revocation of list, Section 6 - Prohibition of the use of parks, play grounds and open spaces in certain cases, Section 7 - Maintenance of parks, playground and open spaces and Section 8 - Prohibition of construction of buildings, etc - The Uttar Pradesh Parks, Playgrounds and

Open Spaces (Regulation and Control) Rules, 2005 - U.P. Urban Planning and Development Act, 1973 - maintenance of Parks, Playgrounds and Open Spaces is a statutory obligation .

(B) Constitution of India - Article 21 - Right to live - includes the right of enjoyment of pollution free water and air for full enjoyment of life - Article 48-A - State is obliged to endeavor, protect and improve the environment of the country - Article 51-A clause (g) in Part IV-A - it shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures . (Para - 18,19,20)

(C) Legitimation expection - Doctrine of the public trust (based on ancient theory of Roman Empire) - certain common property such as lands, waters and airs were held by the Government in trusteeship for smooth and unimpaired use of public - Air, sea, waters and the forests have great importance to the people - wholly unjustified to make them a subject of private ownership - Doctrine enjoins upon the Government to protect the natural resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes. (Para - 25)

Challenging the action of the respondents for conversion of public park, situated in front of the house of the petitioner, into public parking area, which according to the petitioner is totally illegal and not permissible under law. (Para - 2)

Held: - Competent Authority is directed to ensure that there is no encroachment or keeping or throwing garbage etc. in Park. It should be maintained and cleaned in a proper manner so as to be utilized as a Park by people in general. (Para - 31)

Writ Petition disposed of. (E-7)

List of Cases cited:-

1. Bangalore Medical Trust Vs B.S. Muddappa & ors. , (1991) 4 SCC 54.

2. Animal & Environment Legal Defence Fund Vs U.O.I. & ors. , (1997) 3 SCC 549

3. Agins Vs City of Tiburon , 447 us 255 (1980)

4. M.I. Builders Pvt. Ltd Vs Radhey Shyam Sahu & ors. , AIR 1999 Supreme Court page 2468

5. T. Damodhar Rao & ors. Vs The Special Officer, Municipal Corporation of Hyderabad & ors., AIR 1987 AP 17

6. M.C. Mehta Vs Kamal Nath & ors. , (1997) 1 SCC 388

7. Vellore Citizens Welfare Forum Vs U.O.I. & ors. , AIR 1996 SC 2715

8. M.C. Mehta Vs U.O.I., (1987) Supp. SCC 131

(Delivered by Hon'ble Prakash Padia, J.)

1. Heard Sri Prabhat Kumar Singh, learned counsel for the petitioner and learned Standing Counsel for the State respondents.

2. The present writ petition has been filed challenging the action of the respondents for conversion of public park, situated in front of the house of the petitioner, i.e., House No. C-92, Sector 11, Vijay Nagar, Ghaziabad, into public parking area, which according to the petitioner is totally illegal and not permissible under law.

3. Learned Standing Counsel was earlier granted time to seek instructions by an order dated 07.10.2020 and upon written instructions, furnished by the District Magistrate, Ghaziabad, he submits that the status of the park in question has not been changed neither the public park is going to be converted into parking area.

4. In the Uttar Pradesh Parks, Play-grounds and Open Spaces (Preservation

and Regulation) Act, 1975 (for short, 'U.P. Act 1975') the word 'Park' is defined as a piece of land on which there are no buildings or of which not more than 1 / 20th part is covered with buildings and the whole or the remainder of which is laid out as gardens with trees, plant or flower beds or as a lawn or as meadows and maintained as a place for the resort of the public for recreation, air or light. Though this definition in view of Section 2 of the 1975 Act, shall apply only to the areas included in every Nagar Mahapalika, every Municipality or Notified Area and every Town Area and to such other areas to which it is extended by the State Government by notification in the Gazette, there will be no violation of law if we resort to this definition to the case in hand. No doubt, the definition given in a particular enactment cannot be read down into another enactment. But this rule is not invariable, since the word 'park' is used conceptually and contextually in the 1973 Act, namely, U.P. Urban Planning and Development Act, 1973, the same way as it is used in the 1975 Act, defining the term 'park, the same may be extended to 1973 Act, also. Parks owned and maintained by Nagar Mahapalika, Notified Area or Town Area are no more different from the parks belonging to the Development Authority which is nothing but a local authority constituted under the Act of 1973. A park must have considerable area covered by garden with trees, plants or flower beds or lawn, and should have been maintained as a place for the resort of the public for recreation, air or light. Wholly undeveloped open space can never be said to have the characteristic of a park. A park must have a beautiful garden with a lot of trees on its periphery to preserve and protect the environment and from aesthetic point of view, it must have beautiful plants or flower beds and well maintained lawns.

5. So far as preservation and maintenance of Park is concerned, there is no doubt that Authorities are bound to preserve and maintain Public Parks and to ensure that there should not be any encroachment, collection of garbage etc. There should be nothing that may hinder the use of place as Park by public at large. This is applicable not only for Public Parks but Playgrounds and Open Spaces also.

6. Uttar Pradesh legislature has taken care of these places vide the U.P. Act, 1975 which received assent of the President on 28.10.1975 and published in U.P. Gazette, (Extraordinary) on 28.10.1975.

7. "Public Parks", "Playgrounds" and "Open Spaces" are defined in U.P. Act, 1975 in Section 2 (a), (b) and (c) of U.P. Act, 1975, which read as under :-

"2(a) "open space" means any land (whether enclosed or not), belonging to the State Government or any local authority, on which there are no buildings or of which not more than one-twentieth part is covered with buildings, and whole or the remainder of which is used for purposes of recreation, air or light;

(b) "park" means a piece of land on which there are no buildings of which not more than one-twentieth part is covered with or buildings, and the whole or the remainder of which is laid out as a garden with trees, plants or flower-beds or as a lawn or as a meadow and maintained as a place for the resort of the public for recreation, air or light;

(c) "playground" means a piece of land adapted for the purpose of play,

game or sport and used by any educational institution or club or other association;"

8. Section 3 of U.P. Act, 1975 requires maintenance of list with plans and maps of all Parks, Playgrounds and Open Spaces in such areas, prepared and published by such Authorities within such time and in such a manner as may be prescribed and variation in the list is permitted by Sections 4 and 5 of U.P. Act, 1975 respectively. Then, nature of statutory obligation, with regard to preservation and regulation of Parks, Playgrounds and Open Space are provided.

9. Sections 5, 6, 7 and 8 of U.P. Act, 1975, read as under :-

*"**5. Variation or revocation of list** - (1) The State Government may at any time, either suo motu, or at the instance of a local authority, or of any person interested, add to, vary or revoke a list approved under Section 3 or revised under Section 4.*

(2) Before making any such addition, variation or revocation, the State Government shall publish, in the prescribed manner, a draft of such addition, variation or revocation together with a notice specifying a date on or after which such draft will be taken into consideration and shall consider such objections and suggestions as may be received in respect of such draft before the date so specified.

***6. Prohibition of the use of parks, play grounds and open spaces in certain cases.-** No park, playground or open space, specified in the list published under Section 3 or Section 4, as the case may be, shall except with the previous sanction of the prescribed authority, be used for any purpose other than the purpose for which it was used on the date immediately preceding, the date of commencement of this Act.*

***7. Maintenance of parks, playground and open spaces.-** The local authority shall maintain in a clean and proper condition all parks, playgrounds and open spaces belonging to or vested in it and included in the list published under Section 3 or Section 4.*

***8. Prohibition of construction of buildings, etc.-** No person shall, except with the previous sanction of the prescribed authority, construct any building or put up any structure likely to affect the utility of the park, playground or open space specified in the list published under Section 3 or Section 4."*

10. The owner of Parks, Playgrounds and Open Spaces etc., whether it is Local Authority or others but included in the list of Parks etc., has to perform such statutory duties which can be enforced by Prescribed Authority in the manner as provided in Section 9 of U.P. Act, 1975.

11. If there is any entry or stay of any unauthorized person in Park, Authority, as prescribed in Rules, it is obliged to remove such person from such Park, Playground and Open Space etc taking help of the Police Force or any other persons on behalf of State Government or Local Body, as the case may be.

12. Throwing of rubbish etc. in Parks, Playgrounds and Open Spaces is an offence, for which penalty is prescribed under Section 12 of U.P. Act, 1975, which is imprisonment for a term which may extend upto one month or with fine or with both.

13. Section 14 of U.P. Act, 1975 confers power upon State Government to

frame Rules in pursuance whereto "The Uttar Pradesh Parks, Playgrounds and Open Spaces (Regulation and Control) Rules, 2005 (hereinafter referred to as 'Rules, 2005') have been framed. "Prescribed Authority" has been defined in Rule 2 (c) of Rules, 2005, which reads as under :-

"prescribed authority' means an officer or a body corporate appointed by the State Government in this behalf by notification in the Gazette and if no such officer or body corporate is appointed, the Commissioner Division, in which the Corporation or the District Magistrate of the district in which the Municipal Board or the Nagar Panchayat is situated."

14. Rules, 2005 by virtue of Rules 1(2) are applicable to every Municipal Corporation, Municipal Board, Nagar Panchayat in State of U.P. and such other areas as State Government may, from time to time, by notification in Gazette specify. Rule 7 of Rules, 2005 describes various prohibitions in respect of Parks, Playgrounds and Open Spaces and it reads as under :-

*"7. **Prohibition** - (1) No person shall except with the written permission of Prescribed Authority or any officer authorised in this behalf **setup any wall, fence, rail, post, step, booth or other structure whether fixed or movable and whether of a permanent or a temporary nature, or any fixture in or upon any park, playground and open spaces so as to form an obstruction to, or an encroachment upon or to occupy** any portion of such park, playground and open space.*

*(2) **No person**, owner, manager or agent shall **except with the permission of local body** or any officer authorised in this behalf **shall be allowed to enter any any class of animal to any park, playground or open space.***

*(3) **No park, playground or open space specified in the list** approved by Prescribed Authority under rule 5 shall except with the written permission of Prescribed Authority or any officer authorized by it in this behalf, **be used for any purpose other than the purpose for which it has been made for.***

*(4) **No person shall be allowed to affect the utility of the parks, playgrounds or open spaces** specified in the approved list.*

*(5) **No person** shall **throw rubbish, stack debris, get over railing or fence, steal** or damage fruits, flowers, leaves, plants, grass, fixtures, tools or illegal and immoral conduct."*

15. Rule 8 of Rules, 2005 lays down obligation upon Local Authority to maintain all Parks, Playgrounds or Open Spaces in a clean, proper and satisfactory condition. Clauses (a) and (b) of Rule 8 of Rules, 2005, describe various maintenance works to be observed in respect of Parks, Playgrounds and Open Spaces, and it reads as under :-

***"8. Maintenance of Park, Playground of Open Spaces. -** (1) The local body concerned shall maintain all parks, playgrounds or open spaces belonging to or vested in it and included in the list approved and published under rule 5 in a clean, proper and satisfactory condition.*

(2) The parks, playgrounds or open spaces developed by Development authorities, housing boards, housing societies, builders and such other agencies, but not handed over to local body, shall be maintained by them in a clean, properly

and to the satisfaction of the local body concerned.

(3) In case of parks, playgrounds or open spaces not vested in a local authority, but included in the list published under rule 5, the Prescribed Authority, may, by notice, require the owner or occupier of such parks; playgrounds or open spaces -

(a) to maintain such parks, playgrounds or open spaces in a clean and proper condition; or

(b) to remove or alter any projection, encroachment or obstruction in or over in such park, playground or open space or to make within a period specified in the notice such repairs to any buildings in such park playground or open space as Prescribed Authority may consider necessary."

16. Rule 10 of Rules, 2005 talks of removal of encroachment, which reads as under :-

*"**(10) Removal of Encroachments.-** The prescribed authority or any officer authorised by it in this behalf may without notice cause to be removed any wall, fence, railing, post, step, booth or other structures whether fixed or movable and whether of permanent or of temporary nature or any fixture which is erected or setup in or upon any park, playground or open space."*

17. Thus, maintenance of Parks, Playgrounds and Open Spaces is a statutory obligation. The same have to be maintained without any encroachment and without the presence of any unauthorized persons therein and in clean and proper manner. Penal provisions are available in statute and also provisions for enforcement of various duties in respect of Parks, Playgrounds and Open Spaces etc.

18. Under Article 48-A of the Constitution, the State is obliged to endeavour, protect and improve the environment of the country. To effectuate the directive principles there has been a spate of legislation aiming at preservation and protection of the environment. The respondents having failed to develop the spaces earmarked for Parks for several years and have thus belied all the cherished hopes of the citizens. The underlying idea behind the constitution of the Development Authorities were to accelerate the pace of development and make the town in the State as attractive as possible. It is unfortunate that the respondents sat tight over the development of the Parks and remained absolutely inactive for years.

19. Right to live is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life.

20. Article 51-A clause (g) in Part IV-A introduced by the Constitution (42nd Amendment) Act, 1976, with effect from 3rd January, 1977, enshrined as a fundamental duty and mandates that it shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures. The last clause (j) of Article 51-A of the Constitution further mandates that it shall be the duty of every citizen of India to strive towards excellence in all spheres of individual and collective activity, so that the nation constantly rises to higher levels of endeavour and achievement. It is lamentable that the respondents being a State instrumentality have failed to discharge both the fundamental duties. Unless an open space

is developed into a full-fledged park having gardens trees, flower beds, plants, lawn, promenade etc., the environment will not improve and therefore the functionaries of the Development Authorities have remained grossly negligent in discharging their fundamental duty enjoined upon them by clause (g) to Article 51-A of the Constitution. Equally they have failed to discharge their duties enshrined under Article 51A(j). If the functionaries of the State show their averseness to the developmental activities, which are assigned to them, then the nation can never grow to the cherished heights. An ornamental park with well manicured lawns is not only a source of comfort to the public, but adds to the beauty of a town, as jewellery studded with pearls or diamonds add to the beauty of the person who wears it. The relevant portion of Article 51-A of the Constitution of India is quoted below:-

"51A. Fundamental duties - It shall be the duty of every citizen of India -

(g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;

(j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavor and achievement."

21. Public interest requires some areas to be preserved by means of open spaces of parks and play grounds, and that there cannot be any change or action contrary to legislative intent, as that would be an abuse of statutory powers vested in the authorities. Once the area had been reserved, authorities are bound to take steps to preserve it in that method and manner only. These spaces are meant for the common man, and there is a duty cast upon the authorities to preserve such spaces. Such matters are of great public concern and need to be taken care off in the development scheme. The public interest requires not only reservation but also preservation of such parks and open spaces. In our opinion, such spaces cannot be permitted, by an action or inaction or otherwise, to be converted for some other purpose, and no development contrary to plan can be permitted.

22. The importance of open spaces for parks and play grounds is of universal recognition, and reservation for such places in development scheme is a legitimate exercise of statutory power, with the rationale of protection of the environment and of reducing ill effects of urbanization. It is in the public interest to avoid unnecessary conversion of "open space land' to strictly urban uses, as gardens provide fresh air, thereby protecting against the resultant impacts of urbanization, such as pollution etc. Once such a scheme had been prepared in accordance with the provisions of the Act, by inaction, legislative intent could not be permitted to become a statutory mockery. Government authorities and officers are bound to preserve it and to take all steps envisaged for protection.

23. The Hon'ble Apex Court had considered the question as to the duty of the State Authorities to preserve the open spaces for public parks in the case of **Bangalore Medical Trust vs. B.S. Muddappa & Ors.** reported in **(1991) 4 SCC 54**. In the said case, the Court had considered the question as to whether area reserved for a public park can be permitted to be converted for other purposes. The State Government by an order had allotted

the area reserved for public parks to a Medical Trust, for the purposes of constructing a hospital.

24. The Hon'ble Apex Court has pointed out the importance of open spaces for public parks in Bangalore Medical Trust's case(supra). Paragraph 23 to 25, 28 and 36 of the aforesaid judgment is reproduced below:-

"23. The scheme is meant for the reasonable accomplishment of the statutory object which is to promote the orderly development of the City of Bangalore and adjoining areas and to preserve open spaces by reserving public parks and play grounds with a view to protecting the residents from the ill-effects of urbanisation. It is meant for the development of the city in a way that maximum space is provided for the benefit of the public at large for recreation, enjoyment, 'ventilation' and fresh air. This is clear from the Act itself as it originally stood. The amendments inserting Sections 16(1)(d), 38A and other provisions are clarificatory of this object. The very purpose of the BDA, as a statutory authority, is to promote the healthy growth and development of the City of Bangalore and the area adjacent thereto. The legislative intent has always been the promotion and enhancement of the quality of life by preservation of the character and desirable aesthetic features of the city. The subsequent amendments are not a deviation from or alteration of the original legislative intent, but only an elucidation or affirmation of the same.

24. Protection of the environment, open spaces for recreation and fresh air, play grounds for children, promenade for the residents, and other conveniences or amenities are matters of great public concern and of vital interest to be taken care of in a development scheme. It is that public interest which is sought to be promoted by the Act by establishing the BDA. The public interest in the reservation and preservation of open spaces for parks and play grounds cannot be sacrificed by leasing or selling such sites to private persons for conversion to some other user. Any such act would be contrary to the legislative intent and inconsistent with the statutory requirements. Furthermore, it would be in direct conflict with the constitutional mandate to ensure that any State action is inspired by the basic values of individual freedom and dignity and addressed to the attainment of a quality of life which makes the guaranteed rights a reality for all the citizens.

25. Reservation of open spaces for parks and play grounds is universally recognised as a legitimate exercise of statutory power rationally related to the protection of the residents of the locality from the ill effects of urbanisation.

28. Any reasonable legislative attempt bearing a rational relationship to a permissible state objective in economic and social planning will be respected by the courts. A duly approved scheme prepared in accordance with the provisions of the Act is a legitimate attempt on the part of the Government and the statutory authorities to ensure a quiet place free of dust and din where children can run about and the aged and the infirm can rest, breath fresh air and enjoy the beauty of nature. These provisions are meant to guarantee a quiet and healthy atmosphere to suit family needs of persons of all stations. Any action which tends to defeat that object is invalid. As stated by the U.S. Supreme Court in Village of Belle Terre v. Bruce Boraas: {L Ed p. 804: US P.9):

".... The police power is not confined to elimination of filth, stench, and

unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people".

36. Public park as a place reserved for beauty and recreation was developed in 19th and 20th Century and is associated with growth of the concept of equality and recognition of importance of common man. Earlier it was a prerogative of the aristocracy and the affluent either as a result of royal grant or as a place reserved for private pleasure. Free and healthy air in beautiful surroundings was privilege of few. But now it is a, `gift from people to themselves'. Its importance has multiplied with emphasis on environment and pollution. In modern planning and development it occupies an important place in social ecology. A private nursing home on the other hand is essentiality a commercial venture, a profit oriented industry. Service may be its morn but earning is the objective. Its utility may not be undermined but a park is a necessity not a mere amenity. A private nursing home cannot be a substitute for a public park. No town planner would prepare a blue print without reserving space for it. Emphasis on open air and greenery has multiplied and the city or town planning or development acts of different States require even private house-owners to leave open space in front and back for lawn and fresh air. In 1984 the BD Act itself provided for reservation of not less than fifteen per cent of the total area of the lay out in a development scheme for public parks and playgrounds the sale and disposition of which is prohibited under Section 38A of the Act. Absence of open space and public park, in present day when urbanisation is on increase, rural exodus is on large scale and congested areas are coming up rapidly, may given rise to health hazard. May be that it may be taken care of by a nursing home. But it is axiomatic that prevention is better than cure. What is lost by removal of a park cannot be gained by establishment of a nursing home. To say, there- fore, that by conversion of a site reserved for low lying into a private nursing home social welfare was being promoted was being oblivious of true character of the two and their utility."

25. It could be legitimately expected of the authority to take timely steps in which they have failed. Their inaction tantamounts to wrongful deprivation of open spaces/garden to public. The Hon'ble Apex Court in the case of **Animal and Environment Legal Defence Fund v. Union of India & Ors.** reported in **(1997) 3 SCC 549** has laid down that there is duty cast to preserve the ecology of the forest area. The Hon'ble Apex Court has enunciated the doctrine of the public trust based on ancient theory of Roman Empire. Idea of this theory was that certain common property such as lands, waters and airs were held by the Government in trusteeship for smooth and unimpaired use of public. Air, sea, waters and the forests have such a great importance to the people that it would be wholly unjustified to make them a subject of private ownership. The American courts have also in various cases expanded the concept of this doctrine. The doctrine enjoins upon the Government to protect the natural resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes.

26. In the case of **Agins vs. City of Tiburon [447 us 255 (1980)]**, the Supreme Court of the United States upheld a zoning ordinance which provided `... it is in the

public interest to avoid unnecessary conversion of open space land to strictly urban uses, thereby protecting against the resultant impacts, such as ..... pollution, ... destruction of scenic beauty. disturbance of the ecology and the environment, hazards related geology, fire and flood, and other demonstrated consequences of urban sprawl'. Upholding the ordinance, the Court said:

"... The State of California has determined that the development of local open-space plans will discourage the "premature and unnecessary conversion of open-space land to urban uses". The specific zoning regulations at issue are exercises of the city's police power to protect the residents of Tiburon from the ill-effects of urbanization. Such governmental purposes long have been recognized as legitimate.

....The zoning ordinances benefit the appellants as well public by serving the city's interest in assuring careful and orderly development of residential property with provision for open-space areas."

27. The Hon'ble Apex Court in the case of **M.I. Builders Pvt. Ltd vs. Radhey Shyam Sahu and Others** reported in **AIR 1999 Supreme Court page 2468** was pleased to hold that the construction of underground shopping complex and parking, the permission for which was granted by the Mahapalika was not correct. It was held by the Hon'ble Supreme Court that the aforesaid permission is in violation of obligatory duties cast by Section 114 on Mahapalika to maintain parks. It was held by the Hon'ble Supreme Court that the aforesaid permission is in violation of obligatory duties cast by Section 114 on Mahapalika to maintain parks. The relevant paragraphs namely paragraph nos. 59 to 61 are quoted herein-below:-

59. Jhandewala Park, the park in question, has been in existence for a great number of years. It is situated in the heart of Aminabad, a bustling commercial-cum-residential locality in the city of Lucknow. The park is of historical importance. Because of the construction of underground shopping complex and parking it may still have the appearance of a park with grass grown and path laid but it has lost the ingredients of a park inasmuch as no plantation now can be grown. Trees cannot be planted and rather while making underground construction many trees have been cut. Now it is more like a terrace park. Qualitatively it may still be a park but it is certainly a park of different nature. By construction of underground shopping complex irreversible changes have been made. It was submitted that the park was acquired by the State Government in the year 1913 and was given to the Mahapalika for its management. This has not been controverted. Under Section 114 of the Act it is the obligatory duty of the Mahapalika to maintain public places, parks and plant trees. By allowing underground construction Mahapalika has deprived itself of its obligatory duties to maintain the park which cannot be permitted. But then one of the obligatory functions of the Mahapalika under Section 114 is also to construct and maintain parking lots. To that extent some area of the park could be used for the purpose of constructing underground parking lot. But that can only be done after proper study has been made of the locality, including density of the population living in the area, the floating population and other certain relevant considerations. This study was never done. Mahapalika is the trustee for the proper management of the park. When true nature of the park, as it existed, is destroyed it would be violative of the doctrine of public

trust as expounded by this Court in Span Resort Case (1997 (1) SCC 388). Public Trust doctrine is part of Indian law. In that case the respondent who had constructed a motel located at the bank of river Beas interfered with the natural flow of the river. This Court said that the issue presented in that case illustrated "the classic struggle between those members of the public who would preserve our rivers, forests, parks and open lands in their pristine purity and those charged with administrative responsibilities who, under the pressures of the changing needs of an increasingly complex society, find it necessary to encroach to some extent upon open lands heretofore considered inviolate to change".

60. In the treatise "Environmental Law and Policy : Nature, Law, and Society" by Plater Abrams Goldfarb (American Casebook series - 1992) under the Chapter on Fundamental Environmental Rights, in Section 1 (The Modern Rediscovery of the Public Trust Doctrine) it has been noticed that "long ago there developed in the law of the Roman Empire a legal theory known as the Doctrine of the public trust." In America Public Trust doctrine was applied to public properties, such as shore-lands and parks. As to how doctrine works it was stated: "The scattered evidence, taken together, suggests that the idea of a public trusteeship rests upon three related principles. First, that certain interests - like the air and the sea - have such importance to the citizenry as a whole that it would be unwise to make them the subject of private ownership. Second, that they partake so much of the bounty of nature, rather than of individual enterprise, that they should be made freely available to the entire citizenry without regard to economic status. And, finally, that it is a principle purpose of government to promote the interests of the general public rather than to redistribute public goods from broad public uses to restricted private benefit... With reference to a decision in Illinois Central Railroad Company v. Illinois (146 U.S. 387 [1892]), it was stated that the court articulated in that case the principle that has become the central substantive thought in public trust litigation. When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon any governmental conduct which is calculated either to reallocate the resource to more restricted uses or to subject public uses to the self-interest of private parties. This public trust doctrine in our country, it would appear, has grown from Article 21 of the Constitution.

61. Thus by allowing construction of underground shopping complex in the park Mahapalika has violated not only Section 114 of the Act but also the public trust doctrine.

28. Andhra Pradesh High Court in case of **T. Damodhar Rao & Ors. v. The Special Officer, Municipal Corporation of Hyderabad & Ors.**, reported in **AIR 1987 AP 17** pleased to hold that where the land was reserved under the approved development plan for the purpose of recreational park, a portion of it cannot be used by the person for whom it was acquired for construction of residential houses. Relevant paragraphs 23 and 24 of the aforesaid judgment are quoted herein-below:-

23. The objective of the environmental law is to preserve and protect the nature's gifts to man and woman such as air, earth and atmosphere from pollution. Environmental law is based on the realisation of mankind of the dire

ophysical necessity to preserve these invaluable and none too easily replenishable gifts of mother nature to man and his progeny from the reckless wastage and rapacious appropriation that common law permits. It is accepted that pollution "is a show agent of death and if it is continued the next 30 years as it has been for the last 30, it could become lethal". (See Krishna Iyer's Pollution and Law). Stockholm declaration of United Nations on Human Environment evidences this human anxiety :-

"The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystem, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate. . . . . . Nature conservation including wildlife must therefore receive importance in planning for economic development."

Similarly, the African Charter on Human and People's rights declares that "all peoples shall have the right to a general satisfactory environment favourable to their development". Judicially responding to this situation, Justice Douglas has suggested that environmental issues might be litigated in the name of "the inanimate object about to be... deposited" with those who have an "intimate relation" with it recognised as its legitimate spokemen. Common law being basically blind to the future and working primarily for the alienated good of the individual and operating on the cynical theory that because posterity has proved its utter inadequacy to achieve the urgent task of preservation and protection of our ecology and environment. Roscoc Pound blamed the common law for its serious social shortfalls. He wrote :-

"Men have changed their views as to the relative importance of the individual and of society; but the common law has not. Indeed, the common law knows individuals only..... It tries questions of the highest social import as mere private controversies between John Deo and Richard Deo. And this compels a narrow and one sided view."

Rejecting these individualistic legal theories of common law that are found to be incompatible with the basic needs and requirements of the modern collective life environmental laws all over the world lay down rules for the preservation of environment and prevention of pollution of our atmosphere, air, earth and water. Our Parliament has recently enacted the Environment (Protection) Act (Act No. 29 of 1986) for the purpose of protecting and improving our environment. It widely distributed powers on all those who are traditionally classified as not aggrieved persons to take environmental disputes to Courts. This is clearly in harmony with our Constitutional goals which not only mandate the State to protect and improve the environment and to safeguard the forests and wildlife of the Country (Art. 48A); but which also hold it to be the duty of every one of our citizens to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures (Art. 51-A(g)).

24. From the above it is clear that protection of the environment is not only the duty of the citizen but it is also the obligation of the State and all other State organs including Courts. In that extent, environmental law has succeeded in unshackling man's right to life and personal liberty from the clutches of common law theory of individual ownership. Examining the matter from the above constitutional point of view, it would be reasonable to hold that the enjoyment of life and its attainment and fulfillment

guaranteed by Art. 21 of the Constitution embraces the protection and preservation of nature's gifts without life cannot be enjoyed. There can be no reason why practice of violent extinguishment of life alone should be regarded as violative of Art. 21 of the Constitution. The slow poisoning by the polluted atmosphere caused by environmental pollution and spoilation should also be regarded as amounting to violation of Art. 21 of the Constitution. In R. L. & E. Kendra, Dehradun v. State of U. P., , the Supreme Court has entertained environmental complaints alleging that the operations of lime-stone quarries in the Himalayan range of Mussoorie resulted in depredation of the environment affecting ecological balance. In R. L. & E. Kendra, Dehradun v. State of U. P., the Supreme Court in an application under Art. 32 has ordered the closure of some of these quarries on the ground that their operations were upsetting ecological balance. Although Art. 21 is not referred to in these judgments of the Supreme Court, those judgments can only be understood on the basis that the Supreme Court entertained those environmental complaints under Art. 32 of the Constitution as involving violation of Art. 21's right to life.

25. It, therefore, becomes the legitimate duty of the Courts as the enforcing organs of Constitutional objectives to forbid all action of the State and the citizen from upsetting the environmental balance. In this case the very purpose of preparing and publishing the developmental plan is to maintain such an environmental balance. The object of reserving certain area as a recreational zone would be utterly defeated if private owners of the land in that area are permitted to build residential houses. It must, therefore, be held that the attempt of the Life Insurance Corporation of India and the Income-tax Department to build houses in this area is contrary to law and also contrary to Art. 21 of the Constitution."

29. The concept laid down by the Hon'ble Apex Court in the case of **M.C. Mehta v. Kamal Nath & Ors.** reported in **(1997) 1 SCC 388** wherein the Hon'ble Apex Court held that the State Government has committed patent breach of public trust by leasing the ecologically fragile land to the Motel management.

30. In the case of **Vellore Citizens Welfare Forum v. Union of India & Ors.** reported in **AIR 1996 SC 2715** the Hon'ble Apex Court had laid down that protection of environment is one of the legal duties. While setting up of industries essential for economic development measures should be taken to reduce the risk of community by taking all necessary steps for protection of environment. In **M.C. Mehta v. Union of India (1987) Supp. SCC 131**, certain directions were issued by this Court regarding hazardous chemicals. Relying partly on Article 21, it was observed that life, public health and ecology are priority and cannot be lost sight of over employment and loss of revenue.

31. Undeveloped space is often occupied unauthorizedly by the people who have little regard to law. All the parks and playgrounds in the State of U.P. are maintained under the Provisions of U.P. Act, 1975 and Rules framed there under in the year 2005. Therefore, we direct Competent Authority to ensure that there is no encroachment or keeping or throwing garbage etc. in Park. It should be maintained and cleaned in a proper manner so as to be utilized as a Park by people in general.

32. Further, in compliance and observance of this order in respect of similarly placed other public purpose, we direct that a copy of this judgment be forwarded to Chief Secretary, U.P. Lucknow so that he may issue necessary instructions in this regard across the State to all concerned authorities. A compliance report shall be submitted within three months, to this Court by way of filing an affidavit.

33. Subject to above directions and observations, writ petition is disposed of.

(2020)12ILR A472
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.10.2020

BEFORE
THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ - C No. 15941 of 2020

Mahesh Chandra Bharadwaj ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashish Malhotra, Pushpila Bisht

Counsel for the Respondents:
C.S.C.

(A) Civil law-Uttar Pradesh Municipalities Act, 1916 - Section 4 -procedure for removal of a President-elected office bearer under Part IX-A of the Constitution - accountable to the electorate-his removal has repercussions which are of a serious and adverse nature-right to hold the post or office is undoubtedly in terms of the statutory enactment and proceedings for removal may also be initiated but only after adhering strictly with the provisions laid down by the legislature for the purpose. (Para - 15)

Removal of an elected President(respondent no.2) from the office of the President of Nagar Panchayat and for initiating recovery proceedings against the said respondent.

Held: - In the case of an elected President under the the Act, 1916, the procedure for removal of a President is provided for under Section 48 of the Act, 1916 and consequently whenever an issue arises with regard to removal of the President, the procedure prescribed under the statutory provision is required to be strictly followed. (Para-16)

Writ Petition dismissed . (E-7)

List of Cases cited: -

1. Bondu Ramaswamy & ors. Vs Bangalore Development Authority,(2010) 7 SCC 129

2. Paras Jain Vs St. of U.P. & ors., 2016 (1) ADJ (1) (FB)

3. Ravi Yashwant Bhoir Vs District Collector, Raigad & ors. , (2012) 4 SCC 407

4. Bachhittar Singh Vs St. of Punj. & anr., AIR 1963 SC 395

5. U.O.I. Vs H.C. Goel, AIR 1964 Sc 364

6. Indian National Congress (I) Vs Institute of Social Welfare & ors., (2002) 5 SCC 685

7. Tarlochan Dev Sharma Vs St. of Punj. & ors., (2001) 6 SCC 260

8. Sharda Kailash Mittal Vs St.of M.P. & ors., (2010) 2 SCC 319

(Delivered by Hon'ble Surya Prakash Kesarwani, J. & Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Sri Ashish Malhotra, learned counsel for the petitioner and learned Standing Counsel for the State respondents.

2. The present writ petition has been filed by the petitioner asserting to be an elected member of the Nagar Panchayat,

Maswasi, Rampur, seeking a direction for initiation of proceedings for the removal of respondent no.2 from the office of the President of Nagar Panchayat and for initiating recovery proceedings against the said respondent.

3. It is sought to be contended that certain complaints had been made by the petitioner against respondent no.2 relating to award of some contracts and also with regard to some other alleged financial irregularities regarding which a report is also stated to have been submitted by respondent no.4.

4. Learned Standing Counsel appearing for the State respondents has pointed out that for the purposes of removal of an elected President, a complete procedure has been prescribed under the Uttar Pradesh Municipalities Act, 19161 as per terms of the provisions under Section 48 thereof, and in view of the aforesaid, the writ petition filed by the petitioner, who is an elected member of the Nagar Panchayat, seeking removal of respondent no.2 from the office of the President of Nagar Panchayat and initiating proceedings for recovery against the said respondent, would not be maintainable.

5. In order to appreciate the rival contentions, the relevant provisions under law may be adverted to.

6. Part IX-A of the Constitution of India2 relating to Municipalities was inserted by the Constitution (74th Amendment) Act, 1992 for establishment of the Municipalities with a view to provide for setting up of democratic institutions at the grassroot level. The object of introducing Part IX-A in the Constitution was that in many states the local bodies were not working properly and the timely elections were not being held and the nominated bodies were continuing for long periods. Elections had been irregular and many times unnecessarily delayed or postponed and the elected bodies had been superseded or suspended without adequate justification. The new provisions were added in the Constitution with a view to restore the rightful place of local bodies in political governance. It was considered necessary to provide a constitutional status to such bodies to ensure the regular and fair conduct of elections.

7. The object and purpose of the aforesaid Part IX-A of the Consitution was explained in **Bondu Ramaswamy and others vs. Bangalore Development Authority**3 and it was stated as follows :-

"44. Provisions relating to composition of municipalities, constitution and composition of Ward Committees, reservation of seats for weaker sections, duration of municipalities, powers, authority, responsibilities of municipalities, power to impose taxes, proper superintendence and centralised control of elections to municipalities, constitution of committees for district planning and metropolitan planning, were either not in existence or were found to be inadequate or defective in the State laws relating to municipalities.

45. Part IX-A seeks to strengthen the democratic political governance at grass root level in urban areas by providing constitutional status to municipalities, and by laying down minimum uniform norms and by ensuring regular and fair conduct of elections. When Part IX-A came into force, the provisions of the existing laws relating to municipalities which were inconsistent with or contrary to the provisions of Part

IX-A would have ceased to apply. To provide continuity for some time and an opportunity to the State Governments concerned to bring the respective enactments relating to municipalities in consonance with the provisions of Part IX-A in the meanwhile, Article 243-ZF was inserted. The object was not to invalidate any law relating to city improvement trusts or Development Authorities which operate with reference to specific and specialised field of planned development of cities by forming layouts and making available plots/houses/apartments to the members of the public."

8. The 74th Amendment Act, 1992 was brought into strengthen the system of municipal bodies in urban areas with an idea to place the local self-government in urban areas on a sound footing. As per the 73rd and the 74th Amendments, the Panchayats and the Municipalities as institutions of local self-government, have been given a constitutional status with their role and position defined by the Constitution as also their powers, duties and responsibilities. These institutions of self governance are no longer mere administrative agencies of the State but have been conferred with a degree of autonomy to ensure that democracy finds expression at the grassroot level. Both the 73rd and 74th Amendments represent measures for decentralisation of power and greater participation of people in self-rule with a view to provide for democratic governance at the grassroot level through these institutions.

9. The manner and extent of control which the agencies of the State exercise over these institutions of local self-government and the necessity to interpret the relevant statutory provisions in a manner that fosters the attainment of Constitutional objectives was underlined by a Full Bench of this Court in **Paras Jain vs. State of U.P. and others**4 and it was held as follows :-

"15. The extent of control which the agencies of the State exercise over these institutions of local self-Government must necessarily conform to constitutional standards. State legislation of a regulatory nature must be interpreted in a manner that fosters the attainment of constitutional objectives. The Court, consistent with the high constitutional purpose underlying Parts IX and IXA of the Constitution, must give expression to the autonomy expected to be wielded by the constitutionally recognized levels of local self-Government. Hence, while interpreting state legislation, the need to conform to constitutional parameters must be borne in mind. An interpretation of state legislation which will dilute the autonomy of institutions of local self-Government must, to the extent possible, be avoided. Similarly, an interpretation which would result in reducing the panchayats and municipalities to a role of administrative subordination must be eschewed. Consequently, where an issue arises in regard to the removal of an elected head of a municipality, as in the present case, the procedure prescribed by the law must be followed. The law itself must be interpreted in a manner that would render it fair, just and reasonable in its operation and effect. Moreover, in areas where the law is silent, an effort must be made by the Court in the process of interpretation to ensure that the procedure for removal is just, fair and reasonable to be consistent with the mandate of Article 14."

10. The removal from office of elected office bearers on grounds of misconduct in the context of the

Constitutional status conferred by the 74th Amendment Act, 1992 was the subject matter of consideration in **Ravi Yashwant Bhoir vs. District Collector, Raigad and others**5 and it was held that an elected official cannot be permitted to be removed unceremoniously without following the procedure prescribed by law by the State by adopting a casual approach. The observations made in the judgement in this regard are being extracted below :-

"21. The municipalities have been conferred Constitutional status by amending the Constitution vide 74th Amendment Act, 1992 w.e.f. 1.6.1993. The municipalities have also been conferred various powers under Article 243-B of the Constitution.

22. Amendment in the Constitution by adding Parts IX and IX-A confers upon the local self-government a complete autonomy on the basic democratic unit unshackled from official control. Thus, exercise of any power having effect of destroying the Constitutional institution besides being outrageous is dangerous to the democratic set-up of this country. Therefore, an elected official cannot be permitted to be removed unceremoniously without following the procedure prescribed by law, in violation of the provisions of Article 21 of the Constitution, by the State by adopting a casual approach and resorting to manipulations to achieve ulterior purpose. The Court being the custodian of law cannot tolerate any attempt to thwart the Institution.

23.The democratic set-up of the country has always been recognized as a basic feature of the Constitution, like other features e.g. supremacy of the Constitution, rule of law, principle of separation of powers, power of judicial review under Articles 32, 226 and 227 of the Constitution etc. (Vide: Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461, Minerva Mills Ltd. v. Union of India, AIR 1980 SC 1789, Union of India v. Assn. for Democratic Reforms, AIR 2002 SC 2112; Special Reference No. 1 of 2002 (Gujarat Assembly Election Matter), AIR 2003 SC 87; and Kuldip Nayar v. Union of India, AIR 2006 SC 3127)."

11. Referring to the Constitution Bench judgments in **Bachhittar Singh vs. State of Punjab and another6** and **Union of India vs. H.C. Goel**7 and also **Indian National Congress (I) vs. Institute of Social Welfare and others**8 the settled legal position that removal of a duly elected member on the basis of proved misconduct is a quasi judicial proceeding, was reiterated.

12. In a case relating to the removal of a President of a Municipal Council under the Punjab Municipal Act, 1911, in **Tarlochan Dev Sharma vs. State of Punjab and others**9, it was held that removal from an elected office is a serious matter and that a case for removal must clearly be made out before action could be justified. The right of a duly returned candidate holding and enjoying an office and discharging related duties was held to be a valuable statutory right and in view thereof, it was stated that since an order of removal has the effect of curtailing the term of an elected office holder and casting a stigma upon him, the grounds under the relevant statutory provision for removal must be clearly made out before any such order is passed. The relevant observations made in this regard are as follows :-

"7. In a democracy governed by rule of law, once elected to an office in a

democratic institution, the incumbent is entitled to hold the office for the term for which he has been elected unless his election is set aside by a prescribed procedure known to law. That a returned candidate must hold and enjoy the office and discharge the duties related therewith during the term specified by the relevant enactment is a valuable statutory right not only of the returned candidate but also of the constituency or the electoral college which he represents. Removal from such an office is a serious matter. It curtails the statutory term of the holder of the office. A stigma is cast on the holder of the office in view of certain allegations having been held proved rendering him unworthy of holding the office which he held. Therefore, a case of availability of a ground squarely falling within Section 22 of the Act must be clearly made out. A President may be removed from office by the State Government, within the meaning of Section 22, on the ground of "abuse of his powers" (of President), inter alia. This is the phrase with which we are concerned in the present case. "

13. Taking a similar view in **Sharda Kailash Mittal vs. State of Madhya Pradesh and others**10, it was reiterated that removal of a holder from a democratically elected office is an extreme step which must be resorted to only in grave and exceptional circumstances and not for minor irregularities in discharge of duties. It was observed thus :-

"26.There are no sufficient guidelines in the provisions of Section 41-A as to the manner in which the power has to be exercised, except that it requires that reasonable opportunity of hearing has to be afforded to the office-bearer proceeded against. Keeping in view the nature of the power and the consequences that flows on its exercise it has to be held that such power can be invoked by the State Government only for very strong and weighty reason. Such a power is not to be exercised for minor irregularities in discharge of duties by the holder of the elected post. The provision has to be construed in strict manner because the holder of office occupies it by election and he/she is deprived of the office by an executive order in which the electorate has no chance of participation."

14. The decisions referred to above have laid emphasis on the importance of the role and position of elected office bearers under Part IX-A of the Constitution. It has been consistently held that these elected office bearers represent the will of the electorate and their removal affects the rights of the electorate to be governed by their elected representatives.

15. An elected office bearer under Part IX-A of the Constitution, in our considered view, is accountable to the electorate and his removal has repercussions which are of a serious and adverse nature. The right to hold the post or office is undoubtedly in terms of the statutory enactment and proceedings for removal may also be initiated but only after adhering strictly with the provisions laid down by the legislature for the purpose.

16. In the case of an elected President under the the Act, 1916, the procedure for removal of a President is provided for under Section 48 of the Act, 1916 and consequently whenever an issue arises with regard to removal of the President, the procedure prescribed under the statutory provision is required to be strictly followed.

17. Learned counsel for the petitioner has not been able to dispute the aforesaid

legal position that the procedure for removal of an elected President of Nagar Panchayat is to be in accord with the provisions of Section 48 of the Act,1916.

18. Having regard to aforesaid, we are not inclined to entertain the present writ petition for the reliefs prayed for, and the writ petition accordingly stands dismissed.

19. It would be open to the petitioner to pursue the remedies as may be available to him in accordance with the statutory provisions in terms of the Act,1916.

(2020)12ILR A477
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.11.2020

BEFORE
THE HON'BLE SHASHI KANT GUPTA, J.
THE HON'BLE PANKAJ BHATIA, J.

Writ - C No. 15983 of 2020

Gautam Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ajay Kumar Maurya, Sri Jawahar Lal Maurya

Counsel for the Respondents:
C.S.C.

(A) Civil law - *'socio-beneficial scheme'* - 'Mukhayamantri Kisan and Sarvahit Bima Yojna' - for the benefit of marginalised sections of the society - Scheme formulated by the State as a Welfare State and the insurance premium is paid by the State to the Insurance Company, who in turn issue the policies - provisions of the Limitation Act are applicable to the suits, appeals and the applications as enumerated and before the Courts only - any policy decision which is against any statute, or can be faulted on the ground of arbitrariness and unfairness and if the same is dehors the provisions of the acts or legislation can be interfered with by the Court. (Para - 21,22,30,32)

(B) Insurance Act, 1938 - Section 46 - Application of the law in force in India to policies issued in India - mandate - statutory right as contained in Section 46 to sue for relief in respect of the policy in a court - 'law of the land' - which is binding on all insurance contracts by virtue of Section 46 providing three years' of limitation in the event of a suit being filed has to be accepted as a reasonable period within which a claim for insurance and a claim against the wrongful rejection of the insurance can be preferred. (Para 23,24,34)

Father of the petitioner died in an accident - being a farmer having agricultural holdings was entitled to the grant of compensation under the Mukhyamantri Kisan Avam Sarvahit Bima - Petitioner claims to have applied for grant of compensation - District Magistrate rejected the claim of the petitioner under the Mukhyamantri Kisan Avam Sarvahit Bima on the ground that the claim is time barred. (Para - 2,3)

Held: - The limitation prescribed under the Scheme is wholly unreasonable and arbitrary and is liable to be struck out as it is well settled that even while testing the validity of an administrative action, the same can be tested on the touch stone of the Article 14 of the Constitution of India. A "socio-beneficial' Scheme has to be interpreted in a manner so as to advance the purpose for which the Scheme is formulated and not in a manner so as to defeat the entire purpose of the Scheme. (Para - 35)

Writ Petition allowed . (E-7)

List of Cases cited: -

1. Brij Mohan Lal Vs U.O.I. & ors., (2012) 6 SCC 502

2. Mohd. Abdul Kadir Vs DG of Police, (2009) 6 SCC 611 : (2009) 2 SCC (L&S) 227

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Heard learned counsel for the petitioner and learned Standing Counsel for the State-respondents.

2. The present petition has been filed challenging the order dated Nil of 2020 (Annexure-9 to the petition), whereby the District Magistrate, Jaunpur has rejected the claim of the petitioner under the Mukhyamantri Kisan Avam Sarvahit Bima on the ground that the claim is time barred.

3. The facts, in brief, are that on 3.7.2018 the father of the petitioner died in an accident and being a farmer having agricultural holdings was entitled to the grant of compensation under the Mukhyamantri Kisan Avam Sarvahit Bima. The petitioner claims to have applied for grant of compensation on 20th October, 2018 before the Tehsil authorities, which was forwarded to the respondent no. 3, the Insurance Company, for the claim to be processed. No decision was being taken for processing the claim, as such, after representing the matter, the petitioner approached this Court by filing a writ petition being Writ-C No. 558 of 2020 (Gautam Yadav vs. State of U.P. and 3 Others), which was disposed off vide order dated 14.1.2020, directing the District Magistrate, Jaunpur to hear the grievances and take an appropriate decision after summoning the records within a period of two months. It is stated that the petitioner appeared and apprised about his eligibility for the claim, however, the same was rejected vide order dated Nil, March, 2020 (Annexure-9) solely on the ground that the petitioner did not prefer the claim within the limitation prescribed in the Scheme.

4. A perusal of the order passed and impugned in the present writ petition shows that the learned counsel for the petitioner had argued that the father of the petitioner died on 03.07.2018, however, as the death certificate was not granted to the petitioner, the claim was filed as soon as the death certificate was granted on 20th October, 2018, thus, there was no delay in filing the claim.

5. The Insurance Company, on the other hand, contended that the insurance claim has been filed after one month of the accident and, in terms of the Scheme, the District Magistrate, Jaunpur is empowered only to extend the limitation by a period of one month and as Insurance Company had received a claim on 16.1.2019, as such, the petitioner's claim was barred by limitation and accordingly was not processed.

6. The District Magistrate, Jaunpur after hearing the parties held that in terms of the Scheme, the accidents which took place from 14th September, 2017 to 30th September, 2018, the claim should be filed latest by 13th October, 2018 and if the same is delayed, the claim can be filed with a delay condonation application up to 13th November, 2018 before the Insurance Company. He further held that as admittedly the claim was filed on 20.10.2018 before the Tehsildar and not before the Insurance Company, the same is beyond the limitation prescribed and as the District Magistrate cannot condone the delay of more than one month, the claim is liable to be rejected.

7. Learned counsel for the petitioner has raised two fold submissions. Firstly, he argues that the impugned order is bad in law for the reason that the claim petition was filed within one month of obtaining the death certificate and as there was a delay in providing the death certificate, which is required to be annexed along with the

claim, the claim ought to have been considered on its merits.

8. His second submission is that the Insurance Schemes including the present scheme 'Mukhyamantri Kisan Avam Sarvahit Bima' is a beneficial Scheme and the limitation of three months (and upto one month of the expiry of period of Insurance) as provided under the said Scheme as well as the provision for empowering the District Magistrate to condone the delay only upto one month, is wholly arbitrary, illegal and militates against the whole Scheme.

9. He argues that in view of the submissions made, the order deserves to be set aside and directions be issued for grant of compensation to the petitioner, as prayed for.

10. Dealing with the first argument of the petitioner that the impugned order rejecting the Scheme as being beyond the period prescribed. A perusal of the order impugned shows that the District Magistrate found the claim to be beyond period of limitation from the expiry of date of insurance term and also beyond the condonable powers conferred upon the District Magistrate. The limitation prescribed as under:

''द– यदि परिवार के मुखिया/रोटी अर्जक/नामिनी/कानूनी वारिस (जैसा लागू हो) द्वारा बीमा दावा संबंधित बीमा कम्पनी को प्रस्तुत करने में 03 माह से अधिक (किन्तु बीमा अवधि की समाप्ति के 01 माह पश्चात तक) विलम्ब हो जाता है तो उक्त परिस्थिति में 01 माह तक विलम्ब को क्षमा करने का अधिकार जिलाधिकारी को होगा।''

11. On a plain reading of the said provision and the documents on record, it is clear that the petitioner had filed the application for grant of compensation on 20.10.2018 whereas the death had occurred on 03.07.2018. The period of insurance policy expired on 12.9.2018 as such claim could be made by 11.10.2018 with a further condonable limit upto 11.11.2018 as such it was well within the limitation and the condonable limit prescribed in the scheme, by which time the delay in filing could be condoned. The impugned order is clearly wrong on that count and thus liable to be set aside holding that the application for compensation filed was well within the prescribed condonable period of limitation as provided in the Scheme.

12. Now coming to the second question agitated that the limitation prescribed in the Scheme is arbitrary and unreasonable. It is relevant to mention the following aspects which led to the framing of the Scheme in question.

13. We are dealing with the said arguments as a large number of petitions are being filed which are similar in nature and there are grey areas in view of the conflict between the Law and the provisions of the scheme which require clarification.

14. The State Government intending to extend insurance cover to the marginalised farmers in the State floated e-tenders calling upon the Insurance Companies to participate and bid for the implementation of the 'Samajwadi Kisan and Sarvahit Bima Yojna' in Uttar Pradesh which was subsequently renamed as 'Mukhayamantri Kisan and Sarvahit Bima Yojna' in Uttar Pradesh vide Government Order No. 511b(1)/ka-Ni-6-2017-208(4)/2015 dated 20.6.2017. In terms of the said tender, various insurance companies participated and with the highest

bidder an Agreement was entered into in between the Insurance Companies and the State of Uttar Pradesh through the Governor. The relevant portion of one such Agreement is as under:

"The name of the Scheme has been changed to Mukhyamantri Kisan & Sarvhit Bima Yojna vide G.O. GoUP511(1)b/Ka.Ni.-6/2017-20B(4)/2015, dated 20 June, 2017. Vide partially amendment G.O. GOUP424 b/Ka.Ni.-6/2016-20B(4)/2015, dated 31 May, 2016.

All the conditions stated in this agreements signed by the parties dated 14 Sep, 2016 as comprising of Request for Proposal (RFP), Prebid Response sheet and the Corrigendum Documents (as attached herewith) and letter of undertaking regarding renewal of insurance policy dated 6 Sep, 2017 shall form part and parcel of this Agreement for next policy period (i.e. from the midnight of 13 Sep, 2018 to the midnight of 13 Sep, 2019)".

"2. The following documents attached hereto shall be the integral part of the Agreement:

"a. Request for proposal.

b. Agreement dated 14. Sep, 2005 with all attachments.

c. Corrigendum documents as Amendment in the Scheme. (Annx-X)

d. Letter of undertaking regarding renewal of insurance policy by the insurance company. (Annx-Z)

e. The payment Terms (Annx.-A)"

3. Detail Scheme : Mukhyamantri Kisan & Sarvhit Bima Yojna as amended as below:"

15. In the document appended in this Agreement, a copy of the Scheme was also appended and was a part of the Agreement. The relevant provision, in the said Scheme with regard to limitation, was as under:

''(2) यदि परिवार के मुखिया/रोटी अर्जक/नामिनी/कानूनी वारिस (जैसा लागू हो) द्वारा बीमा अवधि की समाप्ति के 01 माह पश्चात् तक बीमा दावा संबंधित बीमा कम्पनी को प्रस्तुत करने में विलम्ब हो जाता है तो उक्त परिस्थिति में 01 माह तक विलम्ब को क्षमा करने का अधिकार जिलाधिकारी को होगा।''

16. In other terms and conditions of the Agreement (relevant for the purposes of this case), the following was incorporated:

"10. The Insurance Company shall perform the services shall perform the services and carry out its obligation under this Agreement with the diligence efficiency and economy in accordance with generally accepted professional standards and practices. ***The Insurance Company shall abide by all the provision/Acts/Rules etc. prevalent in the country.*** *The Insurance Company shall conform to the standards laid down in the RFP in totality.*

11. Applicable Law means the laws and any other instrument having the force of law in India as may be issued and in force from time to time. This Agreement shall be interpreted in accordance with the laws of the Union of India and the State of Uttar Pradesh.

12. If, after the date of issuance of LOI, there is any change in the Applicable Laws of India with respect to taxes and duties, then the same shall be borne by the Insurance Company.

13. Arbitration.....…"

17. As the scheme (which contains period of limitation), is also made part of Agreement, the limitation is said to be prescribed for raising a claim.

18. We are informed that from 04.03.2020, the Scheme has been further amended. The Scheme is renamed as 'Mukhayamantri Kisan and Sarvahit Bima Yojna and the limitation in terms of the

Scheme as applicable w.e.f. 14.9.2019 is as under:

"10- <u>आवेदन पत्र प्रस्तुत करने की अवधि.</u>

कृषक की दुर्घटनावश मृत्यु अथवा दिव्यांगता होने पर, कृषक/विधिक वारिस/वारिसों को आवेदन पत्र निर्धारित प्रमाण पत्रों/प्रपत्रों को पूर्ण कराकर, दो प्रतियों में ;मूल प्रति एवं छाय प्रति) अधिकतम डेढ़ माह (45 दिन) की अवधि में सम्बन्धित तहसील कार्यालय में जमा करना होगा। अपरिहार्य परिस्थित में आवेदन पत्र प्रस्तुत करने की अवधि को 01 माह तक बढ़ाने का अधिकार जिलाधिकारी में निहित होगा। किसी भी दशा में ढाई माह (75 दिन) के पश्चात आवेदन पत्र पर विचार नहीं किया जायेगा।"

19. Thus, what is to be considered of this Court, is whether the prescription of limitation in the Scheme is *'unreasonable'* and *'arbitrary'* and upto what extent this court can interfere with the Scheme especially with regard to limitation.

20. A perusal of the Scheme shows that the Scheme was formulated with an intent of granting benefits to the poor farmers and marginalised sections of the society in the contingency of the them suffering death or permanent disablement on account of the reasons so enumerated in the Scheme.

21. The Scheme was formulated by the State as a Welfare State and the insurance premium is paid by the State to the Insurance Company, who in turn issue the policies. Thus, it is clearly an insurance contract wherein the policy is issued by the Insurance Company and the premium is paid by the State in discharging its obligation as a welfare State. The Scheme is clearly a ***'socio-beneficial scheme'*** for the benefit of marginalised sections of the society.

22. Insurance by its very nature is a contingent contract and the benefits of the insurance policy depend on the contingencies as indicated in the policy. Insurance in India is governed under the provisions of the Insurance Act, 1938 which authorizes and regulates the business of insurance in India. Essentially, the breach of terms of insurance policy is a 'tortuous liability' and but for any specific statutory enactment, (like M.V. Act, Employees Compensation Act, etc) gives a cause of action for filing a suit, in the event of breach of condition of policy. The Schedule appended to the 'Limitation Act' governs the period of limitation for filing a suit on account of breach of an insurance policy and Article 44 (a) of the said Schedule provides for a period of three years' limitation for filing a suit from the date of the death of the deceased, or from the date when the claim is partly or wholly denied. It is well settled that the provisions of the Limitation Act are applicable to the suits, appeals and the applications as enumerated and before the Courts only.

23. It is relevant to refer to the provisions of Insurance Act which are relevant for the purposes of adjudication of the present case. Section 46 of the Insurance Act, 1938 provides as under:

"46. Application of the law in force in India to policies issued in India.-- *The holder of a policy of insurance issued by an insurer in respect of insurance business transacted in [India] after the commencement of this Act* ***<u>shall have the right, notwithstanding anything to the contrary contained in the policy or in any Agreement relating thereto</u>****, to receive payment in [India], of any sum secured thereby and to sue for any relief in respect of the policy in any court of competent*

jurisdiction in 1[India]; ***and if the suit is brought in [India] any question of law arising in connection with any such policy shall be determined according to the law in force in [India]:***

[Provided that nothing in this section shall apply to a policy of marine insurance.]"

24. A plain reading of the mandate of Section 46 makes it clear that the statutory right as contained in Section 46 to sue for relief in respect of the policy in a court and the questions of law in connection with any such policy are to be determined in accordance with the law in force in India. Thus, the term 'law in force' has been made specifically applicable to all the policies irrespective of the terms of the policy or Agreement. The mandate of Section 46 is also reflected in the Agreement signed in between the Insurance Companies and the State wherein Clauses 10, 11 and 12 (quoted above), it has been specifically agreed that the Applicable Laws with regard to the policies shall be the law as prevalent in the country.

25. The Scheme as formulated and a part of the Agreement in between State and Insurance Company has essentially two basic parts, first being the endeavour of the State to provide for compensation to the farmers in the event of happening of particular incidence and thus clearly is a beneficial provision for the benefit of farmers in general, the second limb of the Scheme is the ***'machinery/procedural provision'*** with regard to the manner of claim and which also includes the limitation as contained in the Scheme.

26. The prescription of limitation in Scheme of the nature which is under consideration by this Court has to be interpreted in a manner so as to achieve the object for which the Scheme is made and any prescription or provision/s which is/are for contrary to the statutory provisions has to be repelled more so in view of specific mandate of Section 46 of the Insurance Act as well as the specific Agreement in between the Insurance Companies and the State agreeing to the applicability of the laws as prevalent in India.

27. The Court cannot also ignore the social facts in the State of Uttar Pradesh, wherein the post death rituals extend for a reasonably long time and collection of documents required to be filed with claim (detailed in the scheme) take a long time and to expect the family of the bereaved, that too illiterate to file a claim within a period of 45 days (maximum upto 75 days) as prescribed under the new Scheme and three months in the erstwhile schemes prima facie is wholly arbitrary and has the potential of frustrating the entire purpose of the Scheme which is to benefit the poor farmers.

28. Thus what is to be considered by this Court is whether the ***"machinery/procedural provision"*** providing the limitation for preferring the claim is *'arbitrary'* and *'unreasonable'* moreso in view of the specific provisions of laws in force in India and whether this Court can interfere in the policy matters of the State.

29. The Supreme Court in the case of **Brij Mohan Lal vs. Union of India and others, (2012) 6 SCC 502** while considering the policy of Union of India known as 'FTCC Scheme" laid down the following with regard to the scope of interference in policy matters by the Court:

*"**100.** Certain tests, whether this Court should or not interfere in the policy*

decisions of the State, as stated in other judgments, can be summed up as:

(I) If the policy fails to satisfy the test of reasonableness, it would be unconstitutional.

(II) The change in policy must be made fairly and should not give the impression that it was so done arbitrarily on any ulterior intention.

(III) The policy can be faulted on grounds of mala fides, unreasonableness, arbitrariness or unfairness, etc.

(IV) If the policy is found to be against any statute or the Constitution or runs counter to the philosophy behind these provisions.

(V) It is dehors the provisions of the Act or legislations.

(VI) If the delegate has acted beyond its power of delegation.

101. *Cases of this nature can be classified into two main classes: one class being the matters relating to general policy decisions of the State and the second relating to fiscal policies of the State. In the former class of cases, the courts have expanded the scope of judicial review when the actions are arbitrary, mala fide or contrary to the law of the land; while in the latter class of cases, the scope of such judicial review is far narrower. Nevertheless, unreasonableness, arbitrariness, unfair actions or policies contrary to the letter, intent and philosophy of law and policies expanding beyond the permissible limits of delegated power will be instances where the courts will step in to interfere with government policy.*

102. In Mohd. Abdul Kadir v. DG of Police [(2009) 6 SCC 611 : (2009) 2 SCC (L&S) 227] *this Court, while declining regularisation of the persons employed in a particular project under a temporary Scheme, though the same had been continued for a long time, commented upon the scope of interference in the policy relating to the Prevention of Infiltration of Foreigners Additional Scheme, 1987 and considered it appropriate to draw the attention of the authorities to the issues involved in the case by directing as under: (SCC p. 618, para 22).*

"22. We are conscious of the fact that the issue is a matter of policy having financial and other implications. But where an issue involving public interest has not engaged the attention of those concerned with policy, or where the failure to take prompt decision on a pending issue is likely to be detrimental to public interest, courts will be failing in their duty if they do not draw attention of the authorities concerned to the issue involved in appropriate cases. While courts cannot be and should not be makers of policy, they can certainly be catalysts, when there is a need for a policy or a change in policy."

103. *The correct approach in relation to the scope of judicial review of policy decisions of the State can hardly be stated in absolute terms. It will always depend upon the facts and circumstances of a given case. Furthermore, the court would have to examine any elements of arbitrariness, unreasonableness and other constitutional facets in the policy decision of the State before it can step in to interfere and pass effective orders in such cases.*

104. *A challenge to the formation of a State policy or its subsequent alterations may be raised on very limited grounds. Again, the scope of judicial review in such matters is a very limited one. One of the most important aspects in adjudicating such a matter is that the State policy should not be opposed to basic rule of law or the statutory law in force. This is what has been termed by the courts as the philosophy of law, which must be adhered to by valid policy decisions."*

30. Thus, in view of the law laid down, it is clear that any policy decision which is against any statute, or can be faulted on the ground of *arbitrariness* and *unfairness* and if the same is *dehors* the provisions of the acts or legislation can be interfered with by the Court.

31. In the light of the above dictum of Supreme Court, we have to see whether such a short period of limitation militates against the object of the Scheme and can be interfered with on it being unreasonable and opposed to basic rule of law and whether the period of limitation prescribed in the Scheme is clearly violative of 'law of the land' and thus is contrary to the provisions of 46 of the Insurance Act as well as contrary to the own Agreement of the State with the Insurance Companies.

32. It is no doubt true that the Limitation Act is not applicable in proceedings other than the suits and appeals and the proceedings before the Court, however, the Schedule attached to the Limitation Act clearly lays down the period within which a suit can be instituted in the event of non-payment of compensation.

33. Article 44-(a) & (b) of the Schedule to the Limitation Act, 1963 is quoted as under:

"(a) On a policy of insurance when the sum insured is payable after proof of the death has been given to or received by the insurers;	Three years	The date of the death of the deceased, or where the claim on the policy is denied, either partly or wholly, the date of such denial.
(b) On a policy of insurance when the sum insured is payable after proof of the loss has been given to or received by the insurers;"	Three years	The date of the occurrence causing the loss, or where the claim on the policy is denied either partly or wholly, the date of such denial.

34. Thus, the 'law of the land' which is binding on all insurance contracts by virtue of Section 46 providing three years' of limitation in the event of a suit being filed has to be accepted as a reasonable period within which a claim for insurance and a claim against the wrongful rejection of the insurance can be preferred. We take a "que' from the schedule appended to the Limitation Act to hold that the limitation of three years from the date of the death or the date of rejection of the claim, partly or wholly, would be a reasonable time for filing a claim under the Mukhyamantri Kisan Avam Sarvahit Bima Scheme and the similar schemes which were in force prior thereto on behalf of beneficiaries of the Scheme. We hold so also keeping in mind that the procedure for raising a claim in the manner as provided in the Scheme by implication may bar remedy of filing suit by virtue of Section 9 of Civil Procedure Code.

35. We have no hesitation in holding that the limitation prescribed under the Scheme is wholly unreasonable and arbitrary and is liable to be struck out as it is well settled that even while testing the validity of an administrative action, the same can be tested on the touch stone of the Article 14 of the Constitution of India. A

"socio-beneficial' Scheme has to be interpreted in a manner so as to advance the purpose for which the Scheme is formulated and not in a manner so as to defeat the entire purpose of the Scheme.

36. Thus, we set aside the order dated Nil March, 2020 (Annexure-9), whereby the claim of the petitioner has been rejected on the ground of limitation on both grounds as raised and discussed in this Judgment.

37. We further direct that in place of Limitation Prescribed under the Scheme, it should be read that the claims made within three years of the date of the death or within three years from the date of the rejection, either wholly or partly by the Insurance Company, to be a reasonable period for filing a claim under the 'Mukhyamantri Kisan Avam Sarvahit Bima Scheme' and the similar schemes which were in force prior thereto on behalf of beneficiaries of the Scheme.

38. As innumerable cases are filed seeking compensation under the schemes across the State, we direct that all the claims filed within a period of three years from the date of the death or within a period of three years from the date of rejection of claim, either partly or wholly by the Insurance Company, should be treated to be filed within limitation and should be processed on their merits .

39. As we have held that the limitation provided under the said Scheme is unreasonable and arbitrary and have substituted the said period by a period of three years, as recorded above, we direct the Registrar General of this Court to transmit a copy of this order to The Chief Secretary State of Uttar Pradesh and Director Institutional Finance,State of Uttar Pradesh ,for its communication to all the District Magistrates in the State and the District Magistrates in turn are directed to entertain and process the claims filed under the Scheme within limitation as prescribed above by this Court treating them to be within limitation and the same should be processed on their merits.

40. We have directed and provided for the limitation of three years, till the time the State Government takes an appropriate decision and amends limitation clauses of the Scheme to make them more reasonable taking into account the socio economic condition of the society as well the laws of India.

41. The writ petition is allowed in terms of the said order.

42. The District Magistrate, Jaunpur shall now process the claim of the petitioner in accordance with law on its merits treating the same to be within limitation and the same shall be processed expeditiously preferably within a period of three months from the date of filing of the copy of this order.

43. Copy of this judgment downloaded from the official website of this Court shall be treated/accepted as certified copy of this judgment.

(2020)12ILR A485
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.10.2020

BEFORE

THE HON'BLE NAHEED ARA MOONIS, J.
THE HON'BLE VIVEK VARMA, J.

Writ - C No. 17015 of 2020

Ramesh Chandra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rajeev Chaddha

Counsel for the Respondents:
C.S.C., Sri Sanjai Singh

(A) Civil law - Code of Civil Procedure ,1908 - Order 23 rule 1 C.P.C. - Public Policy which is reflected in the principle enshrined in Order 23 rule 1 C.P.C., mandates that successive writ petition cannot be entertained for the same relief - Explanation IV to Section 11 and Order 2 rule 2 of Code of Civil Procedure ,1908 - principle of constructive res judicata - Even if a party does not pray for the relief in the earlier writ petition, which he ought to have claimed in the earlier petition, he cannot file a successive writ petition claiming that relief, as it would be barred. (Para - 4,5)

Dispute relating to maintainability of second writ petition for the same relief.

Held: -The relief claimed in the present writ petition is same as in the earlier writ petition and as such this is the second writ petition for the same cause of action and even otherwise, if the petitioner has not claimed the relief in the earlier writ petition which he ought to have claimed, he cannot maintain the present writ petition. (Para - 8)

Writ Petition dismissed. (E-7)

List of Cases cited: -

1. M/s. Sarguja Transport Service Vs State Transport Appellate Tribunal & ors., AIR 1987 SC 88

2. Ashok Kumar & ors. Vs Delhi Development Authority, (1994) 6 SCC 97

3. Khacher Singh Vs St. of U.P. & ors., AIR 1995 All. 338

4. Commissioner of Income Tax, Bombay Vs T.P. Kumaran, (1996) 10 SCC 561

5. U.O.I. & ors. Vs Punnilal & ors., (1996) 11 SCC 112

6. M/s. D. Cawasji & Co. & Ors. Vs St. of Mysore & anr., AIR 1975 SC 813

7. Avinash Nagra Vs Navodaya Vidyalaya Samiti & ors., (1997) 2 SCC 534

8. Uda Ram Vs Central State Farm & ors., AIR 1998 Raj. 186

9. M/s. Rajasthan Art Emporium Vs Rajasthan State Industrial and Investment Corporation & anr., AIR 1998 Raj. 277

(Delivered by Hon'ble Naheed Ara Moonis, J. & Hon'ble Vivek Varma, J.)

1. The present writ petition has been filed, seeking following reliefs:

"(a) Issue a writ, order or direction in the nature of mandamus directing the respondent nos. 2 and 3 to consider the applications of the petitioner either to release the property in favour of the petitioner with permission to sale the same and to furnish bank guarantee after sale of the property or to sanction loan of Rs. 10,00,000/- to the petitioner against the property, title deed of which is already in custody of the Bank.

(b) Issue a writ, order or direction in the nature of mandamus commanding the respondents to pay compensation of the construction which has been demolished in arbitrary manner."

2. Sri Sanjai Singh, learned counsel for the respondents has raised a preliminary objection regarding maintainability of this writ petition, contending that the petitioner had earlier filed a writ petition being Writ-C No. 20802 of 2019 (Ramesh Chandra Vs. The State of U.P. and 2 others) and the said writ petition was disposed of vide order dated 28.06.2019. He, therefore, submits that this is the second writ petition for the same relief and is not maintainable. The

order passed in the earlier writ petition reads as under:

"Heard Sri Gandesh Mani Tripathi for the petitioner, Standing Counsel for State and Sri Umesh Dutt Shukla holding brief of Sri Sanjai Singh for respondents- 2 and 3.

The writ petition has been filed for quashing the notice dated 4.5.2019 by which the application of the petitioner for issuing no objection certificate as well as returning the original registered sale deed filed by the petitioner at the time of taking house loan, has been rejected.

A perusal of the impugned order shows that the disciplinary proceeding against the petitioner relating to embezzlement of fund is pending, therefore, the sale deed which was deposited by the petitioner by way of mortgage had not been returned inasmuch as in case the petitioner is found guilty for embezzlement then money can be recovered from the petitioner.

The impugned order does not suffer from any illegality. However in case the petitioner furnishes a bank guarantee of the total embezzled amount then the petitioner may be considered for returning his sale deed within one month.

With the aforesaid observation, the writ petition is disposed of."

3. Heard Sri Rajeev Chaddha, learned counsel for the petitioner and Sri Sanjai Singh, learned counsel appearing on behalf of the respondent nos. 2 and 3 as also perused the record.

4. The issue of filing successive writ petition has been considered by the Hon'ble Supreme Court time and again and held that even if the earlier writ petition has been dismissed as withdrawn, Public Policy which is reflected in the principle enshrined in Order 23 rule 1 C.P.C., mandates that successive writ petition cannot be entertained for the same relief. ***(Vide M/s. Sarguja Transport Service Vs. State Transport Appellate Tribunal & Ors., AIR 1987 SC 88; Ashok Kumar & Ors. Vs. Delhi Development Authority, 1994 (6) SCC 97; and Khacher Singh Vs. State of U.P. & Ors., AIR 1995 All. 338).***

5. Even if a party does not pray for the relief in the earlier writ petition, which he ought to have claimed in the earlier petition, he cannot file a successive writ petition claiming that relief, as it would be barred by the principle of constructive res judicata enshrined in Explanation IV to Section 11 and Order 2 rule 2 C.P.C. as has been explained, in unambiguous and crystal clear language by the Hon'ble Supreme Court in ***Commissioner of Income Tax, Bombay Vs. T.P. Kumaran, 1996 (10) SCC 561; Union of India & Ors. Vs. Punnilal & Ors., 1996 (11) SCC 112; and M/s. D. Cawasji & Co. & Ors. Vs. State of Mysore & Anr., AIR 1975 SC 813.***

6. Similar view has been reiterated by the Hon'ble Supreme Court in ***Avinash Nagra Vs. Navodaya Vidyalaya Samiti & Ors., (1997) 2 SCC 534*** and by the other Court in ***Uda Ram Vs. Central State Farm & ors., AIR 1998 Raj. 186; and M/s. Rajasthan Art Emporium Vs. Rajasthan State Industrial and Investment Corporation & Anr., AIR 1998 Raj. 277.***

7. In M/s. D. Cawasji & Co. etc. Vs. State of Mysore & Anr. (Supra), the Hon'ble Supreme Court observed as under:-

"Be that as it may, in the earlier writ petitions, the appellants did not pray for refund of the amounts paid by way of

cess for the years 1951-52 to 1965-66 and they gave no reasons before the High Court in these writ petitions why they did not make the prayer for refund of the amounts paid during the years in question. Avoiding multiplicity of unnecessary legal proceedings should be an aim of the Courts. Therefore, the appellants could not be allowed to split up their claims for refund and file writ petitions in this piecemeal fashion. If the appellants could have, but did not, without any legal justification, claim refund of the amounts paid during the years in question, in the earlier writ petitions, we see no reason why the appellants should be allowed to claim the amounts by filing writ petitions again. In the circumstances of this case, having regard to the conduct of the appellants in not claiming these amounts in the earlier writ petitions without any justification, we do not think, we would be justified in interfering with the discretion exercised by the High Court in dismissing the writ petitions which were filed only for the purpose of obtaining the refund....in view of the above, the petition is liable to be dismissed as not maintainable and it is dismissed accordingly.…"

8. In our view, the relief claimed in the present writ petition is same as in the earlier writ petition and as such this is the second writ petition for the same cause of action and even otherwise, if the petitioner has not claimed the relief in the earlier writ petition which he ought to have claimed, he cannot maintain the present writ petition. It is, accordingly, dismissed.

(2020)12ILR A488
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.10.2020

BEFORE

THE HON'BLE NAHEED ARA MOONIS, J.
THE HON'BLE VIVEK VARMA, J.

Writ - C No. 17081 of 2020

M/s S.S. Co., Dist. Bijnor & Anr. ...Petitioners
Versus
D.M./Collector Bijnor & Ors. ...Respondents

Counsel for the Petitioners:
Sri Mohd. Afzal

Counsel for the Respondents:
C.S.C., Ms. Sudha Pandey

(A) Civil law- Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 - Section 14 - contemplates for handing over possession of the property to the secured creditor - proceeding under Section 14 of the Act is a consequential action of Section 13 (4) of the Act - where a statute provides efficacious and adequate remedy, the High Court will do well in not entertaining a petition under Article 226. On misplaced consideration, statutory procedures cannot be allowed to be circumvented. (Para - 3,7)

Challenging the order of the District Magistrate, Bijnor dated 05.03.2020 passed under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. (Para - 2)

Held: - Declined to entertain the present petition and relegate the petitioners to pursue the alternative remedy as available to them under the law. (Para - 11)

Writ Petition dismissed. (E-7)

List of Cases cited: -

1. United Bank of India Vs Satyawati Tondon & ors., (2010) 8 SCC 110

2. Kanaiyalal Lalchand Sachdev & ors. Vs St. of Mah. & ors., (2011) 2 SCC 782

3. Standard Chartered Bank Vs Noble Kumar & ors., (2013) 9 SCC 620

4. GM, Sri Siddeshwara Co-operative Bank Limited & anr. Vs Sri Ikbal & ors., (2013) 10 SCC 83

5. Authorized Officer, State Bank of Travancore & anr. Vs Mathew K.C., (2018)3 SCC 85

6. Baburam Prakash Chandra Maheshwari Vs Antarim Zila Parishad, AIR 1969 SC 556

7. Whirlpool Corporation VS Registrar of Trade Marks, (1998) 8 SCC 1

8. Harbanslal Sahnia Vs Indian Oil Corporation Ltd., (2003) 2 SCC 107

9. Dwarikesh Sugar Industries Ltd Vs Prem Heavy Engineering Works (P) Ltd & anr., (1997) 6 SCC 450

10. ICICI Bank Ltd Vs Umakanta Mohapatra, Civil Appeal Nos. 10243-10250 of 2018

11. Sushma Yadav & ors. Vs St. of U.P. & ors., Writ-C No. 14645 of 2019, 2019 (9) ADJ 102 (DB)

(Delivered by Hon'ble Naheed Ara Moonis, J. & Hon'ble Vivek Varma, J.)

1. Heard Sri Mohd. Afzal, learned counsel for the petitioner, learned Standing Counsel for respondent nos. 1 to 3, and Ms. Sudha Pandey, learned counsel appearing for respondent no. 4.

2. By means of the present writ petition the petitioners have come to this Court challenging the order of the District Magistrate, Bijnor dated 05.03.2020 passed under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, the "Act").

3. The proceeding under Section 14 of the Act is a consequential action of Section 13 (4) of the Act. Section 14 of the Act contemplates for handing over possession of the property to the secured creditor. The petitioners, if aggrieved by the aforesaid order, can approach the Debts Recovery Tribunal by filing an appeal under Section 17 of the Act.

4. The issue is no longer *res integra*. The Hon'ble Supreme Court in **United Bank of India v. Satyawati Tondon and others, (2010) 8 SCC 110**, has observed as under:

"42. There is another reason why the impugned order should be set aside. If respondent No.1 had any tangible grievance against the notice issued under Section 13(4) or action taken under Section 14, then she could have availed remedy by filing an application under Section 17(1). The expression `any person' used in Section 17(1) is of wide import. It takes within its fold, not only the borrower but also guarantor or any other person who may be affected by the action taken under Section 13(4) or Section 14. Both, the Tribunal and the Appellate Tribunal are empowered to pass interim orders under Sections 17 & 18 and are required to decide the matters within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective.

43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public

dues, etc., the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

44. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution.

45. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance.

XXXX XXXXX XXXX

55. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection.

56. Insofar as this case is concerned, we are convinced that the High Court was not at all justified in injuncting the appellant from taking action in furtherance of notice issued under Section 13(4) of the Act. In the result, the appeal is allowed and the impugned order is set aside. Since the respondent has not appeared to contest the appeal, the costs are made easy."

5. In **Kanaiyalal Lalchand Sachdev and others Vs. State of Maharashtra and others, (2011) 2 SCC 782**, the Supreme Court held as under:

"24. In City and Industrial Development Corporation Vs. Dosu Aardeshir Bhiwandiwala & Ors. (2009) 1 SCC 168, this Court had observed that:

"30. The Court while exercising its jurisdiction under Article 226 is duty-bound to consider whether:

(a) adjudication of writ petition involves any complex and disputed questions of facts and whether they can be satisfactorily resolved;

(b) the petition reveals all material facts;

(c) the petitioner has any alternative or effective remedy for the resolution of the dispute;

(d) person invoking the jurisdiction is guilty of unexplained delay and laches;

(e) ex facie barred by any laws of limitation;

(f) grant of relief is against public policy or barred by any valid law; and host of other factors."

25. In the instant case, apart from the fact that admittedly certain disputed questions of fact viz. non-receipt of notice under Section 13(2) of the Act, non-communication of the order of the Chief Judicial Magistrate, etc. are involved, an efficacious statutory remedy of appeal under Section 17 of the Act was available to the appellants, who ultimately availed of the same. Therefore, having regard to the facts obtaining in the case, the High Court was fully justified in declining to exercise its jurisdiction under Articles 226 and 227 of the Constitution."

6. Further, in the case of **Standard Chartered Bank Vs. Noble Kumar & Ors., reported in (2013) 9 SCC 620**, the Hon'ble Apex Court has held as under:

"27. The "appeal" under Section 17 is available to the borrower against any measure taken under Section 13(4). Taking possession of the secured asset is only one of the measures that can be taken by the secured creditor. Depending upon the nature of the secured asset and the terms and conditions of the security agreement, measures other than taking the possession of the secured asset are possible under Section 13(4). Alienating the asset either by lease or sale, etc. and appointing a person to manage the secured asset are some of those possible measures. On the other hand, Section 14 authorises the Magistrate only to take possession of the property and forward the asset along with the connected documents to the borrower (sic the secured creditor). Therefore, the borrower is always entitled to prefer an "appeal" under Section 17 after the possession of the secured asset is handed over to the secured creditor. Section 13(4)(a) declares that the secured creditor may take possession of the secured assets. It does not specify whether such a possession is to be obtained directly by the secured creditor or by resorting to the procedure under Section 14. We are of the opinion that by whatever manner the secured creditor obtains possession either through the process contemplated under Section 14 or without resorting to such a process obtaining of the possession of a secured asset is always a measure against which a remedy under Section 17 is available."

7. In **GM, Sri Siddeshwara Co-operative Bank Limited and another Vs Sri Ikbal and others, (2013) 10 SCC 83**, the Apex Court went on to observe that although alternative remedy is not an absolute bar to the exercise of extraordinary jurisdiction under Article 226, yet, it is well settled that where a statute provides efficacious and adequate remedy, the High Court will do well in not entertaining a petition under Article 226. On misplaced consideration, statutory procedures cannot be allowed to be circumvented.

8. So far as invoking of writ jurisdiction in the matters of realization of loan by the financial institutions are concerned, the Hon'ble Apex Court in the case of **Authorized Officer, State Bank of Travancore & Anr. Vs. Mathew K.C., (2018)3 SCC 85**, while considering the earlier judicial pronouncements made in this regard, has held thus:

"16. It is the solemn duty of the Court to apply the correct law without

waiting for an objection to be raised by a party, especially when the law stands well settled. Any departure, if permissible, has to be for reasons discussed, of the case falling under a defined exception, duly discussed after noticing the relevant law. In financial matters grant of ex-parte interim orders can have a deleterious effect and it is not sufficient to say that the aggrieved has the remedy to move for vacating the interim order. Loans by financial institutions are granted from public money generated at the tax payers expense. Such loan does not become the property of the person taking the loan, but retains its character of public money given in a fiduciary capacity as entrustment by the public. Timely repayment also ensures liquidity to facilitate loan to another in need, by circulation of the money and cannot be permitted to be blocked by frivolous litigation by those who can afford the luxury of the same. The caution required, as expressed in Satyawati Tandon (supra), has also not been kept in mind before passing the impugned interim order:-

"46. It must be remembered that stay of an action initiated by the State and/or its agencies/ instrumentalities for recovery of taxes, cess, fees, etc. seriously impedes execution of projects of public importance and disables them from discharging their constitutional and legal obligations towards the citizens. In cases relating to recovery of the dues of banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial health of such bodies/institutions, which (sic will) ultimately prove detrimental to the economy of the nation. Therefore, the High Court should be extremely careful and circumspect in exercising its discretion to grant stay in such matters. Of course, if the petitioner is able to show that its case falls within any of the exceptions carved out in ***Baburam Prakash Chandra Maheshwari Vs Antarim Zila Parishad, AIR 1969 SC 556; Whirlpool Corporation VS Registrar of Trade Marks, (1998) 8 SCC 1; and Harbanslal Sahnia Vs Indian Oil Corporation Ltd., (2003) 2 SCC 107*** *and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass an appropriate interim order."*

17. The writ petition ought not to have been entertained and the interim order granted for the mere asking without assigning special reasons, and that too without even granting opportunity to the Appellant to contest the maintainability of the writ petition and failure to notice the subsequent developments in the interregnum. The opinion of the Division Bench that the counter affidavit having subsequently been filed, stay/modification could be sought of the interim order cannot be considered sufficient justification to have declined interference.

18. We cannot help but disapprove the approach of the High Court for reasons already noticed in ***Dwarikesh Sugar Industries Ltd Vs Prem Heavy Engineering Works (P) Ltd and another, 1997 (6) SCC 450,*** *observing:*

"32. When a position, in law, is well settled as a result of judicial pronouncement of this Court, it would amount to judicial impropriety to say the least, for the subordinate courts including the High Courts to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position. Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate courts in not applying the settled principles and in passing whimsical orders which

necessarily has the effect of granting wrongful and unwarranted relief to one of the parties. It is time that this tendency stops."

19. The impugned orders are therefore contrary to the law laid down by this Court under Article 141 of the Constitution and unsustainable. They are therefore set aside and the appeal is allowed.

20. All questions of law and fact remain open for consideration in any application by the aggrieved before the statutory forum under the SARFAESI Act."

9. In a recent judgment of Apex Court in **Civil Appeal Nos. 10243-10250 of 2018** titled as **"ICICI Bank Ltd Vs Umakanta Mohapatra"** decided on 5.10.2018, the Apex Court has not approved the practice of granting interim order in reference to the matters arising out of the SARFAESI Act, and held as under:-

"Despite several judgments of this Court, including a judgment by Hon'ble Mr.Justice Navin Sinha, as recently as on 30.01.2018, in Authorized Officer, State Bank of Travancore and Another VS Mathew KC., (2018) 3 SCC 85, the High Courts continue to entertain matters which arise under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI), and keep granting interim orders in favour of persons who are Non-Performing Assets (NPAs).

The writ petition itself was not maintainable, as a result of which, in view of our recent judgment, which has followed earlier judgments of this Court, held as follows:-

18. We cannot help but disapprove the approach of the High Court for reasons already noticed in Dwarikesh Sugar Industries Ltd. Vs Prem Heavy Engineering Works (P) Ltd and another, (1997) 6 SCC 450, observing:-

"32. When a position, in law, is well settled as a result of judicial pronouncement of this Court, it would amount to judicial impropriety to say the least, for the subordinate courts including the High Courts to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position. Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate courts in not applying the settled principles and in passing whimsical orders which necessarily has the effect of granting wrongful and unwarranted relief to one of the parties. It is time that this tendency stops." The writ petition, in this case, being not maintainable, obviously, all orders passed must perish, including the impugned order, which is set aside."

10. Following the aforesaid judgments of the Hon'ble Supreme Court a Division Bench of this Court in the case of **Sushma Yadav and others v. State of U.P. And others, Writ-C No. 14645 of 2019**, decided on 15.05.2019, reported in **2019 (9) ADJ 102 (DB)**, has held as under:

"20. It is the solemn duty of the court to ensure that the trust imposed by the public in dealing with public money which is being lent by the Financial Institutions is not mis-utilized or mis-spent. It is not for the Court to distribute largessee or to show misplaced sympathy with borrowers who had taken the advantage of loan facility but are tardy in making repayments. There may be sometimes genuine reasons for the borrowers for being late in payments but such issues can be addressed by the

appropriate forum provided for dealing with these matters. The extraordinary jurisdiction of Court is not to be invoked in such cases."

11. Thus, for the reasons indicated above, we decline to entertain the present petition and relegate the petitioners to pursue the alternative remedy as available to them under the law. The writ petition is accordingly dismissed.

12. No order as to costs.

(2020)12ILR A494
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.11.2020

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ - C No. 18437 of 2020

Jai Ram Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ram Samujh Singh

Counsel for the Respondents:
C.S.C., Sri Ram Gopal Tripathi

(A) Civil law - Administrative law - Principle of *audi alteram partem* - fundamental principle of the rules of natural justice - Exercise of a power which affects the rights of an individual must be exercised in a manner which is fair and just and not arbitrarily or capriciously - Administrative order involving civil consequences must necessarily be made in conformity with rules of natural justice - Any decision made without compliance of principle of natural justice i.e. the rule of *audi alteram partem*, cannot be sustained. (Para - 5)

Challenged a communication/order- whereunder the petitioner has been directed to deposit an amount pursuant to an enquiry report within a specified time period failing which proceedings for recovery would be initiated against him - No opportunity of hearing afforded to the petitioner before passing the aforesaid order and also during the course of the enquiry . (Para - 3,4)

Held: - The impugned order passed by the District Manager; U.P. Cooperative Federation limited is held to be unsustainable being violative of the rule of *audi alteram partem* which is a fundamental principle of natural justice. impugned order dated 01.09.2020 is quashed. (Para - 7)

Writ Petition disposed of. (E-7)

List of Cases cited: -

1. Mahipal Singh Tomar Vs St. of U.P. & ors. , (2013) 16 SCC 771

2. Ridge Vs Baldwin, (1963) 2 AII ER 66 (HL)

3. Chief Constable of North Wales Plice Vs Evans, (1982) AII ER 141 (HL)

4. St. of Orissa Vs Binapani Dei, AIR 1967 SC 1269

5. U.P. Warehousing Corporation Vs Vijay Narayan Vajpayee, (1980) 3 SCC 459

(Delivered by Hon'ble Surya Prakash Kesarwani, J. & Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard the learned counsel for the petitioner, learned standing counsel for respondent nos.1, 3, 4 and 5 and Sri Ram Gopal Tripathi, learned counsel appearing for respondent no.2.

2. With the consent of the learned counsel for the parties, this writ petition is being finally heard without calling for a counter affidavit.

3. The writ petition has been filed seeking to challenge a communication/order dated 01.09.2020 whereunder the petitioner has been directed

to deposit an amount pursuant to an enquiry report dated 04.09.2016 within a specified time period failing which proceedings for recovery would be initiated against him. The aforementioned enquiry report dated 04.09.2016 has also been challenged in the writ petition.

4. There is nothing in the impugned order dated 01.09.2020 or in the enquiry report dated 04.09.2016 to show that any opportunity of hearing was afforded to the petitioner before passing the aforesaid order and also during the course of the enquiry. Learned counsel for the respondent no.2 does not dispute the fact that no opportunity of hearing was afforded to the petitioner before passing the aforesaid impugned order or during the enquiry proceedings.

5. In administrative law the principle of *audi alteram partem* has been held to be a fundamental principle of the rules of natural justice. This requires the maker of a decision to give prior notice of the proposed decision to the persons affected and an opportunity to make a representation. The exercise of a power which affects the rights of an individual must be exercised in a manner which is fair and just and not arbitrarily or capriciously. An administrative order involving civil consequences must necessarily be made in conformity with rules of natural justice. Any decision which has been made without compliance of the aforementioned fundamental principle of natural justice i.e. the rule of *audi alteram partem*, cannot be sustained. For the aforesaid proposition of law reference may be made to the decisions in **Mahipal Singh Tomar v State of Uttar Pradesh and others**1**, Ridge v Baldwin**2**, Chief Constable of North Wales Plice v Evans**3**, State of Orissa v Binapani Dei**4**, U.P. Warehousing Corporation v Vijay Narayan Vajpayee**5**.**

6. Learned counsel for the respondent no.2 submits that a show cause notice shall be issued to the petitioner and he shall be given an opportunity to submit his objections and thereafter a final order in accordance with law shall be passed.

7. In view of the aforesaid the impugned order dated 01.09.2020 passed by the respondent no.2 is held to be unsustainable being violative of the rule of *audi alteram partem* which is a fundamental principle of natural justice. Consequently the impugned order dated 01.09.2020 is quashed.

8. The writ petition is disposed of with a direction to the respondent no.2 to issue a show cause notice to the petitioner within three weeks stating therein specific points. The petitioner shall have four weeks thereafter to submit his reply/objections. The respondent no.2 shall, thereafter, pass a reasoned and speaking order in accordance with law, after affording opportunity of hearing to the petitioner, expeditiously, preferably within next four weeks.

9. It is made clear that we have not expressed any opinion on merits of the case of the petitioner.

10. It is further made clear that this order shall not prevent the respondent authorities to recover the dues in regard to the unsupplied custom-milled-rice (CMR) from the respondent rice-millers.

(2020)12ILR A496
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.10.2020

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE JAYANT BANERJI, J.

Writ - C No. 23223 of 2019

Ms. Swaraj Varun & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Sudhir Bharti, Sri H.N. Singh

Counsel for the Respondents:
C.S.C., Sri Abhishek Gupta

(A) Civil law - Constitution of India - Article 21 - Maintenance and Welfare of Parents and Senior Citizens Act, 2007 - Uttar Pradesh Maintenance and Welfare of Parents and Senior Citizens Rules, 2014 - Rule 21 - duty of the District Magistrate to ensure that life and property of senior citizens of the District (area of his jurisdiction) are protected and they are able to live with security and dignity . (Para - 5)

District Magistrate rejected the application moved by petitioner no. 1 (unmarried daughter of petitioner no. 2) - whereas respondent no. 5 is his daughter-in-law - under the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 - eviction of respondent no. 5 and her two sons from the house-in-question. (Para - 2,4)

Held: - The prayer for eviction or dispossession of the respondent no. 5 and her two sons from the house-in-question could not have been granted by the District Magistrate in exercise of the powers conferred on him under Rule 21 of the Rules, 2014. The issue of eviction or dispossession of respondent no. 5 from the house-in-question which is stated to be her matrimonial house can only be examined by a Civil Court in a proper proceeding. No bar under Section 27 of the Senior Citizens Act, 2007. (Para - 29)

Writ Petition dismissed. (E-7)

List of Cases cited: -

1. Waqf Alalaulad & anr. Vs M/s. Sundardas Daulatram & sons, 1996 (1) ARC 578

(Delivered by Hon'ble Mrs. Sunita Agarwal, J. & Hon'ble Jayant Banerji, J.)

1. Heard Sri H.N. Singh learned Senior Advocate assisted by Sri Sudhir Bharti learned counsel for the petitioners and Sri Abhishek Gupta learned counsel for the respondent.

2. This writ petition is directed against the order dated 28.6.2019 passed by the District Magistrate, Gautam Budh Nagar, whereby he has rejected the application moved by petitioner no. 1 namely Ms. Swaraj Varun under the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 (hereinafter referred to as "the Senior Citizens Act, 2007"). The petitioner no. 1 is unmarried daughter of petitioner no. 2, whereas respondent no. 5 is his daughter-in-law.

3. The aforesaid order of rejection is being challenged on the ground that the petitioner no. 1 is a senior citizen aged about 60 years, whereas petitioner no. 2 (father of petitioner no. 1) is 93 years old. The petitioner no. 2 is incapable to move freely due to fracture of his both hips. The brother of petitioner no. 1, i.e. husband of respondent no. 5 had committed suicide on 21.4.2004. The allegations are that her brother (husband of respondent no. 5) had died due to cruelty and atrocities committed by her sister-in-law.

4. On 3.3.2019, respondent no. 5 threatened and abused both the petitioners

and physically assaulted petitioner no. 1 with the help of her relatives. A first information report dated 4.3.2019 was lodged by the petitioner no. 1/applicant against respondent no. 5. On 3.3.2019 itself, at about 21:07 Hours, the Station House Officer of the Police Station, Sector 20, Noida, Gautam Budh Nagar came with respondent no. 5 to the house of the petitioners and forced the petitioner no. 1 to give keys of the main gate of the house-in-question to respondent no. 5. As a result of the aforesaid, the applicant/petitioner no. 1 was constrained to file an application under Rule 21 of the Uttar Pradesh Maintenance and Welfare of Parents and Senior Citizens Rules, 2014 (In short as "the Rules, 2014") for eviction of respondent no. 5 and her two sons from the house-in-question.

5. The submission of learned counsel for the petitioners is that under Rule 21 of the Rules, 2014, it is the duty of the District Magistrate to ensure that life and property of senior citizens of the District (area of his jurisdiction) are protected and they are able to live with security and dignity. Section 5 of the Senior Citizens Act, 2007 provides that application under Section 4 of the Act may be made by a senior citizen or any person or organization authorized by him. Section 6 deals with the jurisdiction of the Tribunal which conducts the proceeding under Section 5 of the Act against any children or relative. Section 21 as contained in Chapter V and Section 32 as contained in Chapter VII of the Senior Citizens Act, 2007 empowers the State Government to take all measures and to make rule, to ensure protection of life and property of senior citizens, for carrying out the purposes of the Act.

6. The submission is that the Senior Citizens Act, 2007 has been enacted not only to provide for effective provisions for maintenance and welfare of senior citizens guaranteed under the Constitution of India, but also to protect their property to meet its objects. Rule 21 of the Rules, 2014 framed in exercise of the powers conferred under Section 32 of the Senior Citizens Act, 2007 enumerates duties and powers of the District Magistrate in the area of his jurisdiction and obligates to oversee and monitor the work of Maintenance Tribunal of the district. Rule 21 sub-rule (2)(i) mandates the District Magistrate to take all steps to protect the life and property of senior citizens of the district.

7. In light of the above provisions, the District Magistrate has committed a serious error of law in rejecting the application moved by the petitioner no. 1 as not maintainable, while redirecting her to move an application before the Maintenance Tribunal. The observation in the order of the District Magistrate that it was only empowered to decide appeals against the order of the Maintenance Tribunal is based on misreading of the provisions. The refusal for eviction of respondent no. 5 from the self-acquired house of the petitioners is illegal. The application filed by petitioner no. 1 and the affidavit of petitioner no. 2 have been placed before us to assert that petitioner no. 2 had authorized his daughter (petitioner no. 1) to move application seeking eviction of respondent no. 5 and stated in his affidavit that respondent no. 5 with her sons had never been residing in the house-in-question and further that he does not wish them to reside therein.

8. Learned Standing Counsel defending the order passed by the District Magistrate, however, states that the petitioners cannot get any relief under the

Senior Citizens Act, inasmuch as, the dispute essentially pertains to a gift deed dated 24.1.2019 executed by petitioner no. 2 in favour of petitioner no. 1. It is not a case where maintenance has been sought by the senior citizen from respondent no. 5. The appropriate remedy for the petitioners is to file a civil suit or to participate in the pending suit to ventilate their grievances.

9. In rejoinder, learned counsel for the petitioners vehemently assailing the submissions of learned Standing Counsel submits that the provisions of the Act, 2007 has been given overriding effect on any other Act or any instrument which are inconsistent with the provisions of the present Act. Placing Section 27 of the Senior Citizens Act, 2007, it is urged that the jurisdiction of Civil Courts in respect of any matter under the Act is specifically barred. The petitioners, therefore, cannot be relegated to file a civil suit.

10. Reliance is placed on the decision of this Court in **Waqf Alalaulad and another vs. M/s. Sundardas Daulatram and sons report in 1996 (1) ARC 578** to assert that writ can be issued to evict a trespasser from the disputed property.

11. Having heard learned counsel for the parties and perused the record, before entering into the controversy at hand, we deem it appropriate to go through the provisions of the Senior Citizens Act, 2007 and the Rules, 2014 framed thereunder, in order to understand the object and purpose of the said provisions and the powers of the District Magistrate to act upon such an application. The short title of the Act is "Maintenance and Welfare of Parents and Senior Citizens Act, 2007". The words "maintenance" and "welfare" both have been defined in sub-sections (b) and (k) of Section 2 as under:-

"(b) "maintenance" includes provision for food, clothing, residence and medical attendance and treatment;

(k) "welfare" means provision for food, health care, recreation centres and other amenities necessary for the senior citizens."

12. Senior citizen within the meaning of the Act is a person who is a citizen of India and has attained the age of sixty years or above. Sections 4 to 18 as contained in Chapter II of the Senior Citizens Act, 2007 deal with the issue of 'maintenance of parents and senior citizens' and provide for complete procedure for moving an application for maintenance under Section 4; jurisdiction and Constitution of the Maintenance Tribunal and the procedure to deal with the same as also for enforcement of the order of maintenance. Sections 15 and 16 provide for Constitution of Appellate Tribunal and the procedure to deal with an appeal against the order of a Tribunal, filed by an aggrieved person. Under Chapter II, an application for maintenance may be made either by a senior citizen or parent, as the case may be; or if he is incapable, by any person or organization authorized by him; or the Tribunal may take cognizance *suo motu*.

13. The jurisdiction of the Maintenance Tribunal is confined to the District concerned. The enquiry held by the Tribunal under Section 5 of the Act is a summary enquiry, wherein the Tribunal shall exercise the powers of the Civil Court for the purpose enumerated in sub-section (2) of Section 8. Section 9 empowers the Tribunal to make an order of monthly allowance at such monthly rate for the maintenance of such senior citizen, as it may deem fit, and to pay the same to such senior citizen for the time period it directs

on being satisfied that the children or relatives, as the case may be, neglect or refuse to maintain him a senior citizen who is unable to maintain himself. Section 14 even empowers the Tribunal to award simple interest in addition to the amount of maintenance upto 18%. Proviso to Section 18 makes it clear that the application for maintenance under the Senior Citizens Act, 2007 can be moved as the substitute to application for maintenance under Chapter IX of the Code of Criminal Procedure, 1973 and in case, any such application is pending before the criminal court, the same shall be allowed to be withdrawn on the request of the person concerned.

14. Chapter III obliges the State Government to establish and maintain Old Age home in such number at such places, as it may deem necessary and to prescribe a scheme for management of such oldage homes. Chapter IV mandates the State Government to make arrangements in the Government hospitals or Hospitals, clinics funded fully or partially by it for medical care of senior citizens. For protection of life and property of senior citizens, provisions are made under Chapter V which contain Sections 21 to 23.

15. Section 21 mandates the State Government to take all measures to give effect to the provisions of the Act by giving wide publicity through public media and organizing sensitization and awareness training on the issues relating to this Act and also for effective co-ordination between the services provided by the concerned Ministries or Departments of the Government to address the issues relating to the welfare of the senior citizens.

16. The duty to give effect to the provisions of the Act and to exercise all necessary powers in that regard, has been assigned to the District Magistrate within the area of his jurisdiction. Section 23 confers right on the senior citizen to receive maintenance from the transferee of his property whether transfer by way of gift or otherwise is made after the commencement of this Act. In case of refusal or failure of the transferee to provide for the basic amenities and physical needs of the senior citizens, the transfer may be declared void by the Tribunal at the option of the transferor/senior citizen. The right to receive maintenance out of an estate or a part thereof, transferred by a senior citizen, as maintenance from the transferee is given under sub-section (2) of Section 23. Section 24 imposes a criminal liability on any person who is having care or protection of any senior citizen and intentionally abandons him. Under Section 22 the bar of jurisdiction of Civil Court is in respect of any matter to which the provisions of this Act applies.

17. A plain and simple reading of the whole Statute applying the golden rule of construction shows that the words "maintenance" and "welfare" of senior citizens used in the Statute at different places has to be given the same meaning as provided, to these words, in the definition clause.

18. The "maintenance" as defined in Clause 2(b) includes making provision for food, clothing, residence and medical attendance and treatment of senior citizen. The "welfare" means making provision for food, health care, recreation centres and other amenities necessary for the senior citizens. For providing "maintenance" within the meaning of the Senior Citizens Act, 2007, Maintenance Tribunals have been constituted under Section 7 of the Act by the State Government.

19. The provisions of Sections 4 to 18 as contained in Chapter II of the Act deal with the first part of the Act, for making effective provisions for the 'maintenance of parents and senior citizens' guaranteed and recognized under the Constitution of India. For "welfare of parents and senior citizens" under Chapters III, IV and V, the State Government has to make different provisions for protection of fundamental rights of senior citizens guaranteed under Article 21 of the Constitution of India. All the measures to be taken by the State Government for protection of life and property of a senior citizen under the Act are in furtherance of the said object. The long title of the Act also provides an aid to this construction and reads as under:-

"An Act to provide for more effective provisions for the maintenance and welfare of parents and senior citizens guaranteed and recognised under the Constitution and for matters connected therewith or incidental thereto"

20. The cardinal rule of construction of statutes is to read the statute literally, that is, by giving to the words their ordinary, natural and grammatical meaning. Any interpretation or reading of the statute which leads to absurdity should be avoided. Whenever the question arises as to the meaning of a certain provision in a Statute, it is proper to read that provision in its context. The intention of the legislature must be found by reading the Statute as a whole. Every clause of the Statute should be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole Statute. It is the most natural and genuine exposition of a Statute.

21. As noted above in the Act, 2007, the words "maintenance" and "welfare" have been given the same meaning in the whole Statute. The Rules, 2014 have been framed by the State Goverment in exercise of the powers under Section 32 of the Act which empowers it to make rules for carrying out for the purpose of the Act.

22. The purpose of the Act as noted above is to make provisions for the "maintenance and welfare of parents and senior citizen" guaranteed and recognized under the Constitution of India. The duties and powers of the District Magistrate enumerated in Rule 21 contained in Chapter V of the Rules, 2014 are, thus, in furtherance of the said object and purpose of the Act as aforesaid. All the matters connected therewith or incidental thereto are obviously to be in relation to the object and purpose of the Act.

23. One of the duties of the District Magistrate under sub-rule (2)(i) of Rule 21 is to ensure that the lives and property of senior citizens of the district are protected and they are able to live with security and dignity.

24. Placing the said rule, it is vehemently contended by the learned counsel for the petitioners that the District Magistrate, Gautam Budh Nagar was duty bound to order for eviction of respondent no. 5 so as to protect the property of both the senior citizens namely petitioner nos. 1 and 2.

25. The contention is that the house-in-question is a self-acquired of petitioner no. 2, father-in-law of respondent no. 5 whereas two rooms existing on the first floor of the said house have been constructed by petitioner no. 1 out of her own earning. Both the petitioners are residing at the ground floor of the house-in-

question. A gift deed dated 24.1.2019 of the house-in-question has been executed by petitioner no. 2 in favour of petitioner no. 1. The petitioner no. 2, owner of the house has given an affidavit before the District Magistrate making his intention clear that he does not wish that respondent no. 5 reside in the house-in-question.

26. Indisputably respondent no. 5 is daughter-in-law of the petitioner no. 2 and sister-in-law of petitioner no. 1. She is a widow lady and has two sons. She has categorically stated in her objection before the District Magistrate that the house-in-question is her matrimonial house which fact could not be successfully disputed by the petitioners herein. Apart from the assertion made in paragraph '8' of the application moved by petitioner no. 1, there is no allegation of any physical or verbal abuse or assault on the petitioners by respondent no. 5. A careful reading of the application moved by petitioner no. 1 before the District Magistrate and the affidavit of petitioner no. 2 filed in support thereof, clearly shows that the dispute between the parties arose as a result of the gift deed dated 24.1.2019 executed by petitioner no. 2 in favour of petitioner no. 1. It also transpired that respondent no. 5 has filed an Original Suit No. 1544 of 2019 (Rakhi Singh vs. Surendra Singh and others) for permanent injunction and declaration of gift deed as void document which is pending before the Civil Judge, Senior Division, Gautam Budh Nagar.

27. The prayers in the application dated 23.4.2019 moved by petitioner no. 1 before the District Magistrate, Gautam Budh Nagar under Rule 21 of the Rules, 2014 reads as under:-

"अतः श्रीमान जी से करबद्ध प्रार्थना है कि श्रीमान जी के स्तर से प्रार्थिनी, जो वरिष्ठ नागरिक है, के मामले में :-

(i) स्थानीय पुलिस थाना सै-20 के अवैध हस्तक्षेप को रूकवाया जाए।

(ii) प्रार्थिनी के उक्त मकान पर स्थानीय पुलिस द्वारा कराये गए श्रीमति राखी व उसके पुत्रों आशीष सिंह व आयुष सिंह के अवैध कब्जे को भी तुरन्त हटवाया जाए।

(iii) प्रार्थिनी के साथ घटित मारपीट की घटना दि०-03.03.19 की बावत थाना सैक्टर-20, नौएडा, जिला गौतमबुद्धनगर पर प्रार्थिनी द्वारा दि०-04.03.2019 को दी गई तहरीर व प्रार्थिनी को आयी चोटों के अनुसार समुचित धाराओं में मुकदमा दर्ज करवाकर उपरोक्त लोगो के खिलाफ कानूनी कार्यवाही कराने के लिए उचित निर्देश जारी करने की कृपा की जाए, एवं

(iv) माता पिता एंव वरिष्ठ नागरिक भरण पोषण एंव कल्याण अधिनियम 2007 के तहत प्रार्थिनी, जो 61 वर्षिय वरिष्ठ महिला है व उसके पिता 93 वर्षीय वरिष्ठ नागरिक है, को उचित सुरक्षा व यथोचित न्याय दिलवाने की कृपा की जाए।"

28. We may note that though the allegations have been made against the Station House Officer, Police Station, Sector 20, District Gautam Budh Nagar but he has not been impleaded by name in the present petition. The allegations of mala fide made against the officer concerned during the course of argument based on the assertion in the application before the District Magistrate, therefore, cannot be entertained.

29. In light of the above discussion, considering the object and purpose of the Act, we are of the considered opinion that the prayer for eviction or dispossession of the respondent no. 5 and her two sons from the house-in-question could not have been granted by the District Magistrate in exercise of the powers conferred on him under Rule 21 of the Rules, 2014. The issue of eviction or dispossession of respondent

no. 5 from the house-in-question which is stated to be her matrimonial house can only be examined by a Civil Court in a proper proceeding. The bar under Section 27 of the Senior Citizens Act, 2007 will not be attracted in the instant case. Even otherwise, any such objection, if taken, has to be examined by the competent court in the suit proceeding.

30. Third prayer of the application as noted above, is within the jurisdiction of the criminal court of law under the Code of Criminal Procedure.

31. As far as the last prayer is concerned, the District Magistrate has issued necessary directions to the concerned officer to ensure that no illegal interference is made in the life and property of the applicant/petitioner no. 1 by any person and in case of any such event, appropriate action be taken by the Station House Officer concerned.

32. For the above discussion, the decision of the District Magistrate to reject the application of petitioner no. 1, though on technical ground of maintainability need not be interfered.

33. However, as far as the direction nos. '2' and '3' contained in the order dated 28th June, 2019 passed by the District Magistrate, Gautam Budh Nagar, we find that the direction dated 6.5.2019 having been passed by way of an interim order on the application in question cannot be given effect to after dismissal of the application itself on the ground of being not entertainable. The interim direction dated 6.5.2019 having been merged in the final order of rejection of the application dated 28th June, 2019, cannot survive and cannot be given effect to. The respondent no. 5, therefore, cannot be asked to vacate the accommodation in her possession on the date of filing of the application by the petitioner no. 1 i.e. on 28th June, 2019. Both the parties herein have to maintain the position on the spot as on the date of filing of the application. There shall be no interference in the lives and property of the petitioners or that of respondent no. 5 at the hands of each other, so as to protect the right to life guaranteed to every person under Article 21 of the Constitution of India.

34. For the above discussion, the order impugned dated 28th June, 2019 passed by the District Magistrate, Gautam Budh Nagar is modified to the above extent.

35. It is, however, made clear that the observations in this order hereinabove shall not come in the way of the parties in the regular proceeding in the plenary jurisdiction of Criminal or Civil Court. The parties are free to ventilate their grievances before the competent Court of law which shall deal with the same independently.

36. Subject to the above, the writ petition is **dismissed**.

(2020)12ILR A502
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.11.2020

BEFORE

THE HON'BLE ROHIT RANJAN AGARWAL, J.

Arbitration and Conciliation Application No. 100 of 2019

M/s Vidyawati Construction Co. ...Applicant
Versus
Allahabad Dev. Auth. ...Respondent

Counsel for the Applicant:
Sri Suresh Kumar Maurya, Sri Ashish Kumar

Counsel for the Respondent:
Sri Devi Prasad Mishra, Sri Arun Kumar

A. Civil Law -Arbitration and Conciliation Act (26 of 1996)- Section 2(1)(e),11(4), 11(6) - Appointment of substitute/new Arbitrator - Conjoint application U/ss 11(4) & 11(6) for appointment of substitute/new Arbitrator, when earlier Arbitrator refused to act or abandoned the arbitration proceedings - Section. 14, Failure to act - S. 14 (2) provides, parties, have to apply to the Court to decide on the termination of mandate of the Arbitrator - *Held* - firstly applicant should apply to the principal Civil Court of original jurisdiction in a district in regard to the termination of mandate & thereafter only substitution of Arbitrator can be made - therefore conjoint petition under Section. 11(4) & & 11(6) does not lie & cannot be heard by the Chief Justice or his designate, as a petition u/s 14 lies to the "Court" - since Fora are different a conjoint petition does not lie (Para 27,36)

Development Authority invited tenders for construction of Multi-Storied Complex - Dispute arose in the year 1994 when final bill submitted by contractor not released - arbitration clause was invoked in 1995 & an Arbitrator was appointed - No timeline fixed or agreed between parties within which arbitration proceedings was to be concluded - arbitration proceedings initiated but after 2015, the proceedings were left abandoned at hands of parties - neither of parties approached the "Court" for terminating the mandate of Arbitrator & getting substituted by another Arbitrator in terms of S. 15(2) - after 2015 till 2019 the matter was not pursued with the sole Arbitrator - in the year 2019, concealing that earlier arbitral proceedings initiated in the year 1995 had not come to an end, contractor approached Court for the appointment of Arbitrator under the new Act u/s 11 - Neither any prayer for terminating the mandate of the Arbitrator nor any prayer for the substitution of Arbitrator - Held - applicant after 25 years cannot claim the benefit of the amended provision of Section 11(6A) when once he had already availed the remedy as provided in the agreement & arbitral proceedings were already pending - Applicant has to get the mandate of the earlier Arbitrator terminated in pursuance of Section 14(2) of the Act, as in the eye of law, the earlier proceedings still exist & the mandate of the earlier Arbitrator has not come to an end - No relief can be granted u/s 11(6A) by appointing a new Arbitrator - Application misconceived (Para 31, 41, 42, 48, 49)

B. Civil Law -Arbitration and Conciliation Act (26 of 1996) – Section 11(6A) [as amended by amendment of 2015] - Limitation - After the amendment, all that the courts need to see u/s 11(6A) is whether an arbitration agreement exists- nothing more, nothing less (Para 41)

Application dismissed. (E-5)

List of Cases cited :-

1. Mayavati Trading Pvt. Ltd. Vs Pradyuat Deb Burman 2019(6) Arb.LR 1(SC)

2. Uttarakhand Purv Sainik Kalyan Nigam Ltd. Vs Northern Coalfields Ltd. 2019(6) Arb.LR 237 (SC)

3. Madras Port Trust Vs Hymanshu International AIR 1979 SC 1144

4. M/S Reshma Construction Vs St. of Goa 1998 (3) BomCR 837

5. Deputy Manager (Engg.), & anr. Vs Satyanarayana Contractors Company, Gudivada & ors. 2009(Suppl.2) Arb.LR.222 (AP)

6. Satya & ors. Vs Vidarbha Distillers & ors. AIR 1998 Bom 210

7. Kurup Engineering Company Pvt. Ltd Vs Bharat Heavy Electricals Limited & ors. 2008(2) Arb.LR 290(Delhi)

8. Union of India Vs Singh Builders Syndicate (2009) 4 SCC 523

9. Cinevistaas Limited Vs Prasar Bharati 2008(4) Arb.LR 112 (Delhi)

10. Thyssen Stahlunion GMBH Vs S.A.I.L.. JT 1999 (8) SC 66

11. Ram Shakti Construction Vs Agra Development Authority & anr. 2017(2) ADJ 262

12. Grid Corporation of Orissa Ltd. Vs AES Corporation & ors. 2002 (7) SCC 736

13. Lalit Kumar V. Sanghavi Vs Dharamdas V. Sanghavi 2014 (136) AIC 117 (SC)

14. Nimet Resources Inc. & anr. Vs Essar Steels Ltd. (2009) 17 SCC 313

15. Baghel Infrastructures Pvt. Ltd. Vs N.T.P.C. Ltd. & 3 ors. Arbitration and Concili. Appl. u/s 11(4) No.37 of 2014

16. Duro Felguera, S.A. Vs Gangavaram Port Ltd. (2017) 9 SCC 729

(Delivered by Hon'ble Rohit Ranjan Agarwal, J.)

1. Heard Sri Ashish Kumar, learned counsel for the applicant and Sri Arun Kumar, learned counsel for the respondent-Development Authority.

2. This application under Section 11(4) and 11(6) of Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Act, 1996") has been filed for appointment of an independent Arbitrator, preferably a retired Judge of this Court.

3. Facts, in nutshell, are that on 26.02.1985, Allahabad Development Authority (Now known as Prayagraj Development Authority, for short "Authority") framed a project for construction of Multi-Storey Complex at Clock Tower, Chowk then Allahabad (now Prayagraj). Tender, inviting for construction of Commercial Complex, was issued on the said date. Cost of project was quantified approximately at Rs.57 lakhs. Applicant-Company being the lowest bidder, the bid was accepted on 19.03.1985 and an agreement was entered between the parties on 04.04.1985 for construction of two-storey Commercial Complex, to be completed within six months from the date of commencement. However, at a later date, the said project was changed to four-storey Complex along with one Powerhouse building and the cost was also varied. The contract contains arbitration clause no.46 providing for adjudication of dispute by Arbitrator as per the provisions of Arbitration Act, 1940 (old Act) as well as any statutory modifications thereafter. As per the terms of the agreement, construction was not completed within six months as such period was extended and it was completed on 31.8.1987. The applicant-Company was paid about Rs.1,14,00,000/- out of twelve running bills for amount of Rs.1,14,43,922.01. However final bill was submitted by applicant on 09.12.1989 before the Authority. According to the applicant, as the bill was not cleared by the authority, a Writ Petition No.9086 of 1993 was filed before this Court seeking a writ of mandamus commanding the respondent-Authority to release the final amount of bill. This Court on 21.01.1994 disposed of the writ petition directing the Vice-Chairman of the Authority to decide the claim of applicant-Company within a period of one month from the date on which certified copy of the order is produced before him. On 17.06.1994 the Vice Chairman of the respondent-Authority rejected the claim of the applicant-Company. The applicant-Company on 11.02.1995 sent a letter to the Vice-Chairman of the respondent Authority appointing one Sri R.C.Jain, fellow of Indian Institute of Architect, as an Arbitrator invoking the arbitration clause and requested the Authority to appoint another Arbitrator in terms of the Clause 46, and in case the Authority fails to appoint Arbitrator within 15 days, the Arbitrator appointed by the applicant shall adjudicate the dispute between the parties as sole Arbitrator. On 06.02.1995, the Vice

Chairman of the Authority informed the applicant that the matter had already been decided and the claim of the applicant has been rejected on 17.06.1994, thus question of appointing Arbitrator does not arise.

4. The applicant Company on 07.02.1996 submitted 18 claims before the Arbitrator, who issued notice to the Authority on 14.04.1996, but the Authority neither appeared before the Arbitrator nor filed the reply. Various dates were fixed by the sole Arbitrator Sri R.C.Jain as 14.02.1997, 12.4.1997, 23.4.1997 and 24.4.1997 for hearing the matter. The sole Arbitrator could not give the award within the statutory period, as such an application was filed for extension of time before the Court under Section 28 of the Arbitration Act, 1940 (old Act). The Court extended the period with the condition that award be given by 3rd June, 1997. Arbitrator thereafter fixed 19.05.1997 for hearing and award was delivered on 23.05.1997 for a sum of Rs.1,17,91,714/- as principal and interest on Rs.88,12,763/- at the rate of 18% from the date of award till decree or payment whichever is earlier.

5. The said award was submitted before Civil Judge (Senior Division) Allahabad for making the award Rule of the Court, and an application was registered as Suit No.327 of 1997. The Authority filed objection under Section 30/33 of the Arbitration Act, 1940 (old Act), which was registered as Case No.395 of 1997. The Court below made the award Rule of the Court and rejected the objection of the Authority vide judgment and order dated 24.05.1999.

6. The Authority thereafter filed First Appeal From Order No.1072 of 1999 before this Court challenging the order dated 24.5.1999. This Court on 20.9.2001 while allowing the appeal of the Authority, set aside the order of the Court below dated 24.5.1999 as well as award of the Arbitrator dated 23.05.1997 and remitted back the matter to the Arbitrator to take decision afresh in view of the observation made in the said order. This order was challenged by the applicant before Hon'ble Apex Court and vide judgment dated 09.04.2008 the Apex Court dismissed the Civil Appeal No.4027 of 2002. Against the said order, a Review Petition No.13735 of 2008 was preferred by the applicant which was also dismissed by the Apex Court on 20.08.2008. After dismissal of the Civil Appeal as well as Review Petition, the applicant approached the Arbitrator on 18.09.2008 for starting up arbitration proceedings as per the remand order of this Court dated 20.09.2001.

7. The applicant has brought on record through second supplementary affidavit some of the correspondence made by him to the Arbitrator on 30.10.2008, 27.12.2008, 25.01.2009, 31.03.2009, 26.10.2009, 04.02.2010, 10.07.2010, 02.09.2010, 16.03.2011, 14.06.2011, 22.03.2012, 30.08.2012, 04.12.2012, 02.08.2013, 02.09.2013, 23.12.2013 and reminder dated 28.07.2014 for fixing date for hearing. Further, few receipts of the years 2009, 2011 and 2015 have been brought on record as Annexure-2 to the second supplementary affidavit demonstrating that the reminders were sent to the sole Arbitrator Sri R.C. Jain for fixing date. All these facts regarding earlier appointment of Arbitrator by the applicant in the year 1996, as well as award of the year 1997 and the award being made Rule of the Court on 24.05.1999 and they being challenged by the Authority before this Court in Appellate jurisdiction has not been

disclosed by the applicant in his application under Section 11 (4) and 11 (6) of the Act, 1996. It is only when the Authority filed its counter affidavit and disclosed the fact, that the applicant had filed the first and second supplementary affidavit bringing on record the facts that earlier the sole Arbitrator appointed at their instance, the award was pronounced in the year 1997 and the same which was made Rule of the Court was set aside by this Court on 20.09.2001, was ultimately challenged before the Apex Court and after the dismissal of the Civil Appeal and Review Petition on 09.04.2008 and 20.08.2008, the applicant approached the sole Arbitrator for rehearing of the matter.

8. Furthermore, the applicant invoked the Arbitration clause on 12.08.2019 seeking an appointment of the Arbitrator.

9. Sri Ashish Kumar, learned counsel appearing for the applicant submitted that this application under Section 11 (6) be read with Sections 14 and 15 of Act, 1996 as when earlier Arbitrator refused to act or abandoned the arbitration proceedings, a substitute or new Arbitrator be appointed. He further submitted that earlier Arbitrator, Sri R.C. Jain was appointed as a nominee Arbitrator on behalf of the applicant and when the Authority refused to appoint another Arbitrator in terms of Clause 46, Sri Jain proceeded as sole Arbitrator.

10. The second limb of the argument is that the Arbitration Clause 46 provides for any statutory modification, and as the new Arbitration and Conciliation Act came in the year 1996 is applicable, and thereafter amendment of 2015 as per Section 11 (6A), the Court can only examine the issue with relation to existence of Arbitration Clause and the issue of limitation will be left to be decided by the Arbitrator. The present claim of the applicant is not barred by limitation as the applicant had invoked Arbitration Clause on 11.02.1995 i.e. within time after the rejection of application by Vice Chairman of the Authority on 17.06.1994. It is also contended that as far as remand of the matter back to Arbitrator is concerned, the order dated 20.09.2001 passed by this Court had attained finality by the Apex Court, and as the Arbitrator did not decide the issue and had abandoned, thus, the mandate of the Arbitrator stood terminated and Court has to appoint a substitute/new Arbitrator.

11. Lastly, it was contended that though the arbitration proceedings commenced under the old Act of 1940, but the new Act of 1996 would be applicable as is clear from Clause 46 which provides that any statutory modification will be applicable to the arbitration proceedings and thus it is saved by Section 85(2)(a) of the Act, 1996.

12. Reliance has been placed upon decisions of Apex Court in the case of **Mayavati Trading Pvt. Ltd. vs. Pradyuat Deb Burman 2019(6) Arb.LR 1(SC), Uttarakhand Purv Sainik Kalyan Nigam Limited vs. Northern Coalfields Limited 2019(6) Arb.LR 237 (SC)** and **Madras Port Trust vs. Hymanshu International AIR 1979 SC 1144** on the question of limitation.

13. On the question of applicability of old or new Act, reliance has been placed upon the decisions in case of **M/S Reshma Construction vs. State of Goa 1998 (3) BomCR 837 and Deputy Manager (Engg.), & Another vs. Satyanarayana Contractors Company, Gudivada & others 2009(Suppl.2) Arb.LR.222 (AP).**

14. As far as appointment of substitute/new Arbitrator is concerned, reliance has been placed on decisions in the case of **Satya and ors. vs. Vidarbha Distillers and others AIR 1998 Bom 210; Kurup Engineering Company Pvt. Ltd. vs. Bharat Heavy Electricals Limited and others 2008(2) Arb.LR 290(Delhi); Union of India vs. Singh Builders Syndicate 2009(4) SCC 523 and Cinevistaas Limited vs. Prasar Bharati 2008(4) Arb.LR 112 (Delhi).**

15. Per contra, Sri Arun Kumar, counsel appearing for the Authority submitted that this application under Section 11(4) and 11(6) of the Act, 1996 has been filed concealing the relevant material facts from the Court. It is submitted that it is a dead claim of the applicant and remedy of arbitration has already been exhausted after an Arbitrator was appointed under the old Act. He further submitted that vide order dated 17.6.1994 the Vice Chairman after hearing the applicant and Executive Engineer had held that the applicant was not entitled for any outstanding against him. Moreover, a sum of Rs.3,79,552.23 had to be returned by the applicant to the Authority. It is further contended that after dismissal of the Review Petition by the Apex Court in the year 2008, the applicant had written to the sole Arbitrator for the first time on 18.9.2008 and no communication has been made after 11.3.2015 as per the documents filed by the applicant along with second supplementary affidavit. Thus, after about 12 years from the date of decision of Apex Court, the applicant has approached this Court for the appointment of Arbitrator under the new Act invoking the clause in the year 2019 concealing the earlier arbitration proceedings.

16. It is contended by counsel for the respondent that proceedings initiated under the old Act, which has commenced prior to the coming of the new Act shall be held as per the provisions of old Act and reliance has been placed upon decision of Apex Court in the case of **Thyssen Stahlunion GMBH vs. Steel Authority of India Ltd. JT 1999 (8) SC 66**. He further contended that in view of provisions of Section 16(3) of the old Act, an award remitted by the Court to the Arbitrator for reconsideration shall become void on the failure of the Arbitrator to reconsider it and submit his decision within the time fixed. As no time was fixed while the matter was remitted back, thus the award has to be made considering the provisions of Section 3 of the old Act read with first Schedule under which the Arbitrator is required to make his award within four months.

17. Lastly it was contended that though the Apex Court had held that while deciding application under Section 11(4) and 11(6) of the new Act the Court is empowered to see only whether an arbitration agreement exist, but before appointing an Arbitrator, Court can look into the maintainability of fresh proceedings under the new Act when proceedings under the old Act has already been initiated though had not been decided. Reliance has been placed upon decision of this Court in the case of **M/s Ram Shakti Construction vs. Agra Development Authority and another 2017(2) ADJ 262** where the Court held that it is imperative that a satisfaction is arrived that live claim exist which could be arbitrated upon.

18. I have heard counsel for the parties and perused the material on record.

19. This is an application under Section 11(4) and 11(6) of Act, 1996 for appointment of Arbitrator invoking the

arbitration clause 46 as contained in agreement dated 04.04.1985 entered between the parties. According to para 20 of the affidavit to the application, arbitration clause was invoked on 12.8.2019 for the appointment of an independent Arbitrator.

20. It is not disputed by the applicant that at the time of filing of the application under Section 11(4) and 11(6) of the new Act, the entire facts of the case was not disclosed by him and simplicitor it was alleged that there existed a dispute between the parties and pursuant to Clause 46 of the agreement arrived in the year 1985 between them, an Arbitrator be appointed. It was when the counter affidavit was filed by the Authority, the true picture revealed and it was brought to the notice of the Court that earlier round of arbitration proceedings had been initiated and held at the behest of the applicant. It is also not in dispute that the applicant had himself approached this Court through Writ No.9086 of 1993 for the release of his final bill, and on 21.01.1994 direction was issued to the Vice Chairman of the Authority to decide the claim of the applicant. It is also not in dispute that on 17.6.1994 the claim was rejected by the Development Authority thereafter the arbitration Clause 46 was invoked appointing one Sri R.C.Jain, who proceeded to adjudicate upon the dispute as sole Arbitrator. An award was made on 23.5.1997 which was subsequently made Rule of the Court on 24.5.1999. Till this stage the respondent-Authority never appeared before Arbitrator, but the order making award Rule of the Court as well as award was challenged by the Authority through F.A.F.O. No.1072 of 1999 which was allowed on 20.9.2001, and the mater was remitted back to the Arbitrator for decision afresh with certain observations. As the matter was carried to the Apex Court at the behest of the applicant, Civil Appeal of the applicant was dismissed on 09.04.2008 and Review Petition was also rejected on 20.8.2008. During this period, new Arbitration and Conciliation Act, 1996 came into force which provided for repeal and saving clause in Section 85 of the Act.

21. It is also not in dispute that after dismissal of the appeal by Apex Court the applicant had approached the Arbitrator Sri R.C.Jain on 18.9.2008, for hearing of the matter afresh in view of the remand order passed by this Court. It appears that the applicant continued to request the sole Arbitrator till the year 2015 for fixing date in the matter at regular intervals, but after 2015 till 2019 the matter was not pursued with the sole Arbitrator, and in the year 2019, a fresh notice was given to the respondent Authority invoking the arbitration clause and the present application being filed for the appointment of a new Arbitrator.

22. However, during exchange of pleadings the applicant has tried to improve upon his case by filing supplementary affidavit disclosing the earlier sequence of arbitral proceedings initiated by him and held before Arbitral Tribunal of Sri R.C.Jain and various orders passed by this Court and the Apex Court. Further through rejoinder affidavit the applicant has tried to built up a case for substitution of an Arbitrator in terms of Sections 14 and 15 of new Act as the mandate of the Arbitrator stood terminated in view of Section 14(1)(a), as he was unable to perform his function or has failed to act without undue delay. But the original application under Section 11(4) and 11(6) was never amended to bring the facts, and the prayer was made through various supplementary affidavits and rejoinder affidavit.

23. It is no doubt true that mere mentioning of incorrect provision or not mentioning any provision under which the application is filed would not oust the jurisdiction of the Court or the relief claimed by the parties, but the pleadings made in the application discloses the intention of the application which is for appointment of new Arbitrator and not for substitution.

24. The argument raised on behalf of the applicant has now to be tested on the touchstone of Sections 14 and 15 of the amended Act, which are extracted as under:

"14. Failure or impossibility to act.- (1) The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if--

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

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

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

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

15. Termination of mandate and substitution of arbitrator.- (1) In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate--

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

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

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal."

25. Now, coming to Section 14 of the Act, it mandates that authority of an Arbitrator shall terminate on two conditions being satisfied, firstly he becomes de jure or de facto unable to perform his functions or he fails to act without undue delay. The second condition is when the Arbitrator withdraws from the office or the parties agreed to the termination of his mandate.

26. In such a situation, if the parties unless agree, have to apply to the Court to decide on the termination of mandate of the Arbitrator, in terms of sub-section (2) of Section 14.

27. The corresponding provision was there under Section 8(1)(b) and Section 11 of the 1940 Act (old Act). Thus, the party aggrieved has to approach to the "Court' as defined under Section 2(1)(e) of the Act, which means the principal Civil Court of

original jurisdiction in a district. Thus a conjoint reading of Section 11(4) and Section 14 clarify that a petition does not lie and can be heard by the Chief Justice or his designate as a petition under Section 14 lies to the "Court" since Fora are different. A conjoint petition does not lie, this was held by Hon'ble Apex Court in the case of Grid Corporation of Orissa Ltd. Vs. AES Corporation & Ors. 2002 (7) SCC 736.

28. **In Lalit Kumar V. Sanghavi v. Dharamdas V. Sanghavi 2014 (136) AIC 117 (SC)** it was held that an application under Section 14(2) of the Act for decision on termination of the mandate of an Arbitrator lies only before the "Court" as defined in Section 2(1)(e) of the Act.

29. While dealing with somewhat similar situation, the Supreme Court had appointed an Arbitrator on application under Section 11(5) and (6) of the Act, held that application under Section 14(2) of the Act was not maintainable before the Supreme Court for terminating the mandate of an Arbitrator, as jurisdiction which the Chief Justice or his designate exercises under Section 11(6) of this Act is limited and it becomes functus officio after exercising the same (**Nimet Resources Inc. and Another vs. Essar Steels Ltd. (2009) 17 SCC 313).**

30. The Apex Court held that there is no automatic termination of the mandate of an Arbitrator on the alleged ground of his failure to act without undue delay, and it is the Court which will have to resolve the dispute whether the Arbitrator had failed to act without undue delay. In case the Arbitrator fails to conclude arbitration proceedings within fixed timeline agreed between the parties and the same having not been extended, the mandate of the Arbitrator automatically terminates.

31. In the present case, there was no timeline fixed or agreed between the parties within which the arbitration proceedings was to be concluded and from the conduct of the parties, it appears that after 2015, the proceedings were left abandoned at the hands of the parties and neither of them approached the "Court" as defined under Section 2(1)(e) for terminating the mandate of Arbitrator and getting substituted by another Arbitrator in terms of subsection (2) of Section 15.

32. Prior to 23.10.2015, Section 14 read as under :

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

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

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

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

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

33. Thus, post amendment Section 14 of Act, 1996 was amended to the extent that on failure on part of Arbitrator as provided under sub-section (1) of Section 14 the party unless otherwise agreed between them, apply to the Court to decide on termination of mandate and he shall be

substituted by another Arbitrator, which earlier did not find place in the unamended provisions of Section 14.

34. Reverting back to the dispute between the parties, it is evident from the conduct of the applicant that his approach towards getting the matter resolved through arbitration proceedings was very casual, as the party has to approach the Court where Arbitrator fails to act without undue delay. In the present case, no effort was made for about 12 years in getting the mandate of an Arbitrator terminated.

35. While dealing with Section 15(2), this Court in case of **Arbitration and Concili. Appl. u/s 11(4) No.37 of 2014 (Baghel Infrastructures Pvt. Ltd. Vs. N.T.P.C. Ltd. And 3 Ors**) decided on 10.11.2014 held as under :

If an arbitrator refuses to act as an arbitrator, a substitute arbitrator would be appointed in his place under sub-section (2) of Section 15, except where the intention of the parties was to refer the disputes to arbitration by a particular person only.

"Rules" referred to in Section 15(2) would refer not only to any statutory rules or rules framed under the Act or under the Scheme, but also mean that substitute arbitrator must be appointed according to the original agreement or provision applicable to the appointment of the arbitrator at the initial stage. (Yashwitha Construction (P) Ltd. vs. Simplex Concrete Piles India Ltd.8).

In National Highways Authority of India vs. Bumihiway D.D.B. Ltd.9, Supreme Court held that provisions of Section 15(2) states that a substitute arbitrator shall be appointed according to the rules applicable to the appointment of arbitrator being replaced. Appointment of retired Chief Justice by the High Court under Section 11(6) was set aside and directions was given that India Road Congress be approached as per the agreed procedure to appoint the arbitrator.

The applicant has not challenged the appointment of the arbitrator, but submits that once the application under section 11 has been filed, the respondent have lost their right to appoint any arbitrator, is wholly misconceived.

In the facts of the present application, the arbitrator was already appointed and on his resignation another arbitrator has been appointed as per the terms and conditions of the agreement, the application which is ostensibly moved under section 11 of the Arbitration and Conciliation Act to terminate the mandate of the earlier arbitrator, is misconceived and not maintainable.

Since the application is not maintainable accordingly dismissed.

36. After careful consideration of Sections 14 and 15 of the Act as well as the law laid down by the Apex Court it is clear that the applicant should apply to the "Court' in regard to the termination of mandate and the substitution of Arbitrator can only be made in pursuance thereof.

37. The other point canvassed by the counsel that in view of the amended provisions of Section 11(6A), this Court cannot go into the question of limitation and only on the basis of existence of the arbitration clause, will appoint Arbitrator.

38. It is no doubt correct that after 2015 amendment the Court is only empowered to see the existence of an arbitration clause as held by the Apex Court in the case of Duro Felguera, S.A. vs.

Gangavaram Port Limited (2017) 9 SCC 729. Relevant paras 48 and 59 read as under :

"48. Section 11(6-A) added by the 2015 Amendment, reads as follows:

"11(6-A) The Supreme Court or, as the case may be, the High Court, while considering any application Under Sub-section (4) or Sub-section (5) or Sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement." (emphasis supplied)

From a reading of Section 11(6A), the intention of the legislature is crystal clear i.e. the Court should and need only look into one aspect-the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple-it needs to be seen if the agreement contains a Clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.

..

59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. vs. Patel Engg. Ltd., (2005) 8 SCC 618 and National Insurance Co. Ltd. vs. Boghara Polyfab (P) Ltd. (2009) 1 SCC 267. This position contained till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists- nothing more, nothing less. The legislative policy and purpose is essentially to minimise the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respect."

39. This judgment was followed by the Apex Court in case of Mayavati Trading Pvt. Ltd. (supra), in which in para 10, Court held as under :

"This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgment as Section 11(6A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment in Duro Felguera, S.A.- see paras 48 and 59."

40. However, in case of Uttarakhand Purv Sainik Kalyan Nigam Limited (supra) the Apex Court while approving Section 11(6A) in para 9.9, held as under :

"9.9. The doctrine of "Kompetenz-Kompetenz", also referred to as "Compétence-Compétence", or "Compétence de la recognized", implies that the arbitral tribunal is empowered and has the competence to rule on its own jurisdiction, including determining all jurisdictional issues, and the existence or validity of the arbitration agreement. This doctrine is intended to minimize judicial intervention, so that the arbitral process is not thwarted at the threshold, when a preliminary objection is raised by one of the parties.

The doctrine of kompetenz-kompetenz is, however, subject to the exception i.e. when the arbitration agreement itself is impeached as being procured by fraud or deception. This exception would also apply to cases where the parties in the process of negotiation, may have entered into a draft agreement as an antecedent step prior to

executing the final contract. The draft agreement would be a mere proposal to arbitrate, and not an unequivocal acceptance of the terms of the agreement. Section 7 of the Contract Act, 1872 requires the acceptance of a contract to be absolute and unqualified. [Dresser Rand SA vs. Bindal Agro-Chem Ltd. (2006) 1 SCC 751=2006(1)Arb.LR 171 (SC)=2006 SCACTC 15(SC);See also Bharat Sanchar Nigam Ltd. vs. Telephone Cables Ltd., (2010) 5 SCC 213=2010(4) Arb.LR 218 (SC)=2010 SCACTC 113 (SC);Refer to PSA Mumbai Investments PTE Ltd. vs. Board of Trustees of the Jawaharlal Nehru Port Trust & Anr. (2018) 10 SCC 525=2018(5) Arb.LR 185 (SC).] If an arbitration agreement is not valid or non-existent, the arbitral tribunal cannot assume jurisdiction to adjudicate upon the disputes. Appointment of an arbitrator may be refused if the arbitration agreement is not in writing, or the disputes are beyond the scope of the arbitration agreement.

Article V(1)(a) of the New York Convention states that recognition and enforcement of an award may be refused if the arbitration agreement "is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made'."

41. Thus from the reading of the amendment brought in the year 2015 through Section 11(6A), the words existence of an arbitration clause has to be seen and nothing more or nothing less is to be seen by the Court which has now the approval of the Apex Court through the above judgments. But in the present case the dispute arose in the year 1994 when the claim of the applicant Company was rejected by the respondent- Development Authority and the arbitration clause was invoked in 1995 and an Arbitrator was appointed. Thus, the applicant after 25 years cannot come and claim the benefit of the amended provision of Section 11(6A) when once he had already availed the remedy as provided in the agreement clause 46 and the matter had travelled up to the Apex Court and his Review Petition being rejected on 20.8.2008.

42. In the present case, arbitral proceedings were already pending, when the application under Section 11 was moved. It was only after exchange of pleadings that relief was tried to be moulded by the applicant for terminating the mandate of earlier Arbitrator and he be substituted by another Arbitrator.

43. As already discussed above, the remedy lies under Section 14(2) of the Act, where the party has to approach the "Court" for getting the mandate terminated and no conjoint petition under Section 11 and 14 can be filed in view of decision of the Apex Court in case of **Grid Corporation of Orissa Ltd. (supra).**

44. The second point canvassed by the applicant's counsel as to the applicability of the new Act, which came into force in the year 1996 and subsequent amendments made in 2015 being applicable in the present case as Clause 46 of the agreement mandated for statutory modification, thus the Court can only examine issue in relation to existence of arbitration clause and any other issue to be decided by the Arbitrator cannot be accepted in entirety. In the present case though the new Act is applicable as it is saved by Clause 46 read with Section 85(2)(a) of the Act of 1996, but as arbitral proceedings were already on and the matter being remitted by this Court on 20.09.2001,

the applicant did not make any effort to get the mandate of the Arbitrator terminated without undue delay.

45. As already held above, the applicant has to get the mandate of the Arbitrator terminated in pursuance of Section 14(2) of the Act and no relief can be granted to him as claimed under Section 11(6A) of the Act by appointing a new Arbitrator pursuant to the notice dated 12.8.2019 invoking arbitration clause 46 de novo, while the mandate of the earlier Arbitrator has not come to an end.

46. It is pertinent to mention at this juncture that Section 32 of 1996 Act provides for termination of proceedings. According to sub-section (1) of Section 32, arbitral proceedings stands terminated by final arbitral award or by order of Arbitral Tribunal under sub-section (2). Sub-section (2) envisages contingencies where an order is issued by the Tribunal terminating arbitral proceedings, in case claimant withdraws his claim, the parties agree on the termination of the proceedings or where the arbitral Tribunal finds continuation of the proceedings has for any other reason become unnecessary or impossible. Sub-Section (3) of Section 32 provides that mandate of Arbitral Tribunal shall terminate with the termination of arbitral proceedings, meaning thereby that unless and until the arbitral proceedings are concluded, the mandate of Arbitral Tribunal does not come to an end.

47. But the termination of mandate of the Arbitrator, as provided under Section 14 is different from the termination of arbitral proceedings. Though mandate of an Arbitrator can be terminated but that would not mean that the arbitration proceedings have also terminated. In the present context, neither the earlier arbitration proceedings had concluded nor any effort was made by the applicant to get the mandate of the Arbitrator terminated from the "Court".

48. Thus the provisions of Section 11(6A) of the Act cannot be pressed into by the applicant, as in the eye of law, the earlier proceedings still exist and no new Arbitrator can be appointed by mere fresh invocation of clause 46. The argument raised is a fallacy and cannot be accepted.

49. It has never been the intention of legislature or the various decisions rendered by the Apex Court that Section 11(6A) will come into play in those cases in which the arbitral proceedings had already commenced under the old Act and continued under the Act 1996, that a new Arbitrator is appointed and the Court will not consider the earlier proceedings which had taken place in regard to the same agreement and will proceed to appoint a new Arbitrator.

50. Reliance placed by learned counsel on the question of appointment of Arbitrator in case of Satya and others (surpa), Kurup Engineering Company Pvt. Ltd. (supra), Singh Builders Syndicate (supra) and Cinevistaas Limited (supra) are not applicable in the present case as this application under Section 11 has been filed seeking invocation of the arbitration clause 46 in the year 2019 without disclosure that already arbitral proceedings had been set in motion on the behest of the applicant himself in the year 1996, in which the mandate of the Arbitrator was never terminated by the competent Court at the behest of the parties.

51. The claim of applicant that the Arbitral Tribunal did not proceed after

2008 without undue delay and having lost its mandate can only be adjudicated upon by the Court, and only after that a new Arbitral Tribunal can be substituted by appointment of another Arbitrator.

52. It is the applicant who for last 12 years never took any initiative for getting the mandate terminated and in present proceedings also concealment to the said effect that the mandate of Arbitral Tribunal stood terminated was never raised in the application itself.

53. No benefit can be extended to the applicant on the decision relied upon by him as the present case is totally distinguishable and the applicant had himself abandoned the arbitral proceedings after 2015 and no initiative was taken by him without undue delay in approaching the "Court" as defined in Section 2(1)(e) and the present application has been filed under Section 11 before this Court for initiation of fresh arbitral proceedings.

54. The word used in Section 14(1)(a) "undue delay" means that the dispute between the parties had to be resolved in the time prescribed in the agreement, time agreed between the parties or at the earliest without going into the legal technicalities as the same would frustrate the object of the Act. The applicant himself is also guilty to the extent in not approaching the Court for getting the mandate terminated without undue delay and no explanation has either been put forward by him to explain this inordinate delay of 12 years in getting a substitute Arbitrator appointed for deciding the matter afresh.

55. As already pointed out by learned counsel for the respondent that applicant is trying to give life to a dead claim, which cannot be arbitrated upon. Section 16(3) of the 1940 Act (old Act) provides that in case the Court remits the award to Arbitrator or umpire for reconsideration, award shall become void on failure of the Arbitrator or umpire to reconsider it and submit his decision within time fixed.

56. Section 3 of the first schedule to the old Act provides the time limit of four months within which the Arbitrator after entering on the reference has to make the award. As it is evident that after the review petition was rejected, the applicant had approached the Arbitrator on 18.9.2008 but arbitral proceedings did not commence nor any effort was made to get the mandate terminated. The argument raised by learned counsel for the respondent that proceedings shall continue according to the old Act cannot be accepted as Clause 46 clearly provides that Arbitration Act, 1940 or the statutory amendment made therein shall be applicable between the parties in case of dispute. The dispute, which started in the year 1995 was carried after the amendment in 1996 and the proceedings were decided as per the new Act. Further saving clause 85(2)(a) also provides that the new Act shall apply to arbitral proceedings which had commenced before this Court unless otherwise agreed by the parties. However, in the present case the parties had already agreed to submit as per the amended provisions of 1940 Act, meaning thereby that the new Act is applicable in the present dispute.

57. I have carefully considered the rival submission of the parties and the material on record and find that the application, which has been ostensibly moved under Section 11 of the Act, 1996 for appointment of Arbitrator invoking arbitration clause in the year 2019 does not

warrant any interference of this Court as the applicant had completely failed to disclose that earlier arbitral proceedings in regard to the dispute which was initiated in the year 1996 had not come to an end, neither any prayer has been made for terminating the mandate of the Arbitrator nor any prayer has been made for the substitution of Arbitrator and simplicitor the application under Section 11 has been moved invoking the arbitration clause 46.

58. This Court does not find any need to interfere, as this application is totally misconceived and is hereby dismissed.

(2020)12ILR A516
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.12.2020

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Arbitration and Conciliation Application No. 118 of 2020

M/s Three Star Engineering Works Pvt. Ltd. ...Applicant
Versus
Diesel Locomotives Works Varanasi & Anr. ...Respondents

Counsel for the Applicant:
Sri Aditya Pandey, Sri Arvind Sikariya

Counsel for the Respondents:
Sri Rajnish Kumar Rai

A. Civil Law -Arbitration and Conciliation Act (26 of 1996) - Section 12(5) - proviso - Waiver of ineligibility prescribed in Section 12 (5) - In view of Section 12(5) read with Seventh Schedule (i) a person who is disqualified cannot be appointed as an Arbitrator unless there is an agreement in writing with regard to the specific named Arbitrator; (ii) the said agreement in writing should be subsequent to the arising of the dispute in between the parties; (iii) and such agreement in writing should be in conformity with Section 9 of the Contract Act - General Conditions of Contract (in short 'GCC') - Clause 64 - *Held* - Clause 64 of the GCC is in not an express agreement in writing in conformity with Section 9 of the Contract Act and is also not subsequent to the arising of dispute, as such, the procedure prescribed therein would also having no applicability (Para 15)

B. Civil Law -Arbitration and Conciliation Act (26 of 1996)- Section 11 (4) - Appointment of Neutral Arbitrator - If a party fails to appoint an arbitrator within *thirty days* from the receipt of a request to do so from the other party the appointment shall be made, upon request of a party, by Court - *Held* - mandate of S. 11 (4) is extremely clear, time for appointment of Arbitrator is only restricted to 30 days (Para 15)

Agreement entered into between the parties - certain amounts were not paid, as such, a dispute arose between the parties - on 1.10.2020, applicant requested the Opposite Parties to appoint arbitrator- as no Arbitrator was appointed within a period of 30 days as mandated under Section 11 (4) of the Act - then the applicant approached High Court for appointment of an Arbitrator – Opposite party argued that on 3.12.2020, one retired employee of the railways has been appointed as an Arbitrator thus application liable to be rejected - Held - Appointment of retired employee of the railways is not valid appointment - As, no Arbitrator was appointed in terms of the request made on 1.10.2020 within a period of 30 days, as mandated under Section 11 (4) of the Act, applicant is right in approaching Court for appointment of an Arbitrator U/ss 11 (4) & 11 (6) of the Act - Court appointed retired judge as Arbitrartor.

Application allowed. (E-5)

Listed of Cases cited: -

1. Central Organisation for Railway Electrification Vs M/s Eci-SPIC-SMO-MCML (JV),

A Joint Venture Company dt 17.12.2019 Civil Appeal Nos. 9486-9487 of 2017 (arising out of the SLP (C) Nos. 24173-74 of 2019)

2. Bharat Broadband Network Limited Vs United Telecoms Limited, (2019) 5 SCC755

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Instructions produced before this Court today is taken on record.

2. Present application has been filed seeking appointment of a neutral Arbitrator in terms of the powers vested in this Court by virtue of Section 11 (6) of the Arbitration and Conciliation Act, 1996 (in short 'the Act').

3. The averments, in brief, are that Opposite Parties through tender invited bid for maintenance contract of EOT Cranes, DSA and EOT Track Measurement and Repairing with Spares. In pursuance to the said tender, the applicant also gave his bid and was declared successful. Subsequently, a Letter of Acceptance was issued by the Opposite Parties and subsequent thereto, an agreement was entered into between the parties on 18.4.2015. A copy of the agreement is filed as Annexure-3. Arbitration clause is provided under Condition No. 26 of the tender document, which is as under;

"26.1 In the event of any question, dispute or difference arising under these conditions or any special conditions of contract, or instructions to tenderers or in connection with this contract (except as to any matter the decision of which is specifically provided for by these conditions or instructions to tenders or the special conditions) the same shall be referred to the sole arbitration of a Gazetted Railway Officer appointed to be the Arbitrator however, will not be one of those who had an opportunity to deal with the matters to which the contract relates or who in the course of his duties as a Railway servant had expressed views on all or any of the matters under dispute or difference. The award of the arbitrator shall be final and binding on the parties to this contract.

26.2 In the event of the arbitrator dying neglecting or refusing to act, or resigning or being unable to act for any reason or his award being set aside by the court for any reason, it shall be lawful for the authority appointing the arbitrator to appoint another arbitrator in place of the out going arbitrator in the manner aforesaid.

26.3 It is further a term of this contract that no person other than the persons appointed by the authority as aforesaid should act as arbitrator and that if for any reason that is not possible the matter is not to be referred to arbitration at all.

26.4 The arbitrator may from time to time with the consent of all the parties to the contract enlarge, the time for making the award.

26.5 Upon every and any such reference, the assessment of the cost incidental to the reference and award respectively shall be at the discretion of the arbitrator.

26.6 Subject to as aforesaid, the Arbitration Act 1940 and the rules there under and any statutory modification thereof, for the time being in force, shall be deemed to apply to the arbitration proceedings under this clause.

26.7 Work under the contract, if reasonably possible if so decided by the Engineer, may continue during the arbitration proceedings and no payment due to or payable by the Engineer shall be with held on account of such proceedings.

26.8 The venue of arbitration shall be the place from which the contract is issued, or such other place as the arbitrator at his discretion may determine.

26.9 In this clause the authority to appoint the arbitrator includes, if there be no such authority, the offer, for the time being discharging the functions of that authority, whether in addition to other, functions or otherwise."

4. The contention is that after the completion of the contract, certain amounts were not being paid, as such, a dispute arose between the parties and pursuant to the arbitration clause, a request was made on 31.8.2020 for payment of the due amount along with the request that in case the payment was not being made, the matter may be referred before the Arbitrator in terms of the arbitration clause.

5. The applicant claims that once again he was informed vide letter dated 23.9.2020 that no claims are pending and all the claims have been forfeited by the Opposite Parties. Certain other allegations were also levelled against the applicant.

6. The applicant claims that once again on 1.10.2020, the applicant requested the Opposite Parties that as dispute has arisen between the parties, the matter may be referred to the arbitration as per the arbitration clause in the agreement. It is stated that as no Arbitrator was appointed in terms of the request so made on 1.10.2020 within a period of 30 days as mandated under Section 11 (4) of the Act and thus, the applicant has approached this Court for appointment of an Arbitrator.

7. Sri Rajnish Kumar Rai, Advocate appearing on behalf of Opposite Parties, on instructions, states that on 3.12.2020, one Sri Harsh Kumar, a retired employee of the railways has been appointed as an Arbitrator in terms of the request of the applicant dated 1.10.2020 and thus, this application is liable to be rejected. He further argues that agreement in question includes the General Conditions of Contract (in short 'GCC') which provides for a manner of appointment of arbitrator.

Clause 64 of the GCC is quoted as under:

Clause 64. (1): Demand for Arbitration:

64. (1) (i) In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to, or if the Railway fails to make a decision within 120 days, then and in any such case, but except in any of the "excepted matters" referred to in Clause 63 of these Conditions, the contractor, after 120 days but within 180 days of his presenting his final claim on disputed matters shall demand in writing that the dispute or difference be referred to arbitration.

64. (1) (ii) (a) The demand for arbitration shall specify the matters which are in question, or subject of the dispute or difference as also the amount of claim item-wise. Only such dispute or difference, in respect of which the demand has been made, together with counter claims or set off, given by the Railway, shall be referred to arbitration and other matters shall not be included in the reference.

64. (1) (ii) (b) The parties may waive of the applicability of sub-section 12

(5) of Arbitration and Conciliation (Amendment) Act, 2015. If they agree or such waiver in writing after having arisen between them in the formation under Annexure XII of these conditions."

"64. (3) Appointment of Arbitrator:

.....

64. (3) (a) (ii) In case not covered by the Clause 64(3)(a)(i), the Arbitral Tribunal shall consist of a Panel of three Gazette Railway Officers not below JA Grade or two Railway Gazette Officers not below JA Grade and a retired Railway Officer, retired not below the rank of SAG officer, as the arbitrators. For this purpose, the railway will send a panel of at least four (4) names of Gazette Railway Officers of one or more departments of the Railway which may also include the name(s) of retired Railway Officer(s) empanelled to work as railway Arbitrator to the contractor within 60 days from the day when a written and valid demand for arbitration is received by the GM.....".

8. On the strength of the said clause as referred above, Sri Rajnish Kumar Rai argues that in terms of the proviso to Section 12(5) of the Act, once there is an express waiver the bar contained under Section 12(5) of the Act would not apply. He further fortifies his submission to state that retired employees would not fall within the rigours of Section 12 (5) of the Act as they are included in the panel of Arbitrators and in terms of the GCC, there is an express agreement with regard to the appointment of the retired employees and thus, the contention of counsel for the applicant does not merit acceptance.

9. Sri Rajnish Kumar Rai submits that the Diesel Locomotives Works (in short DLW) is an organisation within the Indian Railways and is governed by the Indian Railways. He further submits that the proposed Arbitrators are the retired employees of railways and do not stand disqualified by virtue of Clause 1 of the Seventh Schedule read in consonance with Sections 12 (1) and 12 (5) of the Act, to which the counsel for the applicants submits that the proposed Arbitrator would clearly fall within scope of Clause 1 of the Seventh Schedule as he is an retired employee with the railways under which the respondent organization functions.

10. He further placed reliance on the judgment of the Supreme Court in Central Organisation for Railway Electrification Vs. M/s Eci-SPIC-SMO-MCML (JV), A Joint Venture Company dated 17.12.2019 passed in Civil Appeal Nos. 9486-9487 of 2017 (arising out of the SLP (C) Nos. 24173-74 of 2019). Based upon the said judgment, he argues that Supreme Court had duly considered Clause 64 of the GCC and argues that there is an express agreement in terms of the proviso to Section 12(5) of the Act and thus, the contention of the counsel for the applicant merits rejection on that count. He further argues that in the said very judgment, the question of non-appointment of Arbitrator within 30 days was also considered and repelled by the Supreme Court.

11. Refuting the submissions, the counsel for the applicant specifically argues that in the request dated 31.8.2020, a specific denial was made with regard to the right of appointment of an Arbitrator, whose names finds mention in Schedule 7 of the Act and thus, he argues that there was no waiver in terms of proviso to Section 12 (5) of the Act. He further argues that on a plain reading of Section 12(5) of

the Act read with the proviso makes it clear that two conditions are required for waiver of the bar under Section 12(5) of the Act namely that there should be an express agreement in writing specifically and the said agreement in writing should be subsequent to the dispute having arisen. In the present case, he argues that even if for the sake of arguments, it is presumed that Clause 64 of the GCC would amount to waiver in terms of the proviso to Section 12(5), the same falls short of the requirement of the proviso as, admittedly, the same has not been executed subsequent to the dispute having arisen in between the parties. He has strongly placed reliance on the judgment of the Supreme Court in the case of Bharat Broadband Network Limited Vs. United Telecoms Limited, (2019) 5 Supreme Court Cases 755 wherein the Supreme Court had considered the scheme of Section 12(5) and the proviso to Section 12(5) and had specifically held as under:

"20. This then brings us to the applicability of the proviso to Section (12)5 on the facts of this case. Unlike Section 4 of the Act which deals with deemed waiver of the right to object by conduct, the proviso to Section (12)5 will only apply if subsequent to disputes having arisen between the parties, the parties waive the applicability of sub-section (5) of Section 12 by an express agreement in writing. For this reason, the argument based on the analogy of Section 7 of the Act must also be rejected. Section 7 deals with arbitration agreements that must be in writing, and then explains that such agreements may be contained in documents which provide a record of such agreements. On the other hand, Section (12)5 refers to an "express agreement in writing". The expression "express agreement in writing" refers to an agreement made in words as opposed to an agreement which is to be inferred by conduct. Here, Section 9 of the Indian Contract Act, 1872 becomes important. It states:

"9. Promises, express and implied.--In so far as a proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied."

It is thus necessary that there be an "express" agreement in writing. This agreement must be an agreement by which both parties, with full knowledge of the fact that Shri Khan is ineligible to be appointed as an arbitrator, still go ahead and say that they have full faith and confidence in him to continue as such. The facts of the present case disclose no such express agreement. The appointment letter which is relied upon by the High Court as indicating an express agreement on the facts of the case is dated 17.01.2017. On this date, the Managing Director of the appellant was certainly not aware that Shri Khan could not be appointed by him as Section 12 (5) read with the Seventh Schedule only went to the invalidity of the appointment of the Managing Director himself as an arbitrator. Shri Khan's invalid appointment only became clear after the declaration of the law by the Supreme Court in TRF Ltd. (supra) which, as we have seen hereinabove, was only on 03.07.2017. After this date, far from there being an express agreement between the parties as to the validity of Shri Khan's appointment, the appellant filed an application on 07.10.2017 before the sole arbitrator, bringing the arbitrator's attention to the judgment in TRF Ltd. (supra) and asking him to declare that he has become de jure incapable of acting as an arbitrator. Equally, the fact that a statement of claim

may have been filed before the arbitrator, would not mean that there is an express agreement in words which would make it clear that both parties wish Shri Khan to continue as arbitrator despite being ineligible to act as such. This being the case, the impugned judgment is not correct when it applies Section 4, Section 7, Section 12(4), Section 13(2), and Section 16 (2) of the Act to the facts of the present case, and goes on to state that the appellant cannot be allowed to raise the issue of eligibility of an arbitrator, having itself appointed the arbitrator. The judgment under appeal is also incorrect in stating that there is an express waiver in writing from the fact that an appointment letter has been issued by the appellant, and a statement of claim has been filed by the respondent before the arbitrator. The moment the appellant came to know that Shri Khan's appointment itself would be invalid, it filed an application before the sole arbitrator for termination of his mandate."

12. After hearing the parties what is to be considered by this Court is whether the appointment of Arbitrator, as informed by Sri Rajnish Kumar Rai on 3.12.2020 is a valid appointment or not and whether the Court can appoint an neutral arbitrator in exercise of its powers under Section 11 (4) and 11 (6) of Act.

13. A peculiar situation has arisen as the counsel for the parties have relied upon the Supreme Court judgment dealing with the issue in the case of Bharat Broadband Network Limited (Supra), wherein the Supreme Court had clearly considered the scheme of Section 12(5) read with Seventh Schedule of the Act to hold

(i) that a person who is disqualified cannot be appointed as an Arbitrator unless there is an agreement in writing with regard to the specific named Arbitrator;

(ii) the said agreement in writing should be subsequent to the arising of the dispute in between the parties;

(iii) and such agreement in writing should be in conformity with Section 9 of the Contract Act.

14. The said judgment although was considered by the Supreme Court in the judgment in the case of Central Organisation for Railway Electrification (Supra), however, on a reading of the said judgment, there appears to be no discussion with regard to the agreement (in the present placed Clause 64 (3)(b) of the GCC) being subsequent to the arising of the dispute or not.

15. In view of the fact that the judgment in the case of Central Organisation for Railway Electrification (Supra) does not consider the scope of the proviso to Section 12 (5) as to whether the GCC is subsequent to the arising of the dispute or not, I am bound by the judgment of the Supreme Court in the case of Bharat Broadband Network Limited (Supra) which specifically deals with the issue. The Supreme Court in the case of Central Organisation for Railway Electrification (Supra) had dealt with the issue of expiry of 30 days from the date the railway, on appointment of Arbitrator, and has held that in view of the manner of appointment prescribed under Clause 64 of the GCC, the period of 30 days would have no applicability. I have already held that following the judgment in the case of Bharat Broadband Network Limited (Supra) that Clause 64 of the GCC is in not an express agreement in writing in conformity with Section 9 of the Contract Act and is also not subsequent to the arising of dispute, as such, the procedure prescribed therein would also having no

applicability. The mandate of the Act as contained under Section 11 (4) is extremely clear as the time for appointment of Arbitrator is only restricted to 30 days. Admittedly, the arbitrator has not been appointed within 30 days. Thus, I have no hesitation to hold that the applicant is right in approaching this Court for appointment of an Arbitrator in exercise of the powers under Section 11 (4) and 11 (6) of the Act. Accordingly, I appoint Justice Shashi Kant Gupta (R/o Judges Bungalow No. 25, Drummond Road, Prayagraj/9 Elgin Road, Civil Lines, Prayagraj (Mobile No. 9415216833) as an Arbitrator.

16. Office is directed to seek consent of the learned Arbitrator by the next date in terms of mandate of Section 11 (8) of the Act.

17. List this case on 7.1.2021.

(2020)12ILR A522
ORIGINALJURISDICTION
CIVILSIDE
DATED: ALLAHABAD 12.10.2020

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.

Matter Under Article 227 No.2471 of 2020

Smt. Leela Devi ...Petitioner
Versus
Ramchandra Prasad & Ors. ...Respondents

Counsel for the Petitioner:
Sri Abhishek Kumar.

Counsel for the Respondents:
Sri Ravindra Nath Chaubey, Sri Rajni Ojha.

A. Constitution of India, 1950-Article 227 & U.P. Act No. 13 of 1972-Section 24-right of re-entry u/s 24 of the Act is in regard to the "building" only where the same is in existing form or re-constructed after demolition and there is no power to direct the re-entry over the vacant land of the demolished building or over which the demolished building was once existing. it is obvious that the power to put the tenant back in possession of his tenanted accommodation could be exercised only if the building had not be demolished and was available for occupation in its original condition. it does not authorize the prescribed authority or the District Judge to direct the tenant shall occupy the site of the building and put his own structure temporary or otherwise. (Para 2 to 16)

The Petition is dismissed. (E-6)

List of Cases cited:-

1. Anand Kumar Vs Tulsi Ram, (2005) 2 JCLR 323 Alld, (2004) 2 ARC 832

2. Hameed Kunju Vs Nazim (2017) 8 SCC 611

(Delivered by Hon'ble Vivek Kumar Birla, J.)

1. Heard Sri Abhishek Kumar, learned counsel for the petitioner-tenant and Ms. Rajni Ojha, learned counsel for the respondents-landlord and perused the record.

2. Present petition has been filed challenging the judgement and order dated 31.1.2020 passed by the Additional Sessions Judge, Ballia in Civil Misc. Case No. 205 of 2017 under Section 24 of the UP Act No. 13 of 1972 (Leela Devi vs. Ramchandra Prasad and others).

3. The admitted facts, shorn of details, are that in regard to the property in dispute a release application was filed by the respondents-landlord under Section 21(1)(a) of the UP Act 13 of 1972, which was contested by the petitioner-tenant herein upto the Hon'ble Apex Court without success and thereafter, in execution proceedings the possession of the property in question was handed over to the landlord.

4. It is submitted that after the possession was taken over by the landlord, property in question was demolished and even that property has been transferred to a third person whereas a litigation in respect of ownership of the property is pending between the parties. Therefore, after the execution proceedings were finalized, the petitioner-tenant moved an application under Section 24 of the UP Act No. 13 of 1972 for re-entry in the property in question on the ground that the release application was not bona fide and the purpose of the release application stood frustrated, therefore, the petitioner-tenant herein has a right to re-entry in the property in question. That application was rejected by the court below.

5. Submission is that the court below has incorrectly observed that once the tenant has lost upto to the Hon'ble Apex Court, therefore, now proceedings initiated under Section 24 of the UP Act No. 13 of 1972 cannot be permitted as a thing which cannot be done directly, cannot be allowed to be done indirectly. He submits that judgement relied on by the petitioner-tenant was incorrectly distinguished and the judgement relied on by the respondents-landlord is not applicable in the present case.

6. Per contra, learned counsel for the respondents-landlord has supported the impugned order.

7. I have considered the rival submissions and perused the record.

8. Insofar as the title of the property in question is concerned, a different dispute is pending between the parties. The decree and the judgement of the court below has become final upto the Hon'ble Apex Court in respect of the tenant-landlord relationship and cannot be said to be affected by the title suit.

9. Therefore, insofar as the transfer of the property in question is concerned, prima facie, the doctrine of lis pendens would apply in the concerned case. However, no specific opinion is being expressed in this regard in this petition in hand.

10. To consider this case on merit, it would be beneficial to refer to Section 24 of the UP Act 13 of 1972, which is quoted as under:

*"**24. Option of re-entry by tenant**.- (1) Where a building is released in favour of the landlord and the tenant is evicted under section 21 or on appeal under section 22, and the landlord either puts or causes to be put into occupation thereof any person different from the person for whose occupation according to the landlord's representation, the building was required, or permits any such person to occupy it, or otherwise puts it to any use other than the one for which it was released, or as the case may be, omits to occupy it within one month or such extended period as the prescribed authority may for sufficient cause allow from the date of his obtaining possession or, in the case a building which was proposed to be occupied after some construction or reconstruction, from the date of completion thereof, or in the case of a building which was proposed to be demolished, omits to demolish it within two months or such extended period as the prescribed authority may for sufficient cause allow from the date of his obtaining possession, then the prescribed authority or, as the case may be, the District Judge. may, on an application in that behalf within*

three months from the date of such act or omission, order the landlord to place the evicted tenant in occupation of the building on the original terms and conditions, and on such order being made, the landlord and any person who may be in occupation thereof shall give vacant possession of the building to the said tenant, failing which, the prescribed authority shall put him into possession and may for that purpose use or cause to be used such force as may be necessary.

(2) Where the landlord after obtaining a release order under clause (b) of sub-section (1) of section 21 demolishes a building and constructs a new building or buildings on its site, then the District Magistrate may, on an application being made in that behalf by the original tenant within such time as may be prescribed, allot to him the new building or such one of them as the District Magistrate after considering his requirements thinks fit, and thereupon that tenant shall be liable to pay as rent for such building an amount equivalent to one per cent per month of the cost of construction thereof (including the cost of demolition of the old building but not including the value of the land) and the building shall, subject to the tenant's liability to pay rent as aforesaid, be subject to the provisions of this Act, and where the tenant makes no such application or refuses or fails to take that building on lease within the time allowed by the District Magistrate, or subsequently ceases to occupy it or otherwise vacates it, that building shall also be exempt from the operation of this Act for the period or the remaining period, as the case may be, specified in sub-section (2) of section 2."

(Emphasis supplied)

11. A perusal of Section 24 would clearly disclose that the right of re-entry is only in respect of a 'building' and not on a piece of land or inhabitable or demolished structure. In the present case, this Court is concerned with Section 24(1) only as release application was filed under Section 21(1)(a) of the UP Act 13 of 1972.

12. The Act itself applies to building. Section 29-A is the only exception to the same, which was added vide Amendment Act No. 28 of 1976 in the UP Act 13 of 1972 (Section 20) with effect from 5.7.1976 with specific purpose. Undisputedly, this provision is not applicable in the present case so no further discussion is required on that.

13. The term 'building' is defined under Section 3 (i) as under:

"Section 3 (i): "Building", means a residential or non-residential roofed structure and includes-

(i) any land (including any garden), garages and out-houses, appurtenant to such building;

(ii) any furniture supplied by the landlord for use in such building;

(iii) any fittings and fixtures affixed to such building for the more beneficial enjoyment thereof;"

(Emphasis supplied)

14. Needless to point out that in this definition, the word "any land' is the land "appurtenant to such building." Therefore, existence of a building is a must. After alleged demolition of relevant building, only land or inhabitable or demolished structure is in existence without there being any 'building' existing therein.

15. Therefore, clearly, right of re-entry under Section 24 of the UP Act No. 13 of

1972 is in regard to the "building" only where the same is in existing form or re-constructed after demolition and there is no power to direct the re-entry over the vacant land of the demolished building or over which the demolished building was once existing. The Court below has rightly relied on the judgement in Shiv Kumar vs. Additional District Judge, Bulandshahar and others, 1980 ARC 400 in this regard, paragraphs 2 and 3 whereof are quoted as under:

"2. Taking the first point first. I am clearly of the view that the impugned order is without jurisdiction. It is settled law that statutory authorities and tribunals can exercise only such powers as are specifically conferred upon them. The learned District Judge passing the impugned order was acting as a statutory tribunal. He was not exercising the jurisdiction of an ordinary civil court. Under the provisions of U.P. Act No. XIII of 1972, there is only one provision, namely, Section 24 of the Act which confers a right of re-entry on the former tenants who have been evicted under Section 21 of the Act. The legislature has laid down the precise procedure for enabling such a tenant to get back either the accommodation as it existed or the accommodation which has been reconstructed after demolition. The Act has conferred upon the named authority specific powers towards that end. Section 24 ....."

3. I am fortified in the view which I am taking as regards the power of the court by a direct authority of this Court, namely, Shrimati Sundera Devi vs. Prescribed Authority and others, 1977 UPRCC 419. A learned Single Judge who had occasion to deal with the precise question with which I am concerned, observed thus:

"It is obvious that the power to put the tenant back in possession of his tenanted accommodation could be exercised only if the building had not be demolished and was available for occupation in its original condition. The expression 'placed evicted tenant in occupation of the building' consequently implies the existence of the building. The power is not available when the building has been demolished. It does not authorise the prescribed authority or the District Judge to direct that the tenant shall occupy the side of the building and put his own structure temporary or otherwise."

(Emphasis supplied)

16. To my mind, in the above quoted paragraph of Shrimati Sundera Devi (supra) in second last line the word "side" should be "site". Hence, there appears to be a typing mistake.

17. I have perused the judgement relied on by the petitioner in the court below. In my opinion, the court below has rightly distinguished the judgement relied on by the tenant-petitioner as in that case the proceedings were pending before this Court.

18. In Anand Kumar vs. Tulsi Ram, 2005 (2) JCLR 323 Alld: 2004 (2) ARC 832 release application of the landlord was allowed exparte, which was set aside and release application was restored. The application filed by the tenant for restitution of possession under Section 144 CPC was allowed, which was challenged by the landlord without any success and in the meantime building was demolished whereas in the present case release application was filed in the year 2006 and was successfully contested by the tenant for long 11 years and ultimately he handed

over possession in execution proceedings. The re-entry is being claimed after conclusion of the entire proceeding upto Hon'ble Supreme Court against him. Hence, on facts and provisions of law both, where restitution was claimed under Section 144 CPC (and Section 24 of the UP Act 13 of 1972 was not involved) the case of Anand Kumar (supra) is distinguishable.

19. There is yet another aspect to distinguish Anand Kumar (supra). In such matter, as observed by the Hon'ble Supreme Court in Hameed Kunju vs. Nazim, (2017) 8 SCC 611 (para 29) once the possession had been delivered and decree was recorded as satisfied in accordance with law, the litigation had come to an end leaving no lis pending. Paragraph 29 of the said judgement is quoted as under:

" 29. In our considered view, once the possession had been delivered and decree was recorded as satisfied in accordance with law, the litigation had come to an end leaving no lis pending. In these circumstances, in the absence of any prima facie case having been made out on any jurisdictional issue affecting the very jurisdiction of the court in passing the eviction decree, the High Court should have declined to examine the legality of four orders impugned therein."

20. Thus, I do not find any prima facie jurisdictional error or issue involved in the present case and thus, I do not find any good ground to interfere in the impugned judgement in exercise of powers under Section 227 of the Constitution of India.

21. Present petition is devoid of merit and is accordingly dismissed.

(2020)12ILR A526
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.11.2020

BEFORE

THE HON'BLE J.J. MUNIR, J.

Matter Under Art. 227 No. 9002 of 2019

Shilendra Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Fakhruzzaman.

Counsel for the Respondents:
A.G.A.

A. Constitution of India,1950-Article 227 - Uttar Pradesh Gansters and Anti Social Activities (Prevention) Act, 1986-Section 18-maintainibility of –release of attached property of the petitioner-he was required to disclose the source of his income as he had no source of income or ancestral property-the properties, prima facie, held to be proceed of crime as sixteen cases registered against him-the property were ordered to be attached and appointed receiver to dispose of the same-petitioner can avail his remedy of appeal u/s 18 of the Act as the Act provides equally efficacious alternative remedy to the petitioner.(Para 2 to 13)

The Petition is dismissed. (E-6)

List of Cases cited: -

1. Whirlpool Corporation Vs Registrar of Trade Marks, Mumbai & ors.,(1998) 8 SCC 1

2. Jangali Pasi Vs St. of U.P. Thru Secy. & anr.,(2015) 3 ALJ 673

3. St. of U.P. Vs Nasim Khan & ors., Government Appeal No,- 6042 of 2010

(Delivered by Hon'ble J.J. Munir, J.)

1. The petitioner, Shilendra Singh, has instituted this petition under Article 227 of the Constitution, praying that a writ, order or direction in the nature of certiorari be issued, quashing an order passed by the learned Special Judge (Gangsters Act)/Additional Sessions Judge, Court No. 6, Jhansi dated 13.09.2019, made in G.S.T. Misc. No. 454 of 2017, accepting the District Magistrate's reference under Section 16 (1) of The Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 19861. Also challenged is the order of the District Magistrate, Jhansi dated 08.08.2017, ordering attachment of three motor vehicles of the petitioner under Section 14 (1) of the Act, 1986, and a further order dated 22.11.2017 passed by the District Magistrate last mentioned, rejecting the petitioner's representation made under Section 15(1), seeking release of the said property and making a reference along with his report to the Court under Section 16 (1) of the Act, 1986.

2. It must be remarked at the outset that in a petition under Article 227 of the Constitution, no order in the nature of a writ, mentioned in Article 226 of the Constitution, can be asked for. The distinction between a writ petition under Article 226 of the Constitution and a petition under Article 227 is substantial and clear. The prayer, therefore, made in this petition is not worded the way, it ought to be in a petition under Article 227 of the Constitution. Nevertheless, this petition being one under Article 227 of the Constitution, this Court proceeds to treat the prayer as one made to set aside the impugned orders above described, invoking the supervisory jurisdiction of this Court.

3. This petition has not been admitted to hearing formally, though this Court required the State to file a counter affidavit within two weeks, vide order dated 29.11.2019. The State has filed a counter affidavit in the matter on 08.01.2020, which is on record. On 18.02.2020, this Court passed the following order :

"Learned counsel for the petitioner is hereby directed to show case laws about maintainability of the writ petition particularly keeping in view the provisions provided under Section 18 of the U.P. Gangster and Anti Social Activities (Prevention) Act.

Put up this matter as fresh on 27.02.2020."

4. Heard Sri Fakhruzzaman, learned counsel for the petitioner and Sri Arvind Kumar, learned Additional Government Advocate appearing on behalf of the State. Learned A.G.A. has pressed his objection to the effect that this petition under Article 227 of the Constitution is not maintainable, as the impugned order dated 13.09.2019, in G.S.T. Misc. No. 454 of 2017, is appealable under Section 18 of the Act, 1986 to this Court. This Court proposes to dispose of that objection in the first instance.

5. It appears that the petitioner was served with a notice dated 08.08.2017 under Section 14 (1) of the Act, 1986, detailing a list of some 16 cases registered against him between the years 2004-17, most of which were pending trial in different courts at the time. He was required to disclose the source of his income to acquire three motor vehicles, two tractors and a Pulsar motorcycle, indicating clearly that according to the police report, he had no source of income or ancestral property to furnish the necessary wherewithal. The properties were, prima

facie, held to be proceeds of crime, relevant under the Act, 1986 and, therefore, liable to be attached. The properties were ordered to be attached as an interim measure, pending the petitioner's representation that he may prefer under Section 15 (1) of the Act, 1986. The petitioner preferred a statutory representation, disclosing the source of acquisition of these movables. The representation is one dated 25.09.2017. The District Magistrate proceeded to reject this representation by his order dated 22.11.2017 made in Case No. 5 of 2017, under Section 14 (1) of the Act, 1986. The District Magistrate having declined to release the attached movables, a reference was made to the court under Section 16 (1). It was on the basis of the aforesaid reference made by the District Magistrate that G.S.T. No. 454 of 2017, State v. Shilendra Singh, was registered on the file of the learned Special Judge (Gangsters Act)/Additional Sessions Judge, Court No. 6, Jhansi. On receipt of the reference, the learned Judge fixed a date, holding an enquiry with notice to the petitioner and the State Government. The learned Judge recorded evidence led by parties, where two witnesses on behalf of the petitioner, to wit, O.P.W.1, the petitioner himself and O.P.W.2, his father Vishal Singh testified. The Court, on a perusal of the evidence on record, proceeded to accept the reference and affirmed the order of the District Magistrate dated 22.11.2017, attaching the petitioner's property. The attached property was ordered to be confiscated, with the Collector being appointed receiver to dispose of the same.

6. Learned counsel for the petitioner argues that the impugned order has been passed without application of mind and ignoring material evidence, that clearly show that the property has not been acquired through unlawful means. It is urged that he has been falsely implicated in a number of cases, mala fide. Learned counsel for the petitioner has drawn attention of the Court towards the record, where a final report has been submitted or he has been acquitted, which, according to the learned counsel, constitute relevant material that has been ignored by the learned Trial Judge. He submits that this is a case where the petitioner ought not to be relegated to the alternative remedy of appeal under Section 18 of the Act, 1986, in view of the law laid down by Supreme Court in Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and others2. It is urged, on the strength of the said decision and otherwise also as a well-acknowledged principle, that in exercise of our jurisdiction under Article 226 of the Constitution, the bar of alternative remedy is not absolute. He submits that Whirlpool Corporation (supra) carves out three distinct exceptions, where the bar of alternative remedy is not at all attracted. He submits that in the present case, the proceedings against him are without jurisdiction and in violation of his fundamental rights under Articles 14 and 15 of the Constitution. Once that is his case, the petitioner cannot be relegated to avail his alternative remedy under the Act, 1986.

7. This Court has keenly considered the matter. A perusal of the material on record and the course of proceedings do not indicate it to be a case where one or the other exceptions to the rule of alternative remedy may be attracted. It is true that the rule of alternative remedy does not oust this Court's jurisdiction under Article 226 of the Constitution, but at the same time, the rule is one which has to be applied judiciously, and not arbitrarily. Here, the Court finds

that the impugned order is one passed by the learned Judge on the basis of a competent reference made by the District Magistrate, under Section 16 (1) of the Act, 1986. The reference has been heard and decided, granting opportunity to all parties to this petition. The procedure prescribed for hearing a reference, consistent with the principles of natural justice has been adhered to. There is no breach of the provisions of Section 16 (3) or 16 (4) of the Act, 1986. The order impugned, therefore, cannot be said to be without jurisdiction. The learned Trial Judge has recorded evidence, where the petitioner and his father have appeared in the witness box and testified in support of their case. There is no grievance made, so far as violation of the petitioner's fundamental rights under Articles 14 and 21 of the Constitution are concerned. There is no material pointed out, which may show in what manner those rights, enshrined in Part III of the Constitution, have been violated by the learned Judge while passing the order impugned.

8. Learned counsel for the petitioner submits that a writ petition under Article 226 of the Constitution can, nevertheless, be heard against the order impugned that has drastic civil consequences of confiscating the petitioner's property. He emphasizes that the right to property is enshrined under Article 300A of the Constitution, though not a fundamental right. It ought to be safeguarded by this Court by doing a review of the order impugned, under which the petitioner has been deprived of his property. In this connection, reference has been made to the relevant provisions of the Act, 1986 that are carried in Sections 14 to 18. These read :

14. Attachment of property. - (1) If the District Magistrate has reason to believe that any property, whether moveable or immovable, in possession of any person has been acquired by a gangster as a result of the commission of an offence triable under this Act, he may order attachment of such property whether or not cognizance of such offence has been taken by any Court.

(2) The provisions of the Code shall, mutatis mutandis apply to every such attachment.

(3) Notwithstanding the provisions of the Code the District Magistrate may appoint an Administrator of any property attached under subsection (1) and the Administrator shall have all the powers to administer such property in the best interest thereof.

(4) The District Magistrate may provide police help to the Administrator for proper and effective administration of such property.

15. Release of property. - (1) Where any property is attached under Section 14, the claimant thereof may within three months from the date of knowledge of such attachment make a representation to the District Magistrate showing the circumstances in and the sources by which such property was acquired by him.

(2) If the District Magistrate is satisfied about the genuineness of the claim made under sub-section (1) he shall forthwith release the property from attachment and thereupon such property shall be made over to the claimant.

16. Inquiry into the character of acquisition of property by Court.- (1) Where no representation is made within the period specified in sub-section (1) of Section 15 or the District Magistrate does not release the property under sub-section (2) of Section 15 he shall refer the matter

with his report to the Court having jurisdiction to try an offence under this Act.

(2) Where the District Magistrate has refused to attach any property under sub-section (1) of Section 14 or has ordered for release of any property under sub-section (2) of Section 15, the State Government or any person aggrieved by such refusal or release may make an application to the Court referred to in sub-section (1) for inquiry as to whether the property was acquired by or as a result of the commission of an offence triable under this Act. Such Court may, if it considers necessary or expedient in the interest of justice so to do, order attachment of such property.

(3)(a) On receipt of the reference under sub-section (1) or an application under sub-section (2), the Court shall fix a date for inquiry and give notices thereof to the person making the application under subsection (2) or, as the case may be, to the person making the representation under Section 15 and to the State Government, and also to any other person whose interest appears to be involved in the case.

(b) On the date so fixed or any subsequent date to which the inquiry may be adjourned, the Court shall hear the parties, receive evidence produced by them, take such further evidence as it considers necessary, decide whether the property was acquired by a gangster as a result of the commission of an offence triable under this Act and shall pass such order under Section 17 as may be just and necessary in the circumstances of the case.

(4) For the purpose of inquiry under sub-section (3) the Court, shall have the power of a Civil Court while trying a suit under the Code of Civil Procedure, 1908 (Act No. 5 of 1908), in respect of the following matters, namely :-

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) requisitioning any public record or copy thereof from any Court or office;

(e) issuing commission for examination of witness or documents;

(f) dismissing a reference for default or deciding it ex parte

(g) setting aside an order of dismissal for default or ex parte decision.

(5) In any proceedings under this section, the burden of proving that the property in question or any part thereof was not acquired by a gangster as a result of the commission of any offence triable under this Act, shall be on the person claiming the property, anything to the contrary contained in the Indian Evidence Act, 1872 (Act No. 1 of 1872), notwithstanding.

17. Order after inquiry. - If upon such inquiry the Court finds that the property was not acquired by a gangster as a result of the commission of any offence triable under this Act it shall order for release of the property of the person from whose possession it was attached. In any other case the Court may make such order as it thinks fit for the disposal of the property by attachment, confiscation or delivery to any person entitled to the possession thereof, or otherwise.

18. Appeal. - The provisions of Chapter XXIX of the Code shall, mutatis mutandis, apply to an appeal against any judgment on order of a Court passed under the provisions of this Act.

9. If one were to accept that the order under Section 17 of the Act, 1986 made by the Judge or Court on a reference by the District Magistrate under Section 16 (1) is an order of drastic civil consequences, confiscatory in nature, an aggrieved party is not remediless. The entire scheme of appeals provided under Chapter XIX of The Code of Criminal Procedure, 1973 is available under the Act, 1986. Learned counsel for the petitioner submits that the impugned order passed by the Court is not specifically made appealable under Section 18 of the Act, 1986, as it does not say that an order under Section 17 would be appellable. Section 18 provides in general terms that any judgment and order of a court, passed under the provisions of the Act, 1986, would be appealable. This issue need not detain this Court for long, inasmuch as an order of the Court passed under Section 17, accepting a reference by the Collector under Section 16 (1) of the Act, 1986 or any order made under Section 17, has been held to be appealable under Section 18 by a Division Bench of this Court in Jangali Pasi v. State of U.P. Thru Secy. and Another3, where it has been held :

The 1986 Act therefore has to be read as a complete Code in itself so as to provide such benefit of appeal which the legislature appears to have intended under Section 18. Applying the interpretive tool, Section 18 categorically provides an appeal against any judgment or order* and then mutatis mutandis applies Chapter XXIX of the Cr.P.C. to such an appeal. Judges while interpreting such provisions have to adopt the legalistic method as well as the pragmatistic method as they are said to wear two hats. This distinguishes them from mere umpires and they enjoy a more certain interpretive freedom by applying reasoning through analogy in order to interpret and explain cannons of statutory construction. Applying the said principles, we are also of the opinion that Section 18 does not contain any prohibitive language nor does it give a restrictive meaning to the right of appeal against any judgment or order under the Act which is a special act. This therefore includes the right of an appeal against an order refusing to release attached property. The interpretation has to be meaningful and that which advances the cause of justice.**

10. In Jangali Pasi (supra), it has further been held :

Having considered the above, we therefore find ourselves in full agreement with the judgment of the learned Single Judge in the case of Kailash Sahkari Awas Samiti (supra) which lays down the law correctly and an appeal against an order refusing to release attachment under Section 17 of the 1986 Act would be maintainable under Section 18 of the same Act.

11. The said decision has been followed by another Division Bench of this Court in State v. U.P. v. Nasim Khan and Others, Government Appeal No. - 6042 of 2010, decided on 06.12.2016, where it has been held :

We find ourselves in full agreement with the judgment and order dated 16.4.2015 passed by the Division Bench of this Court in the Criminal Misc. Writ Petition No. 8053 of 2015 (Jangali Pasi Vs. State of U.P. through Secretary and another) with regard to maintainability of the appeal under section 18 of the Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986 filed

against the order passed under section 17 of the same Act, as such, the present appeal filed against the impugned judgment and order dated 23.7.2010 is maintainable.

12. In view of aforesaid clear position of law, there is no good reason for this Court to entertain this petition. It is, accordingly, dismissed on the ground of availability of an equally efficacious alternative remedy.

13. It will, however, be open to the petitioner to avail his remedy of appeal, as envisaged under the Act, 1986.

(2020)12ILR A532
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.12.2020

BEFORE

THE HON'BLE DEEPAK VERMA, J.

Crl. Rev. No. 317 of 2020

Hradyansh ...Revisionist
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Revisionist
Sri Mahadeo Singh Chandel.

Counsel for the Opp. Parties:
A.G.A., Sri Gyan Prakash

Criminal Law- Indian Penal Code, 1860 - Juvenile Justice Act,2015- Section 302,307,504 -bail refused to applicant who is minor- -aged about 13 years and 11 months-main role of his father-another co-accused is his brother-he has been granted bail-Applicant was a juvenile at the time of incidence—does not have criminal history-observation of D.P.O.-don't appear to be prone to criminal psychology- no other factor exist as per section 12 of the Act-Revision allowed-released on bail.

Revision allowed. (E-9)

List of Cases cited:-

1. Shiv Kumar @Sadhu Vs St. of U.P. 2010 (68) ACC 616(LB);

2. Abdullah @ Abdul Hassan Vs St. of U.P. & ors. [2015 (90) ACC 204];

3. Maroof Vs St. of U.P. & anr. [2015 (6) ADJ 203];

4. Criminal Revision No. 112 of 2015 (Suraj @ Ashok Sukla Thru. Father Mahendra Shukla Vs St. of U.P. & anr.)

5. Amit Kumar Vs St.of U.P. 2010(71) ACC 209 decided on 02.07.2015.

6. Sanjay Chaurasia Vs St. of U.P. 2006 Cr.L.J. 2957

7. A. Juvenile Vs St. of Orissa, 2009 Cr.L.J., 2002,

8. Kamal Vs St. of Har., 2004 (13) SCC 526

9. Takht Singh Vs St. of M.P., 2001 (10) SCC 463

10. Dharmendra (Juvenile) Vs St. of U.P. & ors., [2018 (7) ADJ 864]

11. Japani Sahoo Vs Chandra Sekhar Mohanty, (2007) 7 SCC 394

(Delivered by Hon'ble Deepak Verma, J.)

1. Heard Sri Mahadeo Singh Chandel, learned counsel for the revisionist, Sri Gyan Prakash, learned counsel for the opposite party no.2 and learned A.G.A for the State and perused the record.

2. This revision is directed against the judgment and order dated 21.12.2019 passed by Additional Session Judge/(F.T.C.-1)/Special Judge (POCSO Act) Banda dismissing the Criminal Appeal

No.16 of 2019 (Hradyansh vs. State of U.P. and another) under Section 102 of the the Juvenile Justice (Care and Protection of Children) Act 2015 (for short 'the Act') and affirming an order of Juvenile Justice Board, Banda, dated 19.11.2019 refusing the bail plea to the revisionist in Case Crime No.83 of 2019 (State vs. Hradyansh), under sections 302, 307, 504 IPC, Police Station Kotwali, District Banda.

3. The facts of the present case is that the revisionist was minor at the time of incident. He was aged about 13 years 11 months and he was declared minor by Medical Board vide order dated 18.2.2019. He further submitted that revisionist grandfather is deceased in the present case and due to property dispute, the incident occurred and main role has been assigned to accused Devraj, father of the revisionist. He further submitted that co-accused Devansh, brother of the revisionist has been granted bail by this Court in Criminal Misc.Bail Application No.38404 of 2019 vide order dated 24.09.2019. The revisionist is student of Class VIII and main role is assigned to co-accused Devraj, father of the deceased and general role has been assigned to all other co-accused persons. There is no independent witnesses and due to family disputes, the applicant has been falsely implicated in the present case. The mother of the minor has submitted that she will take care of her minor son and she will not permit her minor son to come in contact with the criminal minded persons. The revisionist is in observation since 16.02.2019 more than one and half years have been passed.

4. Learned counsel for the revisionist/applicant submits that revisionist is innocent and has been falsely implicated in concocted case; revisionist is student of class VIII; On 18.10.2019, the revisionist appeared before the Juvenile Justice Board, Banda, where the Board declared revisionist as minor determining his age 13 years 11 months, which is less than 18 years on the date of incident (14.02.2019). It is further submitted that revisionist was declared as juvenile in conflict of law on 18.10.2019 but even that both the court below were failed to consider the special provision for bail to juvenile; there are contradiction in the version of the F.I.R. and the statement recorded under Section 161 Cr.P.C. and 164 Cr.P.C.; the prosecution story does not support the medical report; only gravity of the offence is not relevant consideration for refusing grant of bail to juvenile as has been envisaged in Section 12 of the Act and it has been consistent view of various courts; the Board or the lower appellate court has not given any reason or material on record which shows that release of the juvenile is likely to bring him into association with any known criminal or expose him to moral physical or psychological danger, that his release would defeat the ends of justice; there is no criminal history of the applicant and there is no hope of early conclusion of the trial; the applicant has remained confined in the child observation home for an unduly long period of time, since 16.2.2019.

5. Learned A.G.A. vehemently opposed the present criminal revision. It is submitted that the incident reported is true and it is wrong to say that the allegations made against the revisionist/applicant are false, and/are motivated. Also, reliance has been placed on the findings recorded in the bail rejection orders to submit that the instant revision may be dismissed.

6. It is not in dispute that the revisionist/applicant is a juvenile and is entitled to the benefits of the provisions of

the Act. Under Section 12 of the Act, the prayer for bail of a juvenile may be rejected 'if there appear reasonable grounds for believing that the release of the juvenile is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice'.

7. The provisions relating to bail for a juvenile are carried in Section 12 of the Act, which reads as under:

"(1) When any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person:

Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the person's release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision.

(2) When such person having been apprehended is not released on bail under subsection (1) by the officer-in-charge of the police station, such officer shall cause the person to be kept only in an observation home in such manner as may be prescribed until the person can be brought before a Board.

(3) When such person is not released on bail under sub-section (1) by the Board, it shall make an order sending him to an observation home or a place of safety, as the case may be, for such period during the pendency of the inquiry regarding the person, as may be specified in the order.

(4) When a child in conflict with law is unable to fulfil the conditions of bail order within seven days of the bail order, such child shall be produced before the Board for modification of the conditions of bail."

8. The above provisions clearly show that once a person is held to be a juvenile in conflict with law, then Section 12 of the Act would govern the question of grant of bail and the custody of juvenile and it will not be governed by the provisions of the code of the criminal procedure. It is important to note that gravity or seriousness of the offence, should not been taken as an obstacle or hindrance by the Legislature to refuse bail to a delinquent juvenile. No straight jacket formula of inflexible nature can be laid down as it would depend on facts and circumstances of each case. Words "ends of justice' is confined to those facts which show that the grant of bail itself is likely to result in injustice.

9. The court has to see whether the opinion of the learned appellate Court as well as Juvenile Justice Board recorded in the impugned judgment and orders are in consonance with the provision of the Act. Section 12 of the Act lays down three contingencies in which bail may be refused to a juvenile offender. These are:-

(i) if the release is likely to bring him into association with any known criminal, or

(ii) expose him to moral, physical or psychological danger, or

(iii) that his release would defeat the ends of justice?

10. Gravity of the offence has not been mentioned as a ground to reject the bail. It is not a relevant factor while considering to grant bail to the juvenile. It has been so held by this Court in the cases of **Shiv Kumar alias Sadhu Vs. State of U.P. 2010 (68) ACC 616(LB); Abdullah @ Abdul Hassan Vs. State of U.P. and Ohers [2015 (90) ACC 204]; Maroof Vs. State of U.P. and Another [2015 (6) ADJ 203]; Criminal Revision No. 112 of 2015 (Suraj @ Ashok Sukla Thru. Father Mahendra Shukla Vs. State of U.P. and Another) and Amit Kumar Vs. State of U.P. 2010(71) ACC 209 decided on 02.07.2015.**

11. The Act, namely, Juvenile Justice (Care and Protection of Children) Act, 2015 being beneficiary and social reforms oriented legislation, should be given full effect by all concerned whenever matters relating to juvenile comes for consideration before them. There must be any material or evidence reflecting reasonable ground to believe that delinquent juvenile, if released on bail is likely to fall into association with known criminal persons or such liberty may expose him to moral, physical or psychological danger, or his release would defeat the ends of justice. In absence of such reasonable grounds the bail of juvenile should not be refused. In Sanjay Chaurasia Vs. State of U.P. 2006 Cr.L.J. 2957 it has been observed that:-

"10. In case of the refusal of the bail, some reasonable grounds for believing above-mentioned exceptions must be brought before the Courts concerned by the prosecution but in the present case, no such ground for believing any of the above-mentioned exceptions has been brought by the prosecution before the Juvenile Justice Board and Appellate Court. The Appellate Court dismissed the appeal only on the presumption that due to commission of this offence, the father and other relatives of other kidnapped boy had developed enmity with the revisionist, that is why in case of his release, the physical and mental life of the revisionist will be in danger and his release will defeat the ends of justice but substantial to this presumption no material has been brought before the Appellate Court and the same has not been discussed and only on the basis of the presumption, Juvenile Justice Board has refused the Bail of the revisionist which is in the present case is unjustified and against the spirit of the Act. It appears that the impugned order dated 27.06.2005 passed by the learned Sessions Judge, Meerut and order dated 28.05.2005 passed by the Juvenile Justice Board are illegal and set aside."

12. Learned Magistrate by its order dated 19.11.2019 has rejected the bail of revisionist mentioning that the offence committed by juvenile is heinous and non-bailable in nature.

13. In the case of A. Juvenile Vs. State of Orissa, 2009 Cr.L.J., 2002, it has been held that:

"(6) A close reading of the aforementioned provision shows that it has been mandated upon the Court to release a person who is apparently a juvenile on bail with or without surety, howsoever heinous the crime may be and whatever the legal or other restrictions containing in the Cr.P.C. or any other law may be. The only restriction is that if there appears

reasonable grounds for believing that his release is likely to bring him into association with any moral, physical or psychological danger or his release would defeat the ends of justice, he shall not be so released."

14. The Hon'ble Apex Court in paragraph 2 of the judgment in Kamal Vs. State of Haryana, 2004 (13) SCC 526 has held thus:

"2. This is a case in which the appellant has been convicted u/s 304-B of the India Penal Code and sentenced to imprisonment for 7 years. It appears that so far the appellant has undergone imprisonment for about 2 years and four months. The High Court declined to grant bail pending disposal of the appeal before it. We are of the view that the bail should have been granted by the High Court, especially having regard to the fact that the appellant has already served a substantial period of the sentence. In the circumstances, we direct that the bail be granted to the appellant on conditions as may be imposed by the District and Sessions Judge, Faridabad."

15. The Hon'ble Apex Court in paragraph-2 of the judgment in Takht Singh Vs. State of Madhya Pradesh, 2001 (10) SCC 463, has observed as under:-

"2. The appellants have been convicted under Section 302/149, Indian Penal Code by the learned Sessions Judge and have been sentenced to imprisonment for life. Against the said conviction and sentence their appeal to the High Court is pending. Before the High Court application for suspension of sentence and bail was filed but the High Court rejected that prayer indicating therein that the applicants can renew their prayer for bail after one year. After the expiry of one year the second application was filed but the same has been rejected by the impugned order. It is submitted that the appellants are already in jail for over 3 years and 3 months. There is no possibility of early hearing of the appeal in the High Court. In the aforesaid circumstances the applicants be released on bail to the satisfaction of the learned Chief Judicial Magistrate, Sehore. The appeal is disposed of accordingly."

16. In the instant case, co-accused Devansh has been granted bail by this Court. It does not appear to bear any justification that the revisionist may be denied his liberty by testing his case with reference to the disentitling condition mentioned in the proviso to sub-section (1) of Section 12 of the Act. In the case of Dharmendra (Juvenile) vs. State of U.P. and others, [2018 (7) ADJ 864], the High Court was pleased to observe as under:

"10. The matter can be looked at from another vantage. In case the revisionist were an adult and stood charged of the offence that he faces with a weak circumstantial evidence of last seen and confession to the police, in all probability, it would have entitled him to bail pending trial. If on the kind of evidence forthcoming an adult would be entitled to bail, denying bail to a child in conflict with law may be denying the juvenile/ child in conflict with law the equal protection of laws guaranteed under Article 14 of the Constitution.

11. The rule in Section 12(1) of the Act is in favour of bail always to a juvenile/ child in conflict with law except when the case falls into one or the other categories denial contemplated by the proviso. It is not the rule about bail in Section 12 of the

Act that in case a child in conflict with law is brought before the Board or Court, his case is not to be seen on merits prima facie about his complicity at all for the purpose granting him bail; and all that has been done is to see if his case falls is one or the other exceptions, where he can be denied bail. The rule in Section 12 sanctioning bail universally to every child in conflict with law presupposes that there is a prima facie case against him in the assessment of the Board or the Court based on the evidence placed at that stage. It is where a case against a child in conflict with law is prima facie made out that the rule in Section 12(1) of the Act that sanctions bail as a rule, except the three categories contemplated by the proviso comes into play. It is certainly not the rule, and, in the opinion of the Court cannot be so, that a case on materials and evidence collected not being made out against a child at all, his case has to be tested on the three parameters where bail may be denied presuming that a prima facie case is constructively there. Thus, it would always have to be seen whether a case prima facie on merits against a child in conflict with law is there on the basis of material produced by the prosecution against him. If it is found that a prima facie case on the basis of material produced by the prosecution is there that would have led to a denial of a bail to an adult offender, in that case also the Rule in Section 12(1) of the Act mandates that bail is to be granted to a juvenile/ child in conflict with law except where his case falls into any of the three disentitling categories contemplated by the proviso.

12. In the opinion of this Court, therefore, the perception that merits of the case on the basis of prima facie evidence is absolutely irrelevant to a juvenile's bail plea under the Act would not be in conformity with the law. The catena of decisions that speak about merits of the case or the charge against a juvenile being irrelevant, proceed on facts and not an assumption that a case on merits is made out, and, not where the case is not at all made out prima facie. It is not that a child alleged to be in conflict with law against whom there is not iota of evidence to connect him to the crime would still have bail denied to him because his case may be placed in or the other disentitling categories under the proviso to Section 12(1) of the Act. If this kind of a construction were to be adopted it might expose the provisions of Section 12(1) of the Act to challenge on ground of violating the guarantee of equal protection of laws enshrined in Article 14 of the Constitution. It is an enduring principle that a construction that lends a statute to challenge about its constitutionality should be eschewed and one that saves and upholds its vires is to be adopted. In this context the guidance of their Lordships of the Hon'ble Supreme Court in Japani Sahoo vs. Chandra Sekhar Mohanty, (2007) 7 SCC 394 may be referred to:-

"51. The matter can be looked at from different angle also. Once it is accepted (and there is no dispute about it) that it is not within the domain of the complainant or prosecuting agency to take cognizance of an offence or to issue process and the only thing the former can do is to file a complaint or initiate proceedings in accordance with law. If that action of initiation of proceedings has been taken within the period of limitation, the complainant is not responsible for any delay on the part of the Court or Magistrate in issuing process or taking cognizance of an offence. Now, if he is sought to be penalized because of the omission, default or inaction on the part of

the Court or Magistrate, the provision of law may have to be tested on the touchstone of Article 14 of the Constitution. It can possibly be urged that such a provision is totally arbitrary, irrational and unreasonable. It is settled law that a Court of Law would interpret a provision which would help sustaining the validity of law by applying the doctrine of reasonable construction rather than making it vulnerable and unconstitutional by adopting rule of 'litera legis'. Connecting the provision of limitation in Section 468 of the Code with issuing of process or taking of cognizance by the Court may make it unsustainable and ultra vires Article 14 of the Constitution."

17. Thus, it remains largely undisputed that the applicant - was a juvenile on the date of occurrence; does not appear to be prone to criminal proclivity or criminal psychology, in light of the observations of the D.P.O; does not have a criminal history; has been in confinement for an unduly long period of time, in as much as the trial has not concluded within time frame contemplated by the Act. Even otherwise, there does not appear to exist any factor or circumstance mentioned in section 12 of the Act as may disentitle the applicant to grant of bail, at this stage.

18. In view of the above, it appears that the findings recorded by the learned Court below are in conflict with the settled principle in law, for the purpose of grant of bail and are erroneous and contrary to the law laid down by this court. Consequently, those orders cannot be sustained. The order dated 21.12.2019 passed by Additional Session Judge/(F.T.C.-1)/Special Judge (POCSO) Act, Banda and the dated 19.11.2019 passed by the Juvenile Justice Board, Banda are hereby set aside.

19. In view of the observations made above, the present criminal revision is allowed. Let the revisionist/applicant Hradyansh involved in the aforesaid case crime be released on bail through his natural guardian/ mother, upon his mother furnishing personal bond with two sureties each of like amount, to the satisfaction of the court concerned with the following conditions:

(i) That the natural guardian will furnish an undertaking that upon release on bail the juvenile will not be permitted to come into contact or association with any known criminal or allowed to be exposed to any moral, physical or psychological danger and further that the father will ensure that the juvenile will not repeat the offence.

(ii) The revisionist through his natural guardian will report to the District Probation Officer on the first Wednesday of every calendar month commencing with the first Wednesday of February, 2021 and if during any calendar month the first Wednesday falls on a holiday, then on the next following working day.

(iii) The District Probation Officer will keep strict vigil on the activities of the revisionist and regularly draw up his social investigation report that would be submitted to the Juvenile Justice Board, Banda on such periodical basis as the Juvenile Justice Board may determine.

(iv) The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad or the certified copy issued by the Registry of the High Court, Allahabad.

(v) The computer generated copy of such order shall be self attested by the counsel of the party concerned.

(vi) The concerned Court/Authority/Official shall verify the

authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

However, considering the peculiar facts and circumstances of the case, the court below is directed to make every possible endeavour to conclude the trial of the aforesaid case within a period of four months from today without granting unnecessary adjournments to either of the parties.

(2020)12ILR A539
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.12.2020

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Crl. Rev. No. 320 of 2013

Asha Ram Yadav ...Revisionist
Versus
State of U.P. ...Respondent

Counsel for the Revisionist:
Sri Vikas Mani Srivastava, Sri Anil Kumar, Sri Ram Singh Yadav, Sri Rohit Kumar Singh, Sri Sheetla Prasad Pandey (Amicus curiae), Sri Virendra Kumar Gautam

Counsel for the Respondents:
A.G.A., Sri Pradeep Kumar, Sri Sunil Mishra, Sri Chintamani Dudbey

Money taken in the garb of employment-not giving upon asking-Applicant is65 years-no repition of such case-originally granted 5 years imprisonment with fine-appeallate court reduced it to 2 years – imprisonment limited to time already passed in imprisonment-fine increased to Rs.1 lakh. Revision partially accepted

Revision partially accepted. (E-9).

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

प्रकरण के तथ्य

1.01– वादी चिन्तामणि दूबे ने दिनांक 15.5.2002 को एक प्रार्थना पत्र वरिष्ठ पुलिस अधीक्षक, इलाहाबाद को इस बाबत दिया कि पुनरिक्षणकर्ता/अभियुक्त ने उसके भाई शेषमणि दूबे को नौकरी लगवाने हेतु रू0 53,000/ प्रलोभन देकर उसको ठगने के उद्देश्य से ले लिए। वादी ने जब रूपया वापस मॉगा तो अभियुक्त ने रु0 6000/ दिनांक 10.01.2001 को, रु0 5000/ दिनांक 19.02.2001 को तथा दिनांक 20.03.2001 को रू0 1000 वापस किया, परन्तु शेष रू0 41,000/ वापस नहीं किया। वादी ने प्रार्थना की कि वो अत्यन्त गरीब व असहाय है तथा टयूशन पढ़ाकर महानगर इलाहाबाद में जीवन यापन कर रहा है अतः मुकदमा कायम करके शेष धनराशि वापस दिलवाई जाये।

1.02– उक्त प्रार्थना पत्र पर वरिष्ठ पुलिस अधीक्षक, इलाहाबाद ने थाना कर्नलगंज को आदेशित किया कि मुकदमा पंजीकृत करें। तद्नुसार अभियुक्त के विरूद्ध मुकदमा पंजीकृत होने के बाद विवेचनाधिकारी ने वादी व संबंधित गवाहों से जॉच पड़ताल की और इस निष्कर्ष पर पहुॅचने के बाद कि अभियुक्त के विरूद्ध कोई अपराध नहीं बनता है, 140.7.2002 को अन्तिम रिपोर्ट लगा दी। इसके उपरान्त वादी ने दिनांक 06.05.2003 को स्वयं व दो अन्य गवाहो का एक शपथ पत्र मय प्रोटेस्ट प्रार्थना पत्र सक्षम न्यायालय में दाखिल कर दिया। जिस पर सक्षम न्यायालय द्वारा 19.04.2004 को मामले के समस्त तथ्यों एवं परिस्थितियों को दृष्टिगत रखते हुए, अंतिम रिपोर्ट को निरस्त करने का आदेश पारित किया तथा अभियुक्त के विरूद्ध प्रथम दृष्टया धारा 420 भा0दं0सं0 का मामला मानते हुए उसको आरोप विचरण के लिए तलब किया।

1.03– इसी क्रम में अवर न्यायालय द्वारा अभियुक्त के विरूद्ध धारा 420 भा0दं0सं0 के अर्न्तगत आरोप दि0 21.11.2006 को विरचित किया गया। जिसको अभियुक्त ने इंकार किया और परीक्षण की मॉग की। इसके उपरान्त 04.08.2007 वादी (अभियोजन साक्षी–1) का बयान धारा 244 भा0दं0सं0 के अर्न्तगत अंकित किया गया। तद्उपरान्त अभियोजन साक्षी–2 (राजेन्द्र कुमार त्रिपाठी) व अभियोजन साक्षी–3 (मोहम्मद सुएब) का बयान भी धारा 244 भा0दं0सं0 के अर्न्तगत अंकित किया गया तत्पश्चात उपरोक्त साक्ष्य के आधार पर अवर न्यायालय ने धारा 246 दं0प्र0सं0 के अनुसार 03.06.2008 को पुनः धारा 420 भा0द0सं0 के अन्तर्गत आरोप विरचित किया जिसको अभियुक्त ने इन्कार किया एवं परीक्षण की

मॉग की। इसी क्रम में दिनांक 15.07.2009 को अभियुक्त का बयान धारा 313 दं0प्र0सं0 के अर्न्तगत अंकित कराया गया।

1.04– अवर न्यायालय के आदेश दिनांक 08.12. 2009 के द्वारा यह संज्ञान लेते हुए कि जो कार्यवाही दं0प्र0सं0 के अध्याय 15 (मजिस्टेट से परिवाद) के अनुसार चलनी चाहिए थी वो त्रुटिपूर्ण ढंग से द0प्र0सं0 के अध्याय 12 (पुलिस को इत्तला और उनकी अन्वेषण कीशक्तियॉ) के अनुसार चलाई गयी। अतः अवर न्यायालय ने आदेश दिया कि जब आरोपदिनांक 19.04. 2004 को अभियुक्त के विरूद्ध विचरित किया गया था, उस स्थिति से अध्याय12 दं0प्र0सं0 के अनुसार आगे की कार्यवाही की जानी चाहिए और साक्षी संख्या 1 को पुनःसाक्ष्य देने के लिए सम्मन किया।

1.05–इस क्रम में वादी चिन्तामणि दूबे (अभियोजन साक्ष्य सं0–1), राजेन्द्र कुमार त्रिपाठी(अभियोजन साक्ष्य सं0–2) मोहम्मद सुएव (अभियोजन साक्ष्य सं0–3) व पारस नाथ सिंह(अभियोजन साक्ष्य सं0–4) का परीक्षण किया गया।

1.06–अवर न्यायालय (अपर मुख्य न्यायिक मजिस्ट्रेट, कक्ष सं0–8, इलाहाबाद) ने निर्णयदिनांक 05. 10.2012 द्वारा न्यायालय के समक्ष प्रस्तुत सम्पूर्ण साक्ष्य के परिशीलन केउपरान्त यह निर्णय दिया कि अभियुक्त को धारा 420 भा0दं0सं0 के अर्न्तगत दोष सिद्ध मानाजाता है। निर्णय के मुख्य अंश निम्न है–

"न्यायालय के समक्ष प्रस्तुत सम्पूर्ण साक्ष्य के परिशीलन से यह स्पष्ट है किविपक्षी आशाराम यादव के द्वारा वादी चिन्तामणि दूबे उसके छोटे भाई भोशमणि कीनौकरी न्याय विभाग में लगवाने के लिए प्रवंचना की गयी, जिसके अनुक्रम मेंवादी द्वारा विपक्षी को मु0 53000/ रूपये दिये गये। यदि विपक्षी/अभियुक्तआशाराम यादव के द्वारा वादी को प्रवंचित न किया गया होता तो वह उसे उक्त धनन देता उक्त धन को देने से वादी चिन्तामणि दूबे को कुल मु0 41000/ रूपये कानुकसान हुआ। विपक्षी अधिवक्ता द्वारा जिरह में कुछ छोटे विरोधाभासों का बहस केस्तर पर उल्लेख किया गया लेकिन जब प्रकृति साक्ष्य आती है तो छोटे–2विरोधाभासों का होना सामान्य अनुक्रम है। यह कथन करना कि वादी रंजिशन उसेफॅसा रहा है, बिना किसी साक्ष्य के विश्वास किये जाने योग्य नहीं है, यह कथन किवादी द्वारा पैसे विपक्षी को उसकी पत्नी के इलाज हेतु दिये गये साक्ष्य के अभाव मेंअविश्वसनीय है। उक्त कथनों के आधार पर अभियुक्त कोई लाभ पाने का अधिकार नहीं है। अतः न्यायालय की राय में धारा–420 भा0दं0सं0 के समस्त अव्ययवादी द्वारा प्रस्तुत किये गये साक्ष्यों के आधार पर विपक्षी आशाराम यादव के विरूद्धसिद्ध होते है। अभियुक्त आशाराम यादव को धारा 420 भा0दं0सं0 के अन्तर्गतदोषसिद्ध किये जाने योग्य है। अभियुक्त आशाराम यादव को धारा–420 भारतीयदण्ड संहिता क अंतर्गत दोषसिद्ध किया जाता है। "

1.07–इसी क्रम में अवर न्यायालय ने दिनांक 19. 10.2002 को निम्न दंडादेश पारितकिया –

"अभियुक्त आशाराम उपस्थित आया। उसे दण्ड के प्रश्न पर विद्वानअभियोजक एवं अभियुक्त के विद्वान अधिवक्ता को सुना गया

अभियोजन द्वारा कथन किया गया कि अभियुक्त द्वारा कारित अपराध मूलतःअधिक धन प्राप्त करने की लिप्सा के कारण किया गया है जिसके कारण वादी कोउसके धन से महरूम होना पड़ा तथा 10 वर्षो से वह लगातार मुकदमे में अपने धनका व्यय कर रहा है। अतः उसकी मु0 41000/ रूपये की मूल धनराशि एवंब्याज एवं मानसिक शोषण की प्रतिपूर्ति के लिए भी आदेश किया जाये।

अभियुक्त अधिवक्ता के द्वारा कम से कम दण्ड से दण्डित किये जानेकी याचना की गयी।

तथ्य एवं परिस्थितियों को दृष्टिगत रखते हुए अभियुक्त को निम्न दण्ड सेदण्डित किया जाना न्यायोचित होगा।

आदेश

अभियुक्त आशाराम यादव को धारा–420 भारतीय दण्ड संहिता में दोषसिद्धकिया जाता है। अभियुक्त आशाराम यादव को धारा–420 भारतीय दण्ड संहिता मेंपॉच वर्ष के सश्रम कारावास व मु0 2,00,000/ रूपये (रूपया दो लाख मात्र) केअर्थदण्ड से दण्डित किया जाता है। अर्थदण्ड की धनराशि में से वादी मु01,00,000/ रूपये (एक लाख रूपया मात्र) पाने का अधिकारी होगा। अभियुक्त द्वाराअर्थदण्ड न अदा करने पर अभियुक्त एक वर्ष का अतिरिक्त कारावास भुगतेगा।'

1.08– अभियुक्त ने उपरोक्त उल्लेखित निर्णय से क्षुब्ध होकर आपराधिक अपील संख्या – 207/2012 न्यायालय अपर सत्र न्यायाधीश कोर्ट नं0–2 इलाहाबाद के समक्ष दाखिल की। जो सत्र न्यायालय द्वारा आदेश दिनांक 31.01.2013 से आंशिक रूप से स्वीकार की गयी तथा निम्न मुख्य आदेश पारित किया–

"फौजदारी अपील आंशिक रूप से स्वीकार की जाती है। तदनुसार भा0दं0वि0 की धारा 420 के अपराध के आरोप के सम्बन्ध मे विद्वान विचारण न्यायालय द्वारा पारित अभियुक्त की दोषसिद्ध का आदेश को पुष्ट करते हुए उसे भा0दं0सं0की धारा 420 के अपराध के लिए 2

वर्ष के कठोर कारावास व रूपये 50,000/ के अर्थदंड तथा अर्थदंड अदा ने करने की स्थिति में 6 माह की अतिरिक्त कठोर कारावास से दंडित किया जाता है। अर्थदंड की धनराशि में से वादी मुकदमा को रूपये 41,000/ बतौर प्रतिकर दिलाये जाने का आदेश दिया जाता है।

उपरोक्तानुसार मुकदमा संख्या 94/2010, अन्तर्गत धारा 420 भा0दं0वि0 पुलिस थाना कर्नलगंज के प्रकरण में अपर मुख्य न्यायिक मजिस्ट्रेट कोर्ट नं0 8 इलाहाबाद के द्वारा पारित दण्डादेश दिनांक 9.10.2010 को संशोधित किया जाता है।

अपीलार्थी/अभियुक्त आशाराम यादव जमानत पर है। उसक जमानत बंधपत्र निरस्त एवं जमींदारो को उन्मोचित करते हुए उसे न्यायिक अभिरक्षा में लिया जाता है तथा अभिलेख सहित निर्णय की एक प्रति सहित विचारण न्यायालय को सजा भुगतने के लिए सजायाबी वारण्ट सहित केन्द्रीय कारागार, नैनी, इलाहाबाद को प्रेषित किये जाने हेतु भेजा जा रहा है।''

1.09– अभियुक्त ने उपरोक्त उल्लेखित आदेश से क्षुब्ध होकर वर्तमान आपराधिक–पुनरिक्षण याचिका इस न्यायालय में दाखिल की है। इस न्यायालय ने आदेश दिनांक 08.02.2013 द्वारा पुनरिक्षण याचिका को केवल दण्ड के प्रश्न पर सुनने के लिए ही स्वीकार की।

1.10– इस न्यायालय के आदेश दिनांक 09.11. 2020 द्वारा पुनरिक्षणकर्ता के अधिवक्ता के कई दिनांक पर अनुपस्थित रहने के कारण शीतला प्रसाद पाण्डे, अधिवक्ता को न्याय–मित्र नियुक्त किया।

2– पुनरिक्षणकर्ता के विद्वान अधिवक्ता– अनिल कुमार व शीतला प्रसाद पाण्डे, न्याय–मित्र, ने दण्ड के प्रश्न पर निम्न आवेदन किया।

2.01– वर्तमान प्रकरण वर्ष 2001 का है अतः करीब 19 वर्ष पुराना है तथा अभियुक्त वर्तमान में 65 वर्ष का है तथा अवकाश प्राप्त सरकारी कर्मचारी है। अतः इस प्रकरण में सहानभूति पूर्वक विचार करना चाहिए। अभियुक्त ने विचारण के, अपील के व पुनरिक्षण के दौरान करीब 28 दिन कारावास में गुजारे है। अतः दो वर्ष की सजा को इस अवधि में परिवर्तित किया जाना न्यायोचित रहेगा तथा विकल्प में धारा 357 दं0प्र0सं0 के अर्न्तगत वादी को उचित प्रतिकर भी दिया जा सकता है।

2.02– दंडादेश के सिद्धान्त पर निवेदन करते हुए अधिवक्ताओं ने निम्न निर्णयों की उल्लेख किया–

(क)– नसीम अहमद बनाम उ0प्र0शासन, क्रिमिनल अपील 2546/2006, इलाहाबाद उच्च न्यायालय, के प्रस्तर–36 व 37।

(ख)– उच्चतम न्यायालय द्वारा पारित निर्णय हजारा सिंह बनाम राज कुमार 2013(9) एस0सी0सी0 516 का प्रस्तर 10 व म0प्र0 सरकार बनाम बाबू लाल व अन्य 2013 (12) एस0सी0सी0 308 का प्रस्तर 19।

(ग)– उच्च न्यायालय इलाहाबाद के एकल पीठ द्वारा पारित निर्णय वंशराज व अन्य बनाम उ0प्र0शासन, क्रिमिनल अपील नं0 393/1996 के प्रस्तर 41 व 42 व कौशल कश्यप बनाम उ0प्र0शासन, क्रिमिनल अपील 7194/2018 के प्रस्तर 14,15 व 16।

2.03– उपरोक्त निर्णयों के परिपेक्ष में यह निवेदन किया गया कि दंडादेश का सिद्धान्त है कि दण्ड, अपराध की गंभीरता, अपराध की प्रकृति तथा अपराध कारित करने के तरीके को ध्यान में रखते हुए उचित, न्याय संगत व सदृश्य होना चाहिये। वर्तमान मामले में वादी को केवल आर्थिक नुकसान हुआ है, जिसकी भरपाई उसको उचित प्रतिकर दे कर करी जा सकती है। भा0दं0स0 में धारा 420 के अर्न्तगत कारावास की अवधि सात साल तक बढ़ाई जा सकती है व साथ ही आर्थिक दंड से भी दंडित किया जा सकता है। अभियुक्त अब तक 28 दिन का कारावास व्यतीत कर चुका है अतः उक्त अवधि को कारावास का सम्पूर्ण दंड माना जाये व वादी को उचित प्रतिकर का आदेश पारित कर इस पुनरिक्षण याचिका का निस्तारण किया जाये।

3– आई0 पी0 श्रीवास्तव, अतिरिक्त शासकीय अधिवक्ता ने सरकार की ओर से निवेदन किया कि अवर न्यायालयों द्वारा अभियुक्त को धारा 420 भा0दं0सं0 का दोषी पाया है। अभियुक्त ने वादी को प्रवंचित किया तथा उसे उत्प्रेरित करके उससे धन का परिदत्त कराया। विचारण न्यायालय ने अभियुक्त को 5 वर्ष का कारावास व 5 लाख रू0 का आर्थिक दण्ड का दण्डादेश पारित किया था, जिसको अपीलीय न्यायालय द्वारा 2 वर्ष का कारावास व 50 हजार रू0 के आर्थिक दण्ड में परिवर्तित किया गया, वो उचित है तथा इस आदेश में कोई विधिक त्रुटि नहीं है। अतः उक्त निर्णय में हस्तक्षेप करने का कोई मामला नहीं बनता है। वादी ने वैयक्तिक रूप से निवेदन किया कि आर्थिक दंड की राशि बहुत कम है उसे अधिक करा जाना चाहिये जो उसको ही मिलना चाहिये।

4– उभयपक्ष को सुना, तथा पत्रावली का परिशीलन किया। वर्तमान याचिका, केवल दण्ड के प्रश्न पर स्वीकार की गयी है। अतः 'प्रथम' दंडादेश का क्या सिद्धान्त' है तथा दं0प्र0सं0 में ''प्रतिकर'' का क्या सिद्धान्त है, इसका उल्लेख करना आवश्यक है।

संदर्भः– दंडादेश के सिद्धान्त

5.01 भारतीय विधायी ने दंडादेश के सम्बंध में कोई नीति निर्धारित नहीं करी है, परंतु मालिमथ समिथि

(2003) व माधव मेनन समिति (2008) ने दंडादेश नीति निर्धारित करने की आवश्यकता पर जोर दिया है व नीति बनाने के लिए सिफारिश भी की है।

5.02 दंडादेश के सिद्धान्त या दंडादेश की नीति क्या हो, उच्चतम न्यायालय इस विषय पर चिंतित रहा है और समय≤ पर अपने विभिन्न विधिक उद्धरण के द्वारा इस विषय पर स्पष्टता लाने का प्रयास किया है तथा अवर न्यायालय व उच्च न्यायालय द्वारा दंडादेश पारित करते समय लापरवाही होने से रोकने के लिये सचेत भी किया है।

5.03 उच्चतम न्यायालय की तीन सदस्यीय पीठ द्वारा हाल में ही पारित अपने निर्णय (मध्यप्रदेश शासन बनाम ऊधम और अन्य–(2019) 10 एस सी सी 300) में एक बार फिर से दंडादेश के सिद्धांत पर प्रकाश डाला है और अभिनिर्धारित किया की :–

''8. आरंभ में, यह ध्यान रखना उचित है कि प्रत्यार्थीगण–अभियुक्तगणों की अपीलों को आंशिक रूप से स्वीकृत करने और आलोच्य आदेश को पारित के लिए उच्च न्यायालय कायह तर्क कि यह सजा तक सीमित है। उच्च न्यायालय अपने आदेश में कहते है कि अपराध की प्रकृति को देखते हुए, यह तथ्य कि यह प्रत्यार्थीगण का प्रथम अपराध है और उनके द्वारा पहले से ही सजा की अवधि व्यतीत कर ली है तब यह आलोच्य आदेश पारित किया जाता है।

''9. इस स्तर पर, इस न्यायालय के अभियुक्त 'X' बनाम महाराष्ट्र राज्य (2009) 7 एस.सी.सी. 1, जिसमें हममे से दो सदस्य पीठ के भाग थे, की टिप्पणी भारत में सजा के संबंध में प्रासंगिक है–

''49. आपराधिक प्रतिबंधो का उचित आवंटन, जो कि ज्यादातर न्यायिक शाखा द्वारा दिया जाता है। {निकोला पैडफील्ड, रॉड मॉर्गन और माइक मैगुइयर ''न्यायालय से बाहर, दृष्टि से बाहर'' आपराधिक प्रतिबंधों और कोई न्यायिक निर्णय नहीं'', ओक्सफोर्ड, अपराध शास्त्र की पुस्तिका (5वॉ, संस्करण)}। विचारण के अंत में होने वाली यह प्रक्रिया अभी भी एक आपराधिक न्याय प्रणाली की प्रभावकारिता पर बड़ा प्रभाव डालती है। यह स्थापित है कि सजा एक सामाजिक कानूनी प्रक्रिया है जिसमें एक न्यायाधीश तथ्यात्मक, परिस्थितियों और औचित्य पर विचार करते हुए अभियुक्त के लिए उचित दण्ड को ढूँढता है। इस तथ्य के प्रकाश में यह जरूरी हो जाता हैकि विधायिका ने न्यायाधीशों को सजा देने के लिए विवेक प्रदान किया, किइसका उपयोग एक सैद्धांतिक तरीके से करे। हमें यह प्रोत्साहित करने कीजरूरत है कि सजा देने में एक सख्त निर्धारित दण्ड की सोच को माना नहींजा सकता है जैसा कि न्यायाधीश को प्रर्याप्त स्वविवेक की जरूरत होती है।

50. इस प्रकरण का परीक्षण करने से पूर्व, हमें सजा देने की प्रक्रिया मेंतार्किकता के प्रभाव के प्रश्न को संबोधित करने की जरूरत है। विचारणन्यायालय की तार्किकता कारित किये गये अपराध की सजा के लिए सामान्य
rस्तर और तथ्यों और परिस्थितियों के बीच की कड़ी के जैसे कार्य करती है।विचारण न्यायालय को सजा देने के लिए तर्कों को देने के लिए बाध्य है,प्रथमता जैसे कि नैसर्गिक न्याय का मूलभूत सिद्धांत है कि न्यायकर्ता कोनिर्णय तक पहुॅचने के लिए कारण जरूर बताना चाहिए, और दूसरा कारणअधिक महत्व रखता है क्यों कि अभियुक्त की स्वतंत्रता उपरोक्त वर्णित तर्कके अधीन है। इसके आगे, अपीलीय न्यायालय के पास चुनौती दी गयी सजाकी मात्रा की शुद्धता को जॉचने के लिए उत्तम सुविधा से सुसज्जित है, यदिविचारण न्यायालय ने कारणों सहित उचित बताया
... ..''

(जोर दिया गया)

11. हमारी यह राय है कि निचले न्यायालय द्वारा अपर्याप्त या गलत सजा दियेजाने के कारण इस न्यायालय के समक्ष बड़ी संख्या में प्रकरण दायर किये जा रहेहै। हमे समय है और हम फिर से दोषपूर्ण तरीके के विरूद्ध चेतावनी देते है जिसमेंकी कुछ प्रकरणों में सजा से निपटते है। इसमें कोई दो राय नहीं है कि सजा देनेके पहलुओं को हल्के में नहीं लेना चाहिए,जैसे आपराधिक न्याय व्यवस्था का यहभाग समाज पर निर्णायक प्रभाव डालता है। इसके प्रकाश में हमारी राय है कि हमेंइसको और स्पष्टता प्रदान करने की जरूरत है।

12. अपराधों के लिए सजा को तीन परीक्षण अर्थात अपराध परीक्षण, आपराधिकपरीक्षण और तुलनात्मक अनुपात परीक्षण के मापदण्ड पर परीक्षण किया जाना है।अपराध परीक्षण क कारकों में जैसे अपराध की योजना की सीमा, अपराध में इस्तेमालहथियार का चुनना, अपराध का तरीका, अपराध कारित करना (यदि कोई हो),अभियुक्त की भूमिका, अपराधी की असामाजिकता या घिनौना चरित्र, पीड़ित की दशासम्मलित रहते है। आपराधिक परीक्षण में कारकों का मूल्याकन जैसे अपराधी कीआयु, अपराधी की लिंग, अपराधी की आर्थिक स्थिति या सामाजिक पृष्ठीूमि, अपराधके लिए प्रेरणा, प्रतिरक्षा की उपलब्धता, मानसिक स्थिति, मृतक के समूह में से किसीके द्वारा उत्प्रेरण, विचारण में पर्याप्त रूप से प्रतिनिधित्व, न्यायाधीश द्वारा

अपीलीयप्रकिया में असहमति, पछतावा, सुधार की संभावना, पूर्ववर्ती आपराधिक अभिलेख(लंबित प्रकरणों को न लेना) और कोई अन्य सुसंगत कारण (एक विस्तृत सूची नहींहै) सम्मलित रहते है।

13. इसके अतिरिक्त, हम यह ध्यान दे सकते है कि अपराध परीक्षण क अंतर्गतगंभीरता को सुनिश्चित किये जाने की जरूरत है। अपराध की गंभीरता को (I)पीड़ित की शारीरिक सम्पूर्णता, (II) भौतिक समर्थन या सुख–सुविधा की हानि, (III), मानभंग की सीमा, और (IV) निजता के उल्लंघन के द्वारा सुनिश्चित की जासकती है।'' (जोर दिया गया)

(उपरोक्त https://main.sci.gov.in/ Supremecourt vernacular/ 2013/ 10532_2013_3_1501_17728 Judgement_22_Oct_ 2019_ HIN. pdf से अधोभारण (download) किया गया है, जिसमें यह 'खडन' लिखा गया है किः– ''क्षेत्रीय भाषा में अनुवादित निर्णय से आशय केवल पक्षकारों को उनकी अपनी भाषा में समझने के लिये है एवं इसका प्रयोग किसी अन्य उद्देश्य के लिये नही किया जा सकेगा। सभी व्यवहारिक एवं कार्यालयीन उद्देश्यों के लिये, निर्णय का अग्रेंजी संस्करण ही प्रमाणित होगा और निष्पादन तथा कियान्वयन के उद्देश के लिये प्रभावी माना जायेगा।'')

<u>संदर्भः प्रतिकर</u>

6– धारा 357 दं0 प्रं0 सं0 न्यायालय को किसी आपराधिक कार्य से पीडित को प्रतिकर देने का आदेश पारित करने की शक्ति प्रदान करता है, जो अन्य दंडादेश के अतिरिक्त है न कि अनुषंगी। न्यायसंगत व उचित प्रतिकर प्रदान करते समय न्यायालय को अभियुक्त की आर्थिक क्षमता साथ ही साथ अन्य कारक जैसे– चिकित्सा व्यय, जीवन यापन का नुकसान, पीडा व दर्द आदि का ध्यान रखना चाहिये। उच्चतम न्यायालय ने मनोहर सिंह बनाम राजस्थान सरकार व अन्य 2015(3) SCC 449 में धारा 357 द0 प्र0 सं0 के अंतर्गत प्रतिकर प्रदान करने की शक्ति का उचित उपयोग करने की जरुरत पर बल दिया है। उचित प्रतिकर निर्धारित करने लिए, चिकित्सा पर व्यय, अन्य व्यय, दर्द व पीडा जैसे कारको का ध्यान रखना चाहिये। दंडादेश देना एक बात है तथा प्रतिकर प्रदान करना अन्य बात है। ऐसा हो सकता है इस सम्बंध में साक्ष्य उपलब्ध न हों, ऐसी स्थिति मे अनुमान लगा कर प्रतिकर निर्धारित करना अपरिहार्य नही है। जब तक न्यायालय, धारा 357 द0प्र0सं0 को कर्तव्य के रुप में नही देखता है कि न्यायालय को प्रतिकर के सवाल पर विवेकाधिकार का इस्तेमाल करना चाहिऐ तब तक इस प्रावधान का उद्देश्य ही विफल होता रहेगा।

विश्लेषण

7– उभय पक्षों की बहस, प्रकरण के तथ्य व परिस्थितियॉ व उपरोक्त वर्णित दंडादेश व प्रतिकर के सिद्धान्त की पृष्ठभूमि में यह विदित है कि अभियुक्त ने वादी के साथ छल करके, उसको बेईमानी से उसके भाई की नौकरी लगवाने का झॉसा देकर पचास हजार रूपये देने के लिये उत्प्रेरित किया तथा इस तथ्य पर अवर न्यायालयों का समवर्ती निष्कर्ष है। यह अविवादित है कि अभियुक्त ने मुकदमा कायम होने से पूर्व ही 12 हजार रूपये वादी को वापस भी कर दिये थे। विचारण न्यायालय ने अभियुक्त को पॉच साल की सजा व दो लाख रूपये का जुर्माना का दंडादेश पारित किया था, जिसको अपीलीय न्यायालय ने दो साल की सजा व पचास हजार रूपये के दंडादेश में परिवर्तित कर दिया है।

8– यह ज्ञातव्य रहे कि धारा 420 भा0दं0सं0 में सात वर्ष तक की सजा और जुर्माना के दंड से भी अनिवार्य रुप से दंडित करने का प्रावधान है अर्थात केवल सजा या केवल जुर्माना का दंड देने का प्रावधान नहीं है, परन्तु सजा व जुर्माना दोनों से दंडित करने का प्रावधान है। धारा 420 भा0दं0सं0 में कोई न्यूनतम सजा का प्रावधान नहीं है। यह विधि का अतिसामान्य सिद्धान्त है कि जहॉ न्यूनतम सजा का प्रावधान हो, वहॉ न्यायालय उस न्यूनतम अवधि से कम अवधि की सजा का दंडादेश पारित नहीं कर सकता है।

9– पत्रावली के तथ्यों से स्पष्ट है कि अभियुक्त का विचारण के दौरान तथा आरोप सिद्ध होने बाद भी तथा अब तक चाल चलन ठीक रहा है तथा न तो उसके द्वारा इस तरह के अपराध की पुनरावृत्ति ही की गयी और न ही किसी अन्य अपराध कारित करने की कोई शिकायत पत्रावली पर उपस्थित है। पत्रावली पर उपस्थित अभिलेखों से यह विदित है कि अभियुक्त द्वारा अन्वेषण के दौरान, विचारण के दौरान, दोष सिद्ध होने के बाद, अपील निलंबित होने के दौरान व इस न्यायालय द्वारा जमानत देने तक करीब 28 दिवस की सजा की अवधि व्यतीत की जा चुकी है।

10– जैसा पूर्व में उल्लेखित किया गया है कि अपराधों के लिये सजा की अवधि निर्धारित करने के तीन परीक्षण हैं, जो हैः– अपराध परीक्षण, आपराधिक परीक्षण व तुलनात्मक अनुपात परीक्षण, जिनके विभिन्न कारक है तथा अपराध की गंभीरता को भी विभिन्न कारकों की कसौटी पर सुनिश्चित किया जाना चाहिये। पूर्व में कुछ कारक उल्लेखित भी किये गये है। अगर इन कारकों को वर्तमान प्रकरण में यह निर्धारित करने के लिये कि सजा की क्या उचित अवधि तथा जुर्माना/प्रतिकर की क्या

उचित राशि होनी चाहिए के लिये लागू करें तो यह विदित होता है कि, वर्तमान प्रकरण में अपराध करते हुए न तो किसी भी तरह की हिंसा का उपयोग हुआ है न ही अभियुक्त का कोई घिनौना चरित्र ही दर्शित होता है। हालॉकि अभियुक्त ने छल करके वादी से किस्तों में कुल रू0 53000/ बेईमानी से उत्प्रेरित कर के लिये थे, जिससे वादी को आर्थिक नुकसान अवश्य हुआ है। अभियुक्त का अपराध में प्रत्यक्ष रूप से संलिप्तता है, इसमें दो राय नहीं है। परन्तु मुकदमा दायर होने से पूर्व ही रू0 12000 का वादी को वापस करना, अभियुक्त के आशय व अपराध की गंभीरता को कम अवश्य करता है। इसके अतिरिक्त अपीलीय प्रक्रिया में न्यायालय द्वारा सजा की अवधि व जुर्माना की राशि का कम करना, अभियुक्त का कोई और अपराधिक इतिहास का ना होना, अपराध की पुनरावृत्ति न करना, यह दर्शाता है कि अभियुक्त ने अपने चरित्र में सुधार किया है। इसके अतिरिक्त यह तथ्य कि अपराध वर्ष 2001 में घटित हुआ था, तब अभियुक्त की उम्र 46 वर्ष थी और वर्तमान में 65 वर्ष है, का भी ध्यान में रखना आवश्यक है। प्रकरण मैं प्रतिकर देना भी उचित रहेगा।

11— उपरोक्त समस्त तथ्यात्मक व विधिक विवरण, अपराध व उचित सजा तथा प्रतिकर, अपराधी की स्थिति, वादी को हुआ आर्थिक व मानसिक नुकसान का तुलनात्मक अध्ययन करने पर इस न्यायालय की यह निश्चित राय है कि न्याय के हित में यह आदेश देना न्यायसंगत रहेगा की सजा की अवधि (28 दिवस) जो अपीलीय न्यायालय ने 5 वर्ष से घटाकर 2 वर्ष करी है, उसको जो सजा की अवधि अभियुक्त ने आज तक व्यतीत कर रखी है, उस अवधि तक परिवर्तित किया जाये परन्तु जुर्माना राशि जो अपीलीय न्यायालय ने 2 लाख से कम करके रु0 50000 करी थी, उसको बढ़ा कर प्रतिकर के रूप में रू0 1 लाख करने का आदेश दिया जाये, जो संपूर्ण रूप से वादी को दिया जाये। इस राशि को अभियुक्त/पुनरिक्षणकर्ता इस आदेश की तिथि से दो मास के अन्दर वादी को भुगतान करेगा अथवा अवर न्यायालय में जमा करेगा तथा उसी अवधि में उसका प्रमाण इस उच्च न्यायालय के कार्यालय में जमा भी करेगा। अवर न्यायालय में प्रतिकर जमा होने की दशा में अवर न्यायालय, वादी द्वारा दाखिल उचित आवेदन पर जमा की गयी राशि, वादी के पक्ष में जारी करेगा। तद्नुसार आदेशित किया जाता है।

12— श्री शीतला प्रसाद पाण्डेय, अधिवक्ता (न्यायमित्र) को उनकी सेवा के लिए इस न्यायालय के कार्यालय को आदेशित किया जाता है कि वो रू0 5500/— की राशि न्याय—मित्र को अविलम्ब दें।

13— उपरोक्त आदेशानुसार यह पुनरिक्षण याचिका आंशिक रूप से स्वीकार की जाती है।

14— इस आदेश की एक प्रति व समस्त पत्रावली अवर न्यायालय को अविलम्ब भेजी जाये।

(2020)12ILR A544
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.12.2020

BEFORE

THE HON'BLE DEEPAK VERMA, J.

Crl. Rev. No. 737 of 2020

Lalit @ Chhena ...Revisionist
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Petitioner:
Sri Prashant Sharma, Sri Pankaj Sharma

Counsel for the Respondents:
A.G.A.

A. Criminal Law - Code of Criminal Procedure, 1973-Section 397/401 & Indian Penal Code, 1860-Sections 302, 504, 34 & Juvenile Justice (Care and Protection of Children) Act 2015- Section 12-application-rejection-grant of bail to juvenile-juvenile is entitled to the benefit of the provisions of the Act-revisionist was minor at the time of incident-the prosecution story does not support the medical report-Juvenile Justice Board declared him as minor determining his age 16 years 04 months and 09 days-co-accused has been granted bail-only gravity of offence is not relevant consideration for refusing grant of bail to juvenile as has been envisaged in Section 12 of the Act-the Board or the lower appellate court has not given any reason that his release would defeat the ends of justice in the event if he be released on bail.(Para 5 to 21)

B. Under Section 12 the prayer for bail may be rejected if there appear reasonable grounds for believing that the release of the juvenile is likely to bring him into the association with any known criminal or expose him to moral, physical

or psychological danger or that his release would defeat the ends of justice. It is important to note that gravity or seriousness of the offence, should not be taken as an obstacle or hindrance by the Legislature to refuse bail to a delinquent juvenile. (Para 10 to 20)

The Revision is allowed. (E-6)

List of Cases cited: -

1. Shiv Kumar @ Sadhu Vs St. of U.P. (2010) 68 ACC 616 LB

2. Abdullah @ Abdul Hassan Vs St. of U.P. & ors. (2015) 90 ACC 204

3. Maroof Vs St. of U.P. & anr. (2015) 6 ADJ 203

4. Suraj @ Ashok Sukla Thru. Father Mahendra Shukla Vs St. of U.P. & anr. Crl. Rev. No. 112 of 2015

5. Amit Kumar Vs St. of U.P. (2010) 71 ACC 209

6. Sanjay Chaurasia Vs St. of U.P. (2006) Cr.L.J. 2957

7. A. Juvenile Vs St. of Ori., (2009) Cr. L.J., 2002

8. Kamal Vs St. of Har. (2004) 13 SCC 526

9. Takht Singh Vs St of M.P., (2001) 10 SCC 463

10. Dharmendra (Juvenile) Vs St. of U.P. & ors,(2018) 7 ADJ 864

11. Japani Sahoo Vs Chandra Sekhar Mohanty, (2007) 7 SCC 394

(Delivered by Hon'ble Deepak Verma, J.)

1. Supplementary affidavit filed today by learned counsel for the applicant is taken on record.

2. List is revised. Despite service of notice on opposite party no.2, none has appeared on behalf of the opposite party no. 2 to oppose the present criminal revision.

3. Heard learned counsel for the revisionist, learned A.G.A for the State and perused the material on record.

4. This revision is directed against the impugned judgment and order dated 20.1.2020 passed by learned Additional Sessions Judge, Court No.1, Hathras, dismissing the Criminal Appeal No. 43 of 2019 (CNR No. UPHT 01-006395-2019) (Lalit @ Chhena Vs. State of U.P. and Another) under Section 53 of the the Juvenile Justice (Care and Protection of Children) Act 2015 (for short 'the Act') and affirming an order of Juvenile Justice Board, Hathras dated 13.11.2019 refusing the bail plea of the revisionist in Case Crime No. 60 of 2019, under Sections 302, 504, 34 I.P.C., Police Station- Sasni, District- Hathras.

5. The facts of the present case is that the revisionist was minor at the time of incident. His aged was determined as 16 years 04 months and 09 days by the Medical Board vide order dated 2.11.2019. He further submitted that the applicant has been assigned the role of catching hold of the deceased as per as the statement of accused who is major and the allegation of murder is against him. The deceased was having love affair with the sister of co-accused Rahul who threatened the deceased not to meet with his sister. Co-accused Rahul Kumar has been granted bail by the coordinate Bench of this Court vide order dated 14.2.2020 in Criminal Misc. Bail Application No.6969 of 2020. The bail application of the revisionist has been rejected on irrelevant consideration. There is no evidence against the applicant, except the statement of co-accused Rahul. As per

as the D.P.O. report the act, conduct and behaviour of the revisionist and his family members are absolutely normal and have cordial relation with the villagers. The village Pradhan has also made a positive statement regarding the conduct and behaviour of revisionist. The revisionist has no any past criminal antecedent. In the event of his release on bail there is no likelihood of his going into association with any known and unknown criminals and expose him to moral, physical or psychological danger. He further submitted that gravity of offence cannot be looked on merit while considering the bail of juvenile. The report of the District Probation Officer (annexed as Annexure 15 to the revision) shows that revisionist having no criminal record and in total observation, revisionist can improve his mental criminal activities. The revisionist is in observation home since 24.02.2019 more than one and half years have been passed.

6. Learned counsel for the revisionist/applicant submits that revisionist is innocent and has been falsely implicated in concocted case; revisionist is a student of class VII; On 2.11.2019, the revisionist appeared before the Juvenile Justice Board, Hathras, where the Board declared revisionist as minor determining his age 16 years 04 months and 09 days, which is less than 18 years on the date of incident (23.2.2019). It is further submitted that revisionist was declared as juvenile in conflict of law on 02.11.2019 but even that both the court below were failed to consider the special provision for bail to juvenile; there are contradiction in the version of the F.I.R. and the statement recorded under Section 161 Cr.P.C. and 164 Cr.P.C.; the prosecution story does not support the medical report; only gravity of the offence is not relevant consideration for refusing grant of bail to juvenile as has been envisaged in Section 12 of the Act and it has been consistent view of various courts; the Board or the lower appellate court has not given any reason or material on record which shows that release of the juvenile is likely to bring him into association with any known criminal or expose him to moral physical or psychological danger, that his release would defeat the ends of justice; there is no criminal history of the applicant and there is no hope of early conclusion of the trial; the applicant has remained confined in the child observation home for an unduly long period of time, since 24.2.2019.

7. Learned A.G.A. vehemently opposed the present criminal revision. It is submitted that the incident reported is true and it is wrong to say that the allegations made against the revisionist/applicant are false, and/are motivated. Also, reliance has been placed on the findings recorded in the bail rejection orders to submit that the instant revision may be dismissed.

8. It is not in dispute that the revisionist/applicant is a juvenile and is entitled to the benefits of the provisions of the Act. Under Section 12 of the Act, the prayer for bail of a juvenile may be rejected 'if there appear reasonable grounds for believing that the release of the juvenile is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice'.

9. The provisions relating to bail for a juvenile are carried in Section 12 of the Act, which reads as under:

"(1) When any person, who is apparently a child and is alleged to have

committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person:

Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the person's release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision.

(2) When such person having been apprehended is not released on bail under subsection (1) by the officer-in-charge of the police station, such officer shall cause the person to be kept only in an observation home in such manner as may be prescribed until the person can be brought before a Board.

(3) When such person is not released on bail under sub-section (1) by the Board, it shall make an order sending him to an observation home or a place of safety, as the case may be, for such period during the pendency of the inquiry regarding the person, as may be specified in the order.

(4) When a child in conflict with law is unable to fulfil the conditions of bail order within seven days of the bail order, such child shall be produced before the Board for modification of the conditions of bail."

10. The above provisions clearly show that once a person is held to be a juvenile in conflict with law, then Section 12 of the Act would govern the question of grant of bail and the custody of juvenile and it will not be governed by the provisions of the code of the criminal procedure. It is important to note that gravity or seriousness of the offence, should not been taken as an obstacle or hindrance by the Legislature to refuse bail to a delinquent juvenile. No straight jacket formula of inflexible nature can be laid down as it would depend on facts and circumstances of each case. Words "ends of justice' is confined to those facts which show that the grant of bail itself is likely to result in injustice.

11. The court has to see whether the opinion of the learned appellate Court as well as Juvenile Justice Board recorded in the impugned judgment and orders are in consonance with the provision of the Act. Section 12 of the Act lays down three contingencies in which bail may be refused to a juvenile offender. These are:-

(i) if the release is likely to bring him into association with any known criminal, or

(ii) expose him to moral, physical or psychological danger, or

(iii) that his release would defeat the ends of justice?

12. Gravity of the offence has not been mentioned as a ground to reject the bail. It is not a relevant factor while considering to grant bail to the juvenile. It has been so held by this Court in the cases of Shiv Kumar alias Sadhu Vs. State of U.P. 2010 (68) ACC 616(LB); Abdullah @ Abdul Hassan Vs. State of U.P. and Ohers [2015 (90) ACC 204]; Maroof Vs. State of U.P. and Another [2015 (6) ADJ 203]; Criminal Revision No. 112 of 2015 (Suraj @ Ashok Sukla Thru. Father Mahendra Shukla Vs. State of U.P. and Another) and

Amit Kumar Vs. State of U.P. 2010(71) ACC 209 decided on 02.07.2015.

13. The Act, namely, Juvenile Justice (Care and Protection of Children) Act, 2015 being beneficiary and social reforms oriented legislation, should be given full effect by all concerned whenever matters relating to juvenile comes for consideration before them. There must be any material or evidence reflecting reasonable ground to believe that delinquent juvenile, if released on bail is likely to fall into association with known criminal persons or such liberty may expose him to moral, physical or psychological danger, or his release would defeat the ends of justice. In absence of such reasonable grounds the bail of juvenile should not be refused. In Sanjay Chaurasia Vs. State of U.P. 2006 Cr.L.J. 2957 it has been observed that:-

"10. In case of the refusal of the bail, some reasonable grounds for believing above-mentioned exceptions must be brought before the Courts concerned by the prosecution but in the present case, no such ground for believing any of the above-mentioned exceptions has been brought by the prosecution before the Juvenile Justice Board and Appellate Court. The Appellate Court dismissed the appeal only on the presumption that due to commission of this offence, the father and other relatives of other kidnapped boy had developed enmity with the revisionist, that is why in case of his release, the physical and mental life of the revisionist will be in danger and his release will defeat the ends of justice but substantial to this presumption no material has been brought before the Appellate Court and the same has not been discussed and only on the basis of the presumption, Juvenile Justice Board has refused the Bail of the revisionist which is in the present case is unjustified and against the spirit of the Act. It appears that the impugned order dated 27.06.2005 passed by the learned Sessions Judge, Meerut and order dated 28.05.2005 passed by the Juvenile Justice Board are illegal and set aside."

14. Learned Magistrate by its order dated 13.11.2019 has rejected the bail of revisionist mentioning that the offence committed by juvenile is heinous and non-bailable in nature.

15. In the case of A. Juvenile Vs. State of Orissa, 2009 Cr.L.J., 2002, it has been held that:

"(6) A close reading of the aforementioned provision shows that it has been mandated upon the Court to release a person who is apparently a juvenile on bail with or without surety, howsoever heinous the crime may be and whatever the legal or other restrictions containing in the Cr.P.C. or any other law may be. The only restriction is that if there appears reasonable grounds for believing that his release is likely to bring him into association with any moral, physical or psychological danger or his release would defeat the ends of justice, he shall not be so released."

16. The Hon'ble Apex Court in paragraph 2 of the judgment in Kamal Vs. State of Haryana, 2004 (13) SCC 526 has held thus:

"2. This is a case in which the appellant has been convicted u/s 304-B of the India Penal Code and sentenced to imprisonment for 7 years. It appears that so far the appellant has undergone imprisonment for about 2 years and four months. The High Court declined to grant

bail pending disposal of the appeal before it. We are of the view that the bail should have been granted by the High Court, especially having regard to the fact that the appellant has already served a substantial period of the sentence. In the circumstances, we direct that the bail be granted to the appellant on conditions as may be imposed by the District and Sessions Judge, Faridabad."

17. The Hon'ble Apex Court in paragraph-2 of the judgment in Takht Singh Vs. State of Madhya Pradesh, 2001 (10) SCC 463, has observed as under:-

"2. The appellants have been convicted under Section 302/149, Indian Penal Code by the learned Sessions Judge and have been sentenced to imprisonment for life. Against the said conviction and sentence their appeal to the High Court is pending. Before the High Court application for suspension of sentence and bail was filed but the High Court rejected that prayer indicating therein that the applicants can renew their prayer for bail after one year. After the expiry of one year the second application was filed but the same has been rejected by the impugned order. It is submitted that the appellants are already in jail for over 3 years and 3 months. There is no possibility of early hearing of the appeal in the High Court. In the aforesaid circumstances the applicants be released on bail to the satisfaction of the learned Chief Judicial Magistrate, Sehore. The appeal is disposed of accordingly."

18. In the instant case, co-accused Rahul Kumar has been granted bail by the coordinate Bench of this Court. It does not appear to bear any justification that the revisionist may be denied his liberty by testing his case with reference to the disentitling condition mentioned in the proviso to sub-section (1) of Section 12 of the Act. In the case of Dharmendra (Juvenile) vs. State of U.P. and others, [2018 (7) ADJ 864], the High Court was pleased to observe as under:

"10. The matter can be looked at from another vantage. In case the revisionist were an adult and stood charged of the offence that he faces with a weak circumstantial evidence of last seen and confession to the police, in all probability, it would have entitled him to bail pending trial. If on the kind of evidence forthcoming an adult would be entitled to bail, denying bail to a child in conflict with law may be denying the juvenile/ child in conflict with law the equal protection of laws guaranteed under Article 14 of the Constitution.

11. The rule in Section 12(1) of the Act is in favour of bail always to a juvenile/ child in conflict with law except when the case falls into one or the other categories denial contemplated by the proviso. It is not the rule about bail in Section 12 of the Act that in case a child in conflict with law is brought before the Board or Court, his case is not to be seen on merits prima facie about his complicity at all for the purpose granting him bail; and all that has been done is to see if his case falls is one or the other exceptions, where he can be denied bail. The rule in Section 12 sanctioning bail universally to every child in conflict with law presupposes that there is a prima facie case against him in the assessment of the Board or the Court based on the evidence placed at that stage. It is where a case against a child in conflict with law is prima facie made out that the rule in Section 12(1) of the Act that sanctions bail as a rule, except the three categories contemplated by the proviso comes into

play. It is certainly not the rule, and, in the opinion of the Court cannot be so, that a case on materials and evidence collected not being made out against a child at all, his case has to be tested on the three parameters where bail may be denied presuming that a prima facie case is constructively there. Thus, it would always have to be seen whether a case prima facie on merits against a child in conflict with law is there on the basis of material produced by the prosecution against him. If it is found that a prima facie case on the basis of material produced by the prosecution is there that would have led to a denial of a bail to an adult offender, in that case also the Rule in Section 12(1) of the Act mandates that bail is to be granted to a juvenile/ child in conflict with law except where his case falls into any of the three disentitling categories contemplated by the proviso."

12. In the opinion of this Court, therefore, the perception that merits of the case on the basis of prima facie evidence is absolutely irrelevant to a juvenile's bail plea under the Act would not be in conformity with the law. The catena of decisions that speak about merits of the case or the charge against a juvenile being irrelevant, proceed on facts and not an assumption that a case on merits is made out, and, not where the case is not at all made out prima facie. It is not that a child alleged to be in conflict with law against whom there is not iota of evidence to connect him to the crime would still have bail denied to him because his case may be placed in or the other disentitling categories under the proviso to Section 12(1) of the Act. If this kind of a construction were to be adopted it might expose the provisions of Section 12(1) of the Act to challenge on ground of violating the guarantee of equal protection of laws enshrined in Article 14 of the Constitution. It is an enduring principle that a construction that lends a statute to challenge about its constitutionality should be eschewed and one that saves and upholds its vires is to be adopted. In this context the guidance of their Lordships of the Hon'ble Supreme Court in Japani Sahoo vs. Chandra Sekhar Mohanty, (2007) 7 SCC 394 may be referred to:-

"51. The matter can be looked at from different angle also. Once it is accepted (and there is no dispute about it) that it is not within the domain of the complainant or prosecuting agency to take cognizance of an offence or to issue process and the only thing the former can do is to file a complaint or initiate proceedings in accordance with law. If that action of initiation of proceedings has been taken within the period of limitation, the complainant is not responsible for any delay on the part of the Court or Magistrate in issuing process or taking cognizance of an offence. Now, if he is sought to be penalized because of the omission, default or inaction on the part of the Court or Magistrate, the provision of law may have to be tested on the touchstone of Article 14 of the Constitution. It can possibly be urged that such a provision is totally arbitrary, irrational and unreasonable. It is settled law that a Court of Law would interpret a provision which would help sustaining the validity of law by applying the doctrine of reasonable construction rather than making it vulnerable and unconstitutional by adopting rule of 'litera legis'. Connecting the provision of limitation in Section 468 of the Code with issuing of process or taking of cognizance by the Court may make it unsustainable and ultra vires Article 14 of the Constitution."

19. Thus, it remains largely undisputed that the applicant was a juvenile on the date of occurrence; does not appear to be prone to criminal proclivity or

criminal psychology, in light of the observations of the D.P.O; does not have a criminal history; has been in confinement for an unduly long period of time, in as much as the trial has not concluded within time frame contemplated by the Act. Even otherwise, there does not appear to exist any factor or circumstance mentioned in Section 12 of the Act as may disentitle the applicant to grant of bail, at this stage.

20. In view of the above, it appears that the findings recorded by the learned Court below are in conflict with the settled principle in law, for the purpose of grant of bail and are erroneous and contrary to the law laid down by this court. Consequently, those orders cannot be sustained. The order dated 20.1.2020 passed by learned Additional Sessions Judge, Court No.1, Hathras and order dated 13.11.2019 passed by the Juvenile Justice Board, Hathras are hereby set-aside.

21. In view of the observations made above, the present criminal revision is allowed. Let the revisionist/applicant- Lalit @ Chhena involved in the aforesaid case crime be released on bail through his natural guardian/ father, upon his father furnishing personal bond with two sureties each of like amount, to the satisfaction of the court concerned with the following conditions:

(i) That the natural guardian will furnish an undertaking that upon release on bail the juvenile will not be permitted to come into contact or association with any known criminal or allowed to be exposed to any moral, physical or psychological danger and further that the father will ensure that the juvenile will not repeat the offence.

(ii) The revisionist through his natural guardian will report to the District Probation Officer on the first Wednesday of every calendar month commencing with the first Wednesday of February, 2021 and if during any calendar month the first Wednesday falls on a holiday, then on the next following working day.

(iii) The District Probation Officer will keep strict vigil on the activities of the revisionist and regularly draw up his social investigation report that would be submitted to the Juvenile Justice Board, Hathras on such periodical basis as the Juvenile Justice Board may determine.

(iv) The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad or the certified copy issued by the Registry of the High Court, Allahabad.

(v) The computer generated copy of such order shall be self attested by the counsel of the party concerned.

(vi) The concerned Court/Authority/Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

22. However, considering the peculiar facts and circumstances of the case, the court below is directed to make every possible endeavour to conclude the trial of the aforesaid case within a period of four months from today without granting unnecessary adjournments to either of the parties.

(2020)12ILR A551
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.11.2020

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Crl. Rev. No. 929 of 2020

Rajanikant Mani Tripathi ...Revisionist
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Revisionist:
Sri Hari Om Ojha, Sri Rishi Kant Rai

Counsel for the Respondents:
A.G.A.

A. Code of Criminal Procedure, 1973-Section 397/401 & Negotiable Instrument Act, 1881-Section 138 & General Clause Act, 1897-Section 27- quashing of-summoning order- challenge to-maintainability of-whether complaint time barred- notice issued and was served through speed post and it was deemed to be sufficiently served up-payment was not made within fifteen days-then after within thirty days complaint was filed-presumption made by trial judge for service of notice is not in accordance with principles laid by Apex Court-it cannot be said that the complaint is ex-facie barred by time-on the basis of statement recorded u/s 200 and evidence given u/s 202, offence u/s 138 was made out-trial court failed to appreciate facts and law and dismissed the complaint.(Para 2 to 11)

The Revision is allowed. (E-6)

List of Cases cited: -

1. Kaushalya Devi Massand Vs Roopkishore Khore (2011) AIR SC 2566

2. Subodh S. Salaskar Vs Jayprakash M. Shah & anr. in Crl. Appl.No. 1190 of 2008 (SLP (CrL.) No. 541 of 2008)

3. C.C Alavi Haji Vs Palapetty Muhammed & anr. (2007) 6 SCC 555.

4. Dr. Vinod Shivappa Vs Nanda Belliappa , (2006) AIR SC 2179

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This criminal revision under Section 397/401 of Cr.P.C. has been filed by Rajanikant Mani Tripathi, against State of U.P. and another, against judgment and order dated 7.2.2020, passed by Prescribed Authority/Additional Court (Negotiable Instrument Act), Gorakhpur, whereby Criminal Case No. 473 of 2018, under Section 138 of N.I. Act, P.S. Kotwali, District Gorakhpur, was dismissed, with this contention that learned trial Judge failed to appreciate facts placed on record. Order dated 7.2.2020 was against the provision of N.I. Act. A notice to opposite party No. 2 was sent on 18.12.2017 and as per provision of Section 27 of General Clauses Act, presumption of its service, in case of its non return back to sender, is to be drawn after thirty days and after thirty days, it may be presumed that notice has been served upon the addressee and if within fifteen days of same, amount is not paid, then cause of action arises. Applicant-revisionist has sent notice of dishonour of cheque to opposite party No. 2, drawer of cheque on 18.12.2017, it was a registered notice which had yet not been received back and presumption of service may be taken by the Court on 17.1.2018 i.e. after thirty days. This complaint for offence punishable under Section 138 of N.I. Act was filed before Court on 15.2.2018, which is withing thirty days form the date of arising of cause of action on 17.1.2018. But the Court failed to consider above provision of General Clauses Act and thereby rejected complaint on the ground of delayed filing. It was an order apparently erroneous on the face of it. Hence, this revision with prayer for setting aside impugned judgment and order dated 7.2.2020 of trial Court of Additional Court No. 1(Negotiable Instrument Act) Gorakhpur, in complaint case No. 473 of 2018, under Section 138 of N.I. Act, Rajanikant Mani Tripathi Vs. Kiran Yadav and and remit the matter to Court below for further hearing in the case.

2. Learned counsel for the revisionist argued that as per Section 138 of N.I. Act-Where any cheque drawn by a person on an account maintained by him with a banker

for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both: Provided that nothing contained in this section shall apply unless--

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

3. Hon'ble Apex Court in **Kaushalya Devi Massand vs Roopkishore Khore, AIR 2011 SC 2566**, has observed that the gravity of a complaint under the Negotiable Instruments Act cannot be equated with an offence under the provisions of the Indian Penal Code or other criminal offences. An offence under Section 138 of the Negotiable Instruments Act, 1881, is almost in the nature of a civil wrong which has been given criminal overtones. The notice was issued by way of registered post and its presumption of service under Section 27 of General Clauses Act may be after thirty days but the trial Judge has presumed service within 2 to 3 days on the ground that drawer and drawee of cheque, both were resident of city Gorakhpur. Hence, presumption of service is to be within 2 to 3 days and on the basis of this presumption, the complaint has been held to be of time barred. Accordingly, prosecution has been dismissed. Hence, this revision.

4. Even after service of notice to opposite party No. 2, none appeared to oppose this criminal revision.

5. Learned AGA has vehemently opposed this criminal revision with this contention that learned trial Court has appreciated facts and law and has passed impugned order in accordance with law.

6. Having heard learned counsels for both sides and gone through the material on record, it is apparent that in this case, a complaint was filed by Rajanikant Mani Tripathi against Kiran Yadav, for an offence punishable under Section 138 of N.I. Act, P.S. Kotwali, District Gorakhpur, with this contention that Kiran Yadav received Rs. 4 lacs by cash as well as cheque, for construction work as well as payment of E.M.I. of bus from complainant and in lieu of said liability, issued a cheque No. 788900 of Punjab and Sindh Bank, Golghar, Gorakhpur, of her account, for Rs. 1,60,000/- on 23.10.2017. This cheque was

deposited in the Bank of complainant ICICI Bank, Bank Road, Gorakhpur, in his account, in first week of November. But it was dishonored by bank memo dated 14.11.2017, for insufficiency of amount. This was received by complainant on 22.11.2017. Then after, within thirty days, a payment notice through counsel by registered post was issued to drawer of cheque on 18.12.2017. It was received by drawer but payment was not made. Hence, this complaint was filed in the computer Section of the Court concerned on 15.2.2018. Thereafter, it was registered on 16.2.2018. Complainant-Rajanikant Mani Tripathi was examined by way of affidavit under Section 200 of Cr.P.C., whereas documentary evidence- notice issued as payment notice dated 18.12.2017, receipt of registered post dated 18.12.2017, concerned cheque dated 23.10.2017, dishonour memo dated 14.11.2017, was annexed with affidavit. The offence punishable under Section 138 of N.I. Act was said to be made out and was requested for punishment. Learned Trial Judge dismissed this complaint under Section 203 of Cr.P.C., that too, on the ground of being time barred. The main contention was about presumption of service of notice, which was said to be after thirty days from date of issuing notice by way of registered post and non-return of same to sender, under Section 27 of General Clauses Act, whereas learned presiding Judge held that complaint ought to be filed within 2.2.2018 but it was filed on 15.2.2018 and service of notice may be presumed to be sufficient within 24 to 48 hours. Hence, the main question was about time limit for presuming service of notice, sent by way of registered post, in accordance with Section 27 of General Clauses Act.

7. Section 27 of General Clauses Act 1897, provides:-

Meaning of service by post. --Where any Central Act] or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression "serve" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post. This Court in Smt. Vandana Gulati vs Gurmeet Singh Alias Mangal Singh, AIR 2013 Alld 69, has held that notice sent by registered post to the person concerned at the proper address shall be deemed to be served upon him in the due course unless contrary is proved. Endorsement "not claimed/not met" is not sufficient to prove deemed service of the notice.

8. Apex Court in **Subodh S. Salaskar Vs. Jayprakash M. Shah & another, in Criminal Appeal No. 1190 of 2008 (arising out of SLP (Crl.) No. 541 of 2008**), while reiterating three Judges Bench decision of Apex Court in **C.C. Alavi Haji Vs. Palapetty Muhammed and another (2007) 6 SCC 555**, has propounded that presumption of service, under the statute is arises not only when it is send by registered post in terms of Section 27 of General Clauses Act. But such presumption may be raised also under Section 114 of Evidence Act. In paragraph No. 17 of C.C. Alavi Haji's case (supra):-

"17. It is also to be borne in mind that the requirement of giving of notice is a clear departure from the rule of criminal law, where there is no stipulation of giving of a notice before filing a complaint. Any drawer who claims that he did not receive

the notice sent by post, can, within 15 days of receipt of summons from the court in respect of the complaint under Section 138 of the Act, make payment of the cheque amount and submit to the court that he had made payment within 15 days of receipt of summons (by receiving a copy of complaint with the summons) and, therefore, the complaint is liable to be rejected. A person who does not pay within 15 days of receipt of the summons from the court along with the copy of the complaint under Section 138 of the Act, cannot obviously contend that there was no proper service of notice as required under Section 138, by ignoring statutory presumption to the contrary under Section 27 of the GC Act and Section 114 of the Evidence Act. In our view, any other interpretation of the proviso would defeat the very object of the legislation. As observed in Bhaskaran case if the "giving of notice" in the context of Clause (b) of the proviso was the same as the "receipt of notice" a trickster cheque drawer would get the premium to avoid receiving the notice by adopting different strategies and escape from legal consequences of Section 138 of the Act."

[Emphasis supplied]

9. In paragraph No. 23 of Subodh S. Salaskar's case (supra):-

"23. The complaint petition admittedly was filed on 20.04.2001. The notice having been sent on 17.01.2001, if the presumption of service of notice within a reasonable time is raised, it should be deemed to have been served at best within a period of thirty days from the date of issuance thereof, i.e., 16.02.2001. The accused was required to make payment in terms of the said notice within fifteen days thereafter, i.e., on or about 2.03.2001. The complaint petition, therefore, should have been filed by 2.04.2001."

10. Meaning thereby, presumption of service of notice within a reasonable time is to be raised. It should be deemed to have been served at best within a period of thirty days from the date of issuance thereof. Meaning thereby, the reasonable period for presumption of service may be up to 30 days from date of its issuance. Hence, in present case, notice issued was said to be served and it was issued on 18.12.2017. It was sent through speed post and it was deemed to be sufficiently served up to 17.1.2018 and within fifteen days payment was not made. Then after within thirty days this complaint was filed. Hence, apparently this complaint was not time barred. The presumption made by trial Judge for service of notice on 20.12.2017 is not in accordance with principles laid by Apex Court, as above in Subodh S. Salaskar's case (supra) and in Dr. Vinod Shivappa vs Nanda Belliappa, AIR 2006 SC 2179 as well as Section 27 of General Clauses Act, 1897. Hence, on the basis of statement recorded under Section 200 and documentary evidence given under Section 202 of Cr.P.C., offence punishable under Section 138 of N.I. Act was, prima facie, made out. But learned trial Court has failed to appreciate facts and law, has presumed service of notice within 20.12.2017 and has dismissed complaint. This order is apparently erroneous on the face of it and is under mis-exercise of jurisdiction of learned trial Court. Accordingly, this revision merits its allowance.

11. Allowed.

12. Impugned order dated 7.2.2020 is being set aside. File is remanded back to

trial Court concerned for hearing and passing order afresh, at an earliest.

(2020)12ILR A556
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.12.2020

BEFORE

THE HON'BLE DEEPAK VERMA, J.

Crl. Rev. No. 1266 of 2020

Kanchan Sonkar ...Revisionist
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Revisionist:
Sri Anil Kumar Dubey, Sri Shailendra Kumar Rai

Counsel for the Respondents:
A.G.A.

A. Criminal Law -Code of Criminal Procedure, 1973-Section 397/401 & Indian Penal Code, 1860-Sections 147, 148, 149, 302, 34, 307 & Juvenile Justice(Care and Protection of Children) Act, 2015-section 12-application-rejection-grant of bail to juvenile-juvenile is entitled to the benefit of the provisions of the Act-U/s 12 the prayer for bail may be rejected if there appear reasonable grounds for believing that the release of the juvenile is likely to bring him into the association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice-gravity of the offence should not be taken as an obstacle by the Legislature to refuse bail to a delinquent juvenile-Hence, order passed by the learned Court below cannot be sustained-findings recorded by lower court are in conflict with the settled principle in law, for the purpose of grant of bail and erroneous and contrary to the law.(Para 4 to 20)

B. Once a person is held to be a juvenile in conflict with law, then Section 12 of the Act would govern the question of grant of bail and the custody of juvenile and it will not be governed by the provisions of the code of criminal procedure. It is important to note that gravity or seriousness of the offence, should not be taken as an obstacle or hindrance by the Legislature to refuse bail to a delinquent juvenile. (Para 9)

The Criminal Revision is allowed. (E-6)

List of Cases cited:-

1. Shiv Kumar @ Sadhu Vs St. of U.P. (2010) 68 ACC 616 LB

2. Abdullah @ Abdul Hassan Vs St. of U.P. & ors. (2015) 90 ACC 204

3. Maroof Vs St. of U.P. & anr. (2015) 6 ADJ 203

4. Suraj @ Ashok Sukla Thru. Father Mahendra Shukla Vs St. of U.P. & anr. Crl. Rev. No. 112 of 2015

5. Amit Kumar Vs St. of U.P. (2010) 71 ACC 209

6. Sanjay Chaurasia Vs St. of U.P. (2006) Cr.L.J. 2957

7. A. Juvenile Vs St. of Ori., (2009) Cr. L.J., 2002

8. Kamal Vs St. of Har. (2004) 13 SCC 526

9. Takht Singh Vs St of M.P., (2001) 10 SCC 463

10. Dharmendra (Juvenile) Vs St. of U.P. & ors.,(2018) 7 ADJ 864

11. Japani Sahoo Vs Chandra Sekhar Mohanty,(2007) 7 SCC 394

(Delivered by Hon'ble Deepak Verma, J.)

1. List revised. Despite service of notice, none appears on behalf of the opposite party no. 2 to oppose the present criminal revision.

2. Heard learned counsel for the revisionist and learned A.G.A for the State and perused the record.

3. This revision is directed against the judgment and order dated 08.06.2020 passed by Special Judge, (POCSO)-01, Ghazipur, dismissing the Criminal Appeal No.39 of 2020 (Kanchan Sonkar vs. State of U.P.) under Section 53 of the the Juvenile Justice (Care and Protection of Children) Act 2015 (for short 'the Act') and affirming an order of Juvenile Justice Board, Ghazipur dated 19.05.2020 refusing the bail plea of the revisionist in Case Crime No.603 of 2019 (State vs. Kanchan Sonkar), under sections 147, 148, 149, 302, 34, 307 IPC, Police Station Kotwali, District Ghazipur.

4. The fact of the present case is that the informant lodged FIR against the revisionist and seven other co-accused persons alleging that revisionist and other co-accused person had stabbed his son. The averments made in the FIR is that on 08.10.2019 in the evening informant's son namely Monu alongwith his friend and some other boys of the village were going to see the festival of Dushehra, in the way at about 200 meter Phullanpur Railway Crossing near Gyatri Mandir, the revisionist and seven other co-accused persons stabbed his son, due to which he received serious injuries and he died. Learned counsel for the revisionist submitted that as per marksheet, the revisionist is aged about 15 years. He further submitted that nothing on record to show that revisionist will come in the association of any known or unknown criminal activities. He further submitted that real mother Sheela Devi has full control upon him and there is no chance of any moral, psychological and physical danger against the revisionist. Mother who is real guardian of the minor having full control over his son and she will not allow him to come in the association of any known or unknown criminal implicated person. He further submitted that gravity of offence cannot be looked on merit while considering the bail of juvenile. The report of the District Probation Officer (annexed as annexure 4 to the revision) shows that revisionist having no criminal record and in total observation, revisionist can be improved his mental criminal activities. Learned counsel for the revisionist further submitted that co-accused Vipin Pandey, who is minor and named in the FIR, has been enlarged on bail by the coordinate Bench of this Court in Criminal Revision No.1155 of 2020 vide order dated 23.09.2020 and co-accused Dinesh Bind has been granted bail by this Court in Criminal Misc.Bail Application No.165 of 2020 vide order dated 21.01.2020.

5. Learned counsel for the revisionist/applicant submits that revisionist is innocent and has been falsely implicated in concocted case; only gravity of the offence is not relevant consideration for refusing grant of bail to juvenile as has been envisaged in Section 12 of the Act and it has been consistent view of various courts; the Board or the lower appellate court has not given any reason or material on record which shows that release of the juvenile is likely to bring him into association with any known criminal or expose him to moral physical or psychological danger, that his release would defeat the ends of justice; there is no criminal history of the applicant and there is no hope of early conclusion of the trial; the applicant has remained confined in the child observation home for an unduly long period of time, since 17.01.2020.

6. Learned A.G.A. vehemently opposed the present criminal revision. It is submitted that the incident reported is true

and it is wrong to say that the allegations made against the applicant are false, and/are motivated. Also, reliance has been placed on the findings recorded in the bail rejection orders to submit that the instant revision may be dismissed.

7. It is not in dispute that the applicant is a juvenile and is entitled to the benefits of the provisions of the Act. Under Section 12 of the Act, the prayer for bail of a juvenile may be rejected 'if there appear reasonable grounds for believing that the release of the juvenile is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice'.

8. The provisions relating to bail for a juvenile are carried in Section 12 of the Act, which reads as under:

"(1) When any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person:

Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the person's release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision.

(2) When such person having been apprehended is not released on bail under subsection (1) by the officer-in-charge of the police station, such officer shall cause the person to be kept only in an observation home in such manner as may be prescribed until the person can be brought before a Board.

(3) When such person is not released on bail under sub-section (1) by the Board, it shall make an order sending him to an observation home or a place of safety, as the case may be, for such period during the pendency of the inquiry regarding the person, as may be specified in the order.

(4) When a child in conflict with law is unable to fulfil the conditions of bail order within seven days of the bail order, such child shall be produced before the Board for modification of the conditions of bail."

9. The above provisions clearly show that once a person is held to be a juvenile in conflict with law, then Section 12 of the Act would govern the question of grant of bail and the custody of juvenile and it will not be governed by the provisions of the code of the criminal procedure. It is important to note that gravity or seriousness of the offence, should not been taken as an obstacle or hindrance by the Legislature to refuse bail to a delinquent juvenile. No straight jacket formula of inflexible nature can be laid down as it would depend on facts and circumstances of each case. Words "ends of justice' is confined to those facts which show that the grant of bail itself is likely to result in injustice.

10. The court has to see whether the opinion of the learned appellate Court as well as Juvenile Justice Board recorded in the impugned judgment and orders are in

consonance with the provision of the Act. Section 12 of the Act lays down three contingencies in which bail may be refused to a juvenile offender. These are:-

(i) if the release is likely to bring him into association with any known criminal, or

(ii) expose him to moral, physical or psychological danger, or

(iii) that his release would defeat the ends of justice?

11. Gravity of the offence has not been mentioned as a ground to reject the bail. It is not a relevant factor while considering to grant bail to the juvenile. It has been so held by this Court in the cases of **Shiv Kumar alias Sadhu Vs. State of U.P. 2010 (68) ACC 616(LB); Abdullah @ Abdul Hassan Vs. State of U.P. and Ohers [2015 (90) ACC 204]; Maroof Vs. State of U.P. and Another [2015 (6) ADJ 203]; Criminal Revision No. 112 of 2015 (Suraj @ Ashok Sukla Thru. Father Mahendra Shukla Vs. State of U.P. and Another) and Amit Kumar Vs. State of U.P. 2010(71) ACC 209 decided on 02.07.2015.**

12. The Act, namely, Juvenile Justice (Care and Protection of Children) Act, 2015 being beneficiary and social reforms oriented legislation, should be given full effect by all concerned whenever matters relating to juvenile comes for consideration before them. There must be any material or evidence reflecting reasonable ground to believe that delinquent juvenile, if released on bail is likely to fall into association with known criminal persons or such liberty may expose him to moral, physical or psychological danger, or his release would defeat the ends of justice. In absence of such reasonable grounds the bail of juvenile should not be refused. In Sanjay Chaurasia Vs. State of U.P. 2006 Cr.L.J. 2957 it has been observed that:-

"10. In case of the refusal of the bail, some reasonable grounds for believing above-mentioned exceptions must be brought before the Courts concerned by the prosecution but in the present case, no such ground for believing any of the above-mentioned exceptions has been brought by the prosecution before the Juvenile Justice Board and Appellate Court. The Appellate Court dismissed the appeal only on the presumption that due to commission of this offence, the father and other relatives of other kidnapped boy had developed enmity with the revisionist, that is why in case of his release, the physical and mental life of the revisionist will be in danger and his release will defeat the ends of justice but substantial to this presumption no material has been brought before the Appellate Court and the same has not been discussed and only on the basis of the presumption, Juvenile Justice Board has refused the Bail of the revisionist which is in the present case is unjustified and against the spirit of the Act. It appears that the impugned order dated 27.06.2005 passed by the learned Sessions Judge, Meerut and order dated 28.05.2005 passed by the Juvenile Justice Board are illegal and set aside."

13. Learned Magistrate by its order dated 19.05.2020 has rejected the bail of revisionist mentioning that the offence committed by juvenile is heinous and non-bailable in nature.

14. In the case of A. Juvenile Vs. State of Orissa, 2009 Cr.L.J., 2002, it has been held that:

"(6) A close reading of the aforementioned provision shows that it has

been mandated upon the Court to release a person who is apparently a juvenile on bail with or without surety, howsoever heinous the crime may be and whatever the legal or other restrictions containing in the Cr.P.C. or any other law may be. The only restriction is that if there appears reasonable grounds for believing that his release is likely to bring him into association with any moral, physical or psychological danger or his release would defeat the ends of justice, he shall not be so released."

15. The Hon'ble Apex Court in paragraph 2 of the judgment in **Kamal Vs. State of Haryana, 2004 (13) SCC 526** has held thus:

"2. This is a case in which the appellant has been convicted u/s 304-B of the India Penal Code and sentenced to imprisonment for 7 years. It appears that so far the appellant has undergone imprisonment for about 2 years and four months. The High Court declined to grant bail pending disposal of the appeal before it. We are of the view that the bail should have been granted by the High Court, especially having regard to the fact that the appellant has already served a substantial period of the sentence. In the circumstances, we direct that the bail be granted to the appellant on conditions as may be imposed by the District and Sessions Judge, Faridabad."

16. The Hon'ble Apex Court in paragraph-2 of the judgment in Takht Singh Vs. State of Madhya Pradesh, 2001 (10) SCC 463, has observed as under:-

"2. The appellants have been convicted under Section 302/149, Indian Penal Code by the learned Sessions Judge and have been sentenced to imprisonment for life. Against the said conviction and sentence their appeal to the High Court is pending. Before the High Court application for suspension of sentence and bail was filed but the High Court rejected that prayer indicating therein that the applicants can renew their prayer for bail after one year. After the expiry of one year the second application was filed but the same has been rejected by the impugned order. It is submitted that the appellants are already in jail for over 3 years and 3 months. There is no possibility of early hearing of the appeal in the High Court. In the aforesaid circumstances the applicants be released on bail to the satisfaction of the learned Chief Judicial Magistrate, Sehore. The appeal is disposed of accordingly."

17. In the instant case, co-accused Vipin Pandey & Dinesh Bind have been granted bail by this Court. It does not appear to bear any justification that the revisionist may be denied his liberty by testing his case with reference to the disentitling condition mentioned in the proviso to sub-section (1) of Section 12 of the Act. In the case of Dharmendra (Juvenile) vs. State of U.P. and others, [2018 (7) ADJ 864], the High Court was pleased to observe as under:

"10. The matter can be looked at from another vantage. In case the revisionist were an adult and stood charged of the offence that he faces with a weak circumstantial evidence of last seen and confession to the police, in all probability, it would have entitled him to bail pending trial. If on the kind of evidence forthcoming an adult would be entitled to bail, denying bail to a child in conflict with law may be denying the juvenile/ child in conflict with law the equal protection of laws

guaranteed under Article 14 of the Constitution.

11. The rule in Section 12(1) of the Act is in favour of bail always to a juvenile/ child in conflict with law except when the case falls into one or the other categories denial contemplated by the proviso. It is not the rule about bail in Section 12 of the Act that in case a child in conflict with law is brought before the Board or Court, his case is not to be seen on merits prima facie about his complicity at all for the purpose granting him bail; and all that has been done is to see if his case falls is one or the other exceptions, where he can be denied bail. The rule in Section 12 sanctioning bail universally to every child in conflict with law presupposes that there is a prima facie case against him in the assessment of the Board or the Court based on the evidence placed at that stage. It is where a case against a child in conflict with law is prima facie made out that the rule in Section 12(1) of the Act that sanctions bail as a rule, except the three categories contemplated by the proviso comes into play. It is certainly not the rule, and, in the opinion of the Court cannot be so, that a case on materials and evidence collected not being made out against a child at all, his case has to be tested on the three parameters where bail may be denied presuming that a prima facie case is constructively there. Thus, it would always have to be seen whether a case prima facie on merits against a child in conflict with law is there on the basis of material produced by the prosecution against him. If it is found that a prima facie case on the basis of material produced by the prosecution is there that would have led to a denial of a bail to an adult offender, in that case also the Rule in Section 12(1) of the Act mandates that bail is to be granted to a juvenile/ child in conflict with law except where his case falls into any of the three disentitling categories contemplated by the proviso.

12. In the opinion of this Court, therefore, the perception that merits of the case on the basis of prima facie evidence is absolutely irrelevant to a juvenile's bail plea under the Act would not be in conformity with the law. The catena of decisions that speak about merits of the case or the charge against a juvenile being irrelevant, proceed on facts and not an assumption that a case on merits is made out, and, not where the case is not at all made out prima facie. It is not that a child alleged to be in conflict with law against whom there is not iota of evidence to connect him to the crime would still have bail denied to him because his case may be placed in or the other disentitling categories under the proviso to Section 12(1) of the Act. If this kind of a construction were to be adopted it might expose the provisions of Section 12(1) of the Act to challenge on ground of violating the guarantee of equal protection of laws enshrined in Article 14 of the Constitution. It is an enduring principle that a construction that lends a statute to challenge about its constitutionality should be eschewed and one that saves and upholds its vires is to be adopted. In this context the guidance of their Lordships of the Hon'ble Supreme Court in Japani Sahoo vs. Chandra Sekhar Mohanty, (2007) 7 SCC 394 may be referred to:-

"51. The matter can be looked at from different angle also. Once it is accepted (and there is no dispute about it) that it is not within the domain of the complainant or prosecuting agency to take cognizance of an offence or to issue process and the only thing the former can do is to file a complaint or initiate proceedings in accordance with law. If that action of

initiation of proceedings has been taken within the period of limitation, the complainant is not responsible for any delay on the part of the Court or Magistrate in issuing process or taking cognizance of an offence. Now, if he is sought to be penalized because of the omission, default or inaction on the part of the Court or Magistrate, the provision of law may have to be tested on the touchstone of Article 14 of the Constitution. It can possibly be urged that such a provision is totally arbitrary, irrational and unreasonable. It is settled law that a Court of Law would interpret a provision which would help sustaining the validity of law by applying the doctrine of reasonable construction rather than making it vulnerable and unconstitutional by adopting rule of 'litera legis'. Connecting the provision of limitation in Section 468 of the Code with issuing of process or taking of cognizance by the Court may make it unsustainable and ultra vires Article 14 of the Constitution."

18. Thus, it remains largely undisputed that the applicant - was a juvenile on the date of occurrence; does not appear to be prone to criminal proclivity or criminal psychology, in light of the observations of the D.P.O; does not have a criminal history; has been in confinement for an unduly long period of time, in as much as the trial has not concluded within time frame contemplated by the Act. Even otherwise, there does not appear to exist any factor or circumstance mentioned in section 12 of the Act as may disentitle the applicant to grant of bail, at this stage.

19. In view of the above, it appears that the findings recorded by the learned Court below are in conflict with the settled principle in law, for the purpose of grant of bail and are erroneous and contrary to the law laid down by this court. Consequently, those orders cannot be sustained. The order dated 08.06.2020 passed by Special Judge(POCSO)-01, Ghazipur, and the dated 19.05.2020 passed by the Juvenile Justice Board, Ghazipur are hereby set aside.

20. In view of the observations made above, the present criminal revision is allowed. Let the revisionist/applicant Kanchan Sonkar involved in the aforesaid case crime be released on bail through his natural guardian/ mother, upon his mother furnishing personal bond with two sureties each of like amount, to the satisfaction of the court concerned with the following conditions:

(i) That the natural guardian will furnish an undertaking that upon release on bail the juvenile will not be permitted to come into contact or association with any known criminal or allowed to be exposed to any moral, physical or psychological danger and further that the father will ensure that the juvenile will not repeat the offence.

(ii) The revisionist through his natural guardian will report to the District Probation Officer on the first Wednesday of every calendar month commencing with the first Wednesday of February, 2021 and if during any calendar month the first Wednesday falls on a holiday, then on the next following working day.

(iii) The District Probation Officer will keep strict vigil on the activities of the revisionist and regularly draw up his social investigation report that would be submitted to the Juvenile Justice Board, Ghazipur on such periodical basis as the Juvenile Justice Board may determine.

(iv) The party shall file computer generated copy of such order downloaded

from the official website of High Court Allahabad or the certified copy issued by the Registry of the High Court, Allahabad.

(v) The computer generated copy of such order shall be self attested by the counsel of the party concerned.

(vi) The concerned Court/Authority/Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

However, considering the peculiar facts and circumstances of the case, the court below is directed to make every possible endeavour to conclude the trial of the aforesaid case within a period of four months from today without granting unnecessary adjournments to either of the parties.

(2020)12ILR A563
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.12.2020

BEFORE

THE HON'BLE SAMIT GOPAL, J.

Crl. Rev. No. 1305 of 2006

Constable Vishram Singh & Ors.
...Revisionists
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Revisionists:
Sri Rajesh Kumar Singh

Counsel for the Respondents:
A.G.A., Sri S.R. Sahu

A. Criminal Law -Code of Criminal Procedure, 1973-Section 397/401 & Indian Penal Code, 1860-Sections 498-A, 323,506-application-compromise between the parties (husband & wife)-on the basis of settlement they are living together again and two cases were decided before the family court-technicalities and hyper technicalities should not come in between to disturb married life-the revisionists are acquitted. (Para 3 to 17)

B. Certain offences, which bear civil flavour, particularly relating to dowry and family dispute, where the wrong is basically to victim and offender and victim have settled the disputes between them amicably, irrespective of the fact that such offences have not been made compoundable, the High Court may within the framework of its inherent power, quash the criminal proceeding or criminal complaint or F.I.R. if it is satisfied that on the face of such settlement, there is hardly any likelihood of offender being convicted and by not quashing the criminal proceedings, justice shall be casualty and ends of justice shall be defeated.(Para 9 to 11)

The Revision is allowed. (E-6)

List of Cases cited:-

1. Gian Singh Vs St. of Panj. , (2012) 10 SCC 303

2. Parbatbhai Aahir @ Prabatbhai Bhimsinhbhai Karmur & ors. Vs St. of Guj. & anr. ,(2017) 9 SCC 641,

3. Bitan Sengupta & Anr. Vs St. of W.B. & Anr.,(2018) 18 SCC 366.

4. B.S. Joshi Vs St. of Har., (2003) 4 SCC 675

5. A.R. Antulay Vs R.S. Nayak, (1988) 2 SCC 602

6. Montreal Street Railway Company Vs Normadin, (1917) AC 170

7. St. of Guj. Vs Ram Prakash P. Puri, (1969) 3 SCC 156

(Delivered by Hon'ble Samit Gopal, J.)

1. Heard Sri Rajesh Kumar Singh, learned counsel for the revisionists and Sri

Irshad Husain, learned brief holder for the State of U.P. Sri S.R. Sahu, learned counsel appearing on behalf of opposite party no.2 is not present even when the case is called up in the revised list.

2. The trial court record was summoned which has been received on 08.09.2016 as per the office report, the same has also been perused.

3. By means of the judgment and order dated 31.08.2005 passed by the Chief Judicial Magistrate, Banda, in Criminal Case No. 2383 of 2001 (Smt. Usha Prajapati Vs. Constable Vishram Singh & others) under Sections 498-A, 323, 506 IPC, P.S. Kotwali Nagar, District Banda, the revisionists Constable Vishram Singh, Karelal, Rajesh and Smt. Sumitra have been convicted and sentenced under Section 498-A IPC for one year simple imprisonment and a fine of Rs. 500/- each. Further, Constable Vishram Singh, the revisionist no.1 has been convicted and sentenced under Sections 323, 504 IPC for three months simple imprisonment. The revisionists Constable Vishram Singh, Karelal and Rajesh have further been convicted and sentenced under Section 506 IPC to six months simple imprisonment each.

4. Against the said judgment and order of conviction dated 31.08.2005, the revisionists preferred an appeal before the Sessions Judge which was numbered as Criminal Appeal No. 25 of 2005 (Vishram Singh and others Vs. State of U.P.) which was decided vide judgment and order dated 01.03.2006 passed by the Additional Sessions Judge, Court No.4, Banda, wherein the Appellate Court acquitted the accused persons of charges under Sections 323, 504 IPC and in so far as it related to the offences under Sections 498-A, 506 IPC, the conviction of the appellants were maintained but the sentences as awarded to them was modified and they were given benefit of Section 4 of the Uttar Pradesh Probation of Offenders Act, 1958 and they were ordered to be released on probation of good conduct for a period of one year, for which, it was ordered that they will file bail bonds and sureties.

5. This revision is thus preferred against the said judgment and order dated 31.08.2005 passed by the trial court and the judgment and order dated 01.03.2006 passed by the appellate court.

6. The issue in the present matter rests on a very small compass. The opposite party no.2 Smt. Usha Prajapati, daughter of Ramadheen is the wife of Revisionist No.1/Constable Vishram Singh. She had filed a complaint dated 30.07.2001 against Vishram Singh, Karelal, Rajesh, Smt. Sumitra, Shiv Rani and Chunnuvadi for offences under Sections 498-A, 323, 506 IPC in the Court of Chief Judicial Magistrate, Banda which was numbered as Criminal Complaint No. 2383/IX of 2001 titled as (Smt. Usha Prajapati Vs. Vishram Singh and others) PS- Kotwali Nagar, District Banda, in which, four accused persons who are the revisionists here, were summoned to face trial. The marriage between the opposite party no.2/Usha Prajapati and the revisionist no.1/Constable Vishram Singh was solemnized in May, 1996. Subsequently, the trial in the matter was conducted and the convictions were recorded as stated above by the trial court. The appeal against the said judgment was filed which was decided by the judgment and order as also stated above. The present revision is thus before this Court against both the judgment and orders.

7. The allegations as levelled in the case are not being dealt with and even the evidence is not being dealt with by this Court as the issue in the present matter is only to the extent that since the parties have entered into compromise during the pendency of the appeal which was taken due note of by the Appellate Court and the said compromise was also verified before the Court concerned and further two matters in the Family Court were also decided on the basis of the said compromise, the revision may be allowed and the impugned judgments and orders be set aside. The compromise between the parties was to the effect that the husband and wife had settled their disputes and were living together as husband and wife again and as such the Appellate Court had taken note of the same and though maintaining the conviction had modified the sentenced as awarded. This Court as of now has under powers of its revisional jurisdiction been knocked to set aside the conviction of the revisionists. The dispute between the parties was a matrimonial dispute.

8. In view of the settlement arrived between the revisionist no.1 and opposite party no.2 on the basis of which two matters before the Family Court had been decided and the compromise was duly verified by the concerned court below and the revisionist no.1/Constable Vishram Singh and the opposite party no.2 Smt. Usha Prajapati are living together as husband and wife again after the said dispute. Section 397 Cr.P.C. reads as under:-

" 397. Calling for records to exercise powers of revision.

(1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order,- recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

Explanation. - All Magistrates whether Executive or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of section 398.

(2) The powers of revision conferred by sub- section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.

(3) If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them."

9. The Apex Court in the case of Gian Singh Vs. State of Punjab: (2012) 10 SCC 303 in para 58 has held as under:-

"58. Where High Court quashes a criminal proceeding having regard to the fact that dispute between the offender and victim has been settled although offences are not compoundable, it does so as in its opinion, continuation of criminal proceedings will be an exercise in futility and justice in the case demands that the dispute between the parties is put to an end

and peace is restored; securing the ends of justice being the ultimate guiding factor. No doubt, crimes are acts which have harmful effect on the public and consist in wrong doing that seriously endangers and threatens well-being of society and it is not safe to leave the crime- doer only because he and the victim have settled the dispute amicably or that the victim has been paid compensation, yet certain crimes have been made compoundable in law, with or without permission of the Court. In respect of serious offences like murder, rape, dacoity, etc; or other offences of mental depravity under IPC or offences of moral turpitude under special statutes, like Prevention of Corruption Act or the offences committed by public servants while working in that capacity, the settlement between offender and victim can have no legal sanction at all. However, certain offences which overwhelmingly and predominantly bear civil flavour having arisen out of civil, mercantile, commercial, financial, partnership or such like transactions or the offences arising out of matrimony, particularly relating to dowry, etc. or the family dispute, where the wrong is basically to victim and the offender and victim have settled all disputes between them amicably, irrespective of the fact that such offences have not been made compoundable, the High Court may within the framework of its inherent power, quash the criminal proceeding or criminal complaint or F.I.R if it is satisfied that on the face of such settlement, there is hardly any likelihood of offender being convicted and by not quashing the criminal proceedings, justice shall be casualty and ends of justice shall be defeated. The above list is illustrative and not exhaustive. Each case will depend on its own facts and no hard-and-fast category can be prescribed."

10. Further in para 61 of the judgment in the case of Gian Singh (supra), the Apex Court has further held that where the parties have entered into compromise particularly in the matters predominantly of civil nature, matrimonial relating to dowry and family dispute etc. which are of private and personal nature, the High Court may quash the proceedings in such matters. Para 61 of the said judgment is extracted herein-below:

"61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving

such offences. But the criminal cases having overwhelmingly and predominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding."

11. Further, in the case of Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and others Vs. State of Gujarat and another: (2017) 9 SCC 641, the Apex Court has laid down the category of cases in which the offences can be compounded, the said guidelines are extracted herein-below:

"16.The broad principles which emerge from the precedents on the subject, may be summarised in the following propositions:

(16.1) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court.

(16.2) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

(16.3) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power.

(16.4) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court.

(16.5) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated.

(16.6) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental

depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences.

(16.7) As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned.

(16.8) Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute.

(16.9) In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

(16.10) There is yet an exception to the principle set out in propositions 16.8 and 16.9. above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

12. In the case of **Bitan Sengupta and another Vs. State of West Bengal and another: (2018) 18 SCC 366**, the Apex Court has held that even after dismissal of the revision by the High Court, by which, the judgment of the Sessions Court was concurred, the parties had entered into compromise and had settled the matter and they had decided the keep harmony between them to enable them to live with peace and love and by following the spirit of the law laid down in the case of B.S. Joshi Vs. State of Haryana: (2003) 4 SCC 675, the Apex Court set aside the order of conviction against the accused persons.

13. In the present case, the situation as was in the case of Bitan Sengupta (supra) is even better. In the said case, the parties had entered into a compromise by way of getting themselves separated and they had acted upon the said settlement and took mutual divorce on that basis but in the present case, the parties have entered into a settlement which was acted upon in two cases filed before the Family Court and the revisionist no.1 and the opposite party no.2 have decided to live together and are living together again as husband and wife.

14. This Court while exercising powers under Section 397 Cr.P.C. is also vested with powers under Section 482 of the Code of Criminal Procedure, 1973. The Court can also exercise its powers ex-debito justitiae to reach to a judgment to secure the ends of justice between the parties.

A Bench of Seven Judges of the Apex Court in the case of A.R. Antulay Vs. R.S. Nayak: (1988) 2 SCC 602 have pointed out that no man is above the law, but at the same time no man can be denied his rights

under the constitutions and the laws, and no man should suffer a wrong by technical and procedure irregularities. It was observed referring to the judgment of Montreal Street Railway Company Vs. Normadin: 1917 AC 170 as follows:

"All rules of court are nothing but provisions intended to secure proper administration of justice. It is, therefore, essential that they should be made to serve and be subordinate to that purpose".

It is further observed in the said judgment referring to the judgment of State of Gujarat Vs. Ram Prakash P.Puri: (1969) 3 SCC 156 as follows:-

"Procedure has been described to be a handmaid and not a mistress of law, intended to subserve and facilitate the cause of justice and not to govern or obstruct it. Like all rules of procedure, this rule demand a construction which would promote this cause."

15. In the present case, since the husband and wife have arrived at a settlement between them, have got two cases before the Family Court decided on the basis of the said settlement and are living together as husband and wife again, technicalities and hyper technicalities should not come in between to disturb their married life.

16. This Court thus by exercising its powers sets aside the judgment and order of conviction dated 31.08.2005 passed by the Chief Judicial Magistrate, Banda in Criminal Case No. 2383 of 2001 (Smt. Usha Prajapati Vs. Constable Vishram Singh & others) under Sections 498-A, 323, 506 IPC, P.S. Kotwali Nagar, District Banda and the judgment and order dated 01.03.2006 passed by the Additional Sessions Judge, Court No. 4, Banda in Criminal Appeal No. 25 of 2005 (Vishram Singh and others Vs. State of U.P.). The revisionists are acquitted of the charges levelled against them.

17. The revision is thus allowed.

18. Office is directed to return the trial court records to the trial court forthwith.

19. A copy of this judgment be also certified to the concerned District and Sessions Judge for its compliance and necessary action.

20. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad.

21. The computer generated copy of such order shall be self attested by the counsel of the party concerned.

22. The concerned Court/Authority/Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

(2020)12ILR A569
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.11.2020

BEFORE

THE HON'BLE DINESH PATHAK, J.

Crl. Rev. No. 2032 of 2020

Naved @ Kadeer ...Revisionist
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Petitioner:
Sri Rajesh Kumar Mishra

Counsel for the Respondents:
A.G.A.

Discharge application rejected-Applicant had illicit relationship with victim's wife-Victim was lying unconscious in his room – froth oozing out of his mouth-doctor's statement-possibility of poisoning can be inferred-whatsapp chat supports FIR-strict standard of proof not required for deciding discharge application.

Revision dismissed. (E-9).

List of Cases cited: -

1. Sajjan Kumar Vs C.B.I. reported in (2010) 9 SCC 368

2. M.E. Shivalingamurthy Vs C.B.I. reported in (2020) 2 SCC 768

3. P. Vijayan Vs St. of Ker., (2010) 2 SCC 398

4. Bhawna Bai Vs Ghanshyam & ors., (2020) 2 SCC 217

5. Amit Kapoor Vs Ramesh Chander reported in (2012) 9 SCC 460

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

1. Heard Sri Rajesh Kumar Mishra, learned counsel for the revisionist and learned A.G.A. for the State.

2. In view of the peculiar facts and circumstances of the case and the order proposed to be passed hereunder, this Court proceeded to finally decide this matter at the admission stage, without putting notice to respondent no.2.

3. Instant revision has been preferred with a prayer to set aside judgment and order dated 05.11.2020 passed by Additional Sessions Judge/Fast Track Court (Offence Against Women), District-Rampur in Sessions Trial No.04 of 2020 arising out of Case Crime No.374 of 2019, under Section 328, 120 B IPC, Police Station-Kemari, District-Rampur, by which discharge application u/s 227 Cr.P.C. filed by the revisionist, had been rejected.

4. Sageer Ahmad has filed an FIR alleging therein that on 20.08.2019 his son Md. Tehsin Raza, aged about 28 years, was found lying unconscious in his room and froth was oozing from his mouth. He had been rescued by two other sons of the informant to the hospital where doctors diagnosed brain haemorrhage like condition and operated his brain. After operation his memory became week. Subsequently, he had been shifted to Sir Ganga Ram Hospital but no improvement could not seen in his condition and he came into vegetative state. He was not in a position to speak any word and move his limbs. Further allegation is that his daughter-in-law Nida Parween, wife of Md. Tensin Raza (victim), was having illicit relation with some other man namely, Naved alias Kadeer (revisionist herein), with whom she used to talk on mobile no.9410820370 and after going through whatsapp chat history of the two, their relationship had emerged. Because of their relationship, his daughter-in-law in collusion with Naved alias Kadeer (revisionist) had given poison to his son.

5. Present revisionist had moved a discharge application under Section 227 Cr.P.C. inter alia on the grounds that there is no evidence available on record to prove that son of informant was poisoned.

6. After considering the material available on record, trial court has rejected

the discharge application of present revisionist with an observation that from perusal of statement of prosecution u/s 161 Cr.P.C. and statement of Dr. Monit Agrawal, it cannot be ruled out that patient (victim) was not poisoned.

7. It is submitted by learned counsel for the revisionist that with respect to alleged incident dated 20.08.2019, an FIR was lodged on 19.10.2019 at a very belated stage and there was no justification for such delay. It is further submitted that there is no eye witness to the incident as alleged in the FIR. From hospital report it is clear that informant's son was treated for hydrocephalus and there is no report with respect to his poisoning. Learned counsel for the revisionist has shown the part of case diary, at Serial no.4, (Annexure-4) wherein it has been stated that according to record of hospital, Md. Tehsin Raza (victim) was brought by his brother Wasim on 20.08.2019 at about 6.05 A.M. in unconscious condition but subsequently at about 8.10 A.M. they were absconded from the hospital. It is mentioned in the case diary that attendant of the patient had stated that patient, Md. Tehsin Raza has taken medicine for headache on advice of a private doctor. Learned counsel for the revisionist has also drawn attention of this Court towards statement of Dr. Satnam Singh Chhabra and Dr. Ansul Gupta, who have stated that they have treated the patient Md. Tehsin Raza, who was suffering from hydrocephalus and patient was earlier operated at Sri Sai Hospital. He was unable to move, eat and drink, therefore, he was kept in I.C.U. and after treatment he had been discharged. It is further stated that there was no sign of poisoning to the patient. Learned counsel for the revisionist has also drew attention of Court towards statement of Dr. Monit Agrawal, Neuro Surgeon, Sai Hospital, who had said that during medical examination he had not found any poison but some of the poisons are in such a nature which cannot be detected in medical report. Submission of learned counsel for the revisionist is that there is no case of poisoning and statutory ingredients as required for commission of crime u/s 328 IPC are lacking in the present matter, inasmuch as, there is no sign of poison which is clearly evident from statements of Dr. Satnam Singh Chhadha and Dr. Ansul Gupta of Sir Ganga Ram Hospital. Apart that, Serial No.4 of case diary (Annexure-4) reveals that Md. Tehsin Raza was medicated for headache and not for the poison.

8. Per contra, learned A.G.A. has submitted that FIR was fully corroborated by statement of informant u/s 161 Cr.P.C. Apart from that, Dr. Monit Agrawal of Sri Sai Hospital has clearly stated that some of the poisons could not be detected in medical report, therefore, poisoning of victim (son of informant) cannot be ruled out. It is further submitted that the order passed by the Court below is legal and there is no infirmity or perversity in the aforesaid order, which has been passed after considering the evidence available on record. No case is made out for discharge of the revisionist, who has to face the trial, inasmuch as, in the facts and circumstances of the present case, his complicity in commission of crime can, prima facie, be inferred and the offence is made out against him.

9. I have considered the rival submissions made by learned counsel for the parties and perused the record on board.

10. FIR version is clearly worded that son of informant had been poisoned by his

wife who was having illicit relationship with Kadeer (revisionist). Version of FIR is fully corroborated by statement of informant u/s 161 Cr.P.C. There is no inconsistency or contradiction between the statement of informant and FIR version.

11. Prima facie, I do not find any force in the submission made by learned counsel for the revisionist qua non poisoning of victim, inasmuch as, statement of Dr. Monit Agrawal, Neuro Surgeon of Sri Sai Hospital has clearly stated that some of the poisons are of such nature which could not be detected in medical report, therefore, possibility of poisoning to the victim, cannot be ruled out at this stage, which is a matter of investigation and the motive could be inferred from the whatsapp chat history of the two.

12. Scope of deciding discharge application under Section 227 Cr.P.C. is limited. Prima facie, satisfaction of the trial court is sufficient to frame the charges and the purpose of making out the sufficient ground is only for putting the accused to trial not to hold him guilty. From perusal of the impugned order it reveals that trial court has exercised its jurisdiction very sparingly and consciously in deciding the discharge application and has considered and discussed all the relevant material which was available on record.

13. Scope of applicability of the provisions as embodied under Sections 227 and 228 Cr.P.C. has been discussed in detail by Hon'ble Supreme Court in the case of Sajjan Kumar vs. Central Bureau of Investigation reported in (2010) 9 SCC 368 and expounded the seven principles in explaining the scope of applicability of Sections 227 and 228 Cr.P.C. in paragraph 21 of the judgment, which is reproduced hereinbelow :

"21. On consideration of the authorities about the scope of Section 227 and 228 of the Code, the following principles emerge:-

(i) The Judge while considering the question of framing the charges under Section 227 of the Cr.P.C. has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.

(ii) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing a charge and proceeding with the trial.

(iii) The Court cannot act merely as a Post Office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

(iv) If on the basis of the material on record, the Court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

(v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the Court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

(vi) At the stage of Sections 227 and 228, the Court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value discloses the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

(vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal."

14. In a recent judgment in the case of M.E. Shivalingamurthy vs. Central Bureau of Investigation reported in (2020) 2 SCC 768, Hon'ble Supreme Court has considered the judgment of P. Vijayan vs. State of Kerala, (2010) 2 SCC 398 and reproduced the principle laid down in aforesaid judgment. Relevant paragraphs 17, 18, 28, 29, 30 and 31 are being quoted below :

"17. This is an area covered by a large body of case law. We refer to a recent judgment which has referred to the earlier decisions, viz., P. Vijayan v. State of Kerala and another2 and discern the following principles:

17.1 If two views are possible and one of them gives rise to suspicion only as distinguished from grave suspicion, the Trial Judge would be empowered to discharge the accused.

17.2 The Trial Judge is not a mere Post Office to frame the charge at the instance of the prosecution.

17.3 The Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding. Evidence would consist of the statements recorded by the Police or the documents produced before the Court.

17.4 If the evidence, which the Prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, "cannot show that the accused committed offence, then, there will be no sufficient ground for proceeding with the trial".

17.5 It is open to the accused to explain away the materials giving rise to the grave suspicion.

17.6 The court has to consider the broad probabilities, the total effect of the evidence and the documents produced before the court, any basic infirmities appearing in the case and so on. This, however, would not entitle the court to make a roving inquiry into the pros and cons.

17.7 At the time of framing of the charges, the probative value of the material on record cannot be gone into, and the material brought on record by the prosecution, has to be accepted as true.

17.8 There must exist some materials for entertaining the strong suspicion which can form the basis for drawing up a charge and refusing to discharge the accused."

"18. The defence of the accused is not to be looked into at the stage when the accused seeks to be discharged under Section 227 of the Cr.P.C. The expression, "the record of the case", used in Section 227 of the Cr.PC, is to be understood as the documents and the articles, if any, produced by the prosecution. The Code does not give any right to the accused to produce any document at the stage of framing of the charge. At the stage of

framing of the charge, the submission of the accused is to be confined to the material produced by the Police."

28. It is here that again it becomes necessary that we remind ourselves of the contours of the jurisdiction under Section 227 of the Cr.PC. The principle established is to take the materials produced by the prosecution, both in the form of oral statements and also documentary material, and act upon it without it been subjected to questioning through cross-examination and everything assumed in favour of the prosecution, if a scenario emerges where no offence, as alleged, is made out against the accused, it, undoubtedly, would enure to the benefit of the accused warranting the Trial Court to discharge the accused."

29. It is not open to the accused to rely on material by way of defence and persuade the court to discharge him.

30. However, what is the meaning of the expression "materials on the basis of which grave suspicion is aroused in the mind of the court's", which is not explained away? Can the accused explain away the material only with reference to the materials produced by the prosecution? Can the accused rely upon material which he chooses to produce at the stage?

31. In view of the decisions of this Court that the accused can only rely on the materials which are produced by the prosecution, it must be understood that the grave suspicion, if it is established on the materials, should be explained away only in terms of the materials made available by the prosecution. No doubt, the accused may appeal to the broad probabilities to the case to persuade the court to discharge him."

15. In another recent judgment passed by Three Judges' Bench in the case of Bhawna Bai vs. Ghanshyam and others, (2020) 2 SCC 217, Hon'ble Supreme Court has considered the decision in the case of Amit Kapoor vs. Ramesh Chander reported in (2012) 9 SCC 460 wherein scope of Sections 227 and 228 Cr.P.C. has been discussed. Relevant paragraph 15 of Bhawan Bai's case (supra) is being quoted below :

"15. Considering the scope of Sections 227 and 228 Crl.P.C., in Amit Kapoor v. Ramesh Chander and another (2012) 9 SCC 460, the Supreme Court held in paragraphs 17 and 19 as under:-

"17. Framing of a charge is an exercise of jurisdiction by the trial court in terms of Section 228 of the Code, unless the accused is discharged under Section 227 of the Code. Under both these provisions, the court is required to consider the "record of the case" and documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the court and in its opinion there is ground for presuming that the accused has committed an offence, it shall frame the charge. Once the facts and ingredients of the section exists, then the court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. This presumption is not a presumption of law as such. The satisfaction of the court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for exercise of such jurisdiction. It may even be weaker than a prima facie case. There is a fine distinction between the language of Sections 227 and 228 of the Code. Section 227 is the expression of a definite opinion and judgment of the Court while Section 228 is tentative. Thus, to say that at the stage of framing of charge, the Court should form an opinion that the accused is

certainly guilty of committing an offence, is an approach which is impermissible in terms of Section 228 of the Code.

19. At the initial stage of framing of a charge, the court is concerned not with proof but with a strong suspicion that the accused has committed an offence, which, if put to trial, could prove him guilty. All that the court has to see is that the material on record and the facts would be compatible with the innocence of the accused or not. The final test of guilt is not to be applied at that stage. We may refer to the well-settled law laid down by this Court in State of Bihar v. Ramesh Singh (1977) 4 SCC 39:

"4. Under Section 226 of the Code while opening the case for the prosecution the Prosecutor has got to describe the charge against the accused and state by what evidence he proposes to prove the guilt of the accused. Thereafter comes at the initial stage the duty of the court to consider the record of the case and the documents submitted therewith and to hear the submissions of the accused and the prosecution in that behalf. The Judge has to pass thereafter an order either under Section 227 or Section 228 of the Code. If "the Judge considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing', as enjoined by Section 227. If, on the other hand, "the Judge is of opinion that there is ground for presuming that the accused has committed an offence which -- ... (b) is exclusively triable by the court, he shall frame in writing a charge against the accused', as provided in Section 228. Reading the two provisions together in juxtaposition, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the Prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or Section 228 of the Code. At that stage the court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the court to think that there is ground for presuming that the accused has committed an offence then it is not open to the court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the court should proceed with the trial or not. If the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. An

exhaustive list of the circumstances to indicate as to what will lead to one conclusion or the other is neither possible nor advisable. We may just illustrate the difference of the law by one more example. If the scales of pan as to the guilt or innocence of the accused are something like even at the conclusion of the trial, then, on the theory of benefit of doubt the case is to end in his acquittal. But if, on the other hand, it is so at the initial stage of making an order under Section 227 or Section 228, then in such a situation ordinarily and generally the order which will have to be made will be one under Section 228 and not under Section 227."

16. Provisions of discharge and framing of charges comes within Chapter XVIII of Cr.P.C., which is captioned as "Trial before Court of Sessions". Aforesaid chapter starts from Section 225, which denotes that in every trial the prosecution shall be conducted by the Public Prosecutor before Court of Sessions. Under Section 226 Cr.P.C., duty is entrusted upon the Prosecutor to open the case and he has to describe the charges against the accused, and in support of said charges, he has to state the evidences which he is going to produce to prove the guilt of accused. Thereafter, initial duty of the Court starts to consider the documents submitted with the record and to hear the submission of accused and prosecution under Section 227 Cr.P.C. to ascertain the alleged complicity of accused in the commission of crime. After considering the documents and submissions, with his judicial mind, in case, he did not find any ground for initiating the proceedings against the accused, he is empowered to discharge him with the reasonings. In considering discharge of the accused, Court is not supposed to discuss the case under the proposition that the case is beyond reasonable doubt. Strict standard of proof is not required at this stage. Only prima facie case against accused is required to be seen. While evaluating the materials, the Court has to see as to whether sufficient ground for proceeding against the accused, exists or not. Even in framing the charges, Court is not required to discuss the detail reasons as to why charge has been framed. After perusal of the record and hearing the parties, if the Court is of the opinion that there is sufficient ground for presuming that accused has committed an offence exclusively triable by the Court of Sessions, he shall frame the charges against the accused for such offence. At the stage of discharge, accused is not permitted to adduce any fresh evidence, rather he has to prove his innocence only on the basis of evidence which was produced by the prosecution at the initial stage. Availability of material entertaining strong suspicion is sufficient for the prima facie conclusion qua complicity of the accused in commission of crime.

17. In view of the propositions laid down by Hon'ble Supreme Court as discussed in the preceding paragraphs, alleged complicity of present revisionist in the commission of crime, prima facie, can easily be inferred in the present matter. After considering the documentary evidence, as available on the board, in totality of facts and circumstances of the present case, it is evident that prima facie case is made out for framing charges against present revisionist. Sufficient material is available on record to prima facie infer the complicity of present revisionist in commission of crime. As per FIR version, victim was lying unconscious in his room and froth was oozing from his mouth. Therefore, seeing the condition of

victim, in the light of statement made by Dr. Monia Agrawal, possibility of victim's poisoning could be inferred. Mobile number and whatsapp chat history, as mentioned in FIR, also supports the accusation made by prosecution.

18. Accordingly, present revision is dismissed. Judgment and order dated 05.11.2020 passed by Additional Sessions Judge/Fast Track Court (Offence Against Women), District-Rampur in Sessions Trial No.04 of 2020 is hereby affirmed and maintained.

19. Let a copy of this order be sent to the concerned Court below forthwith for information and follow up action, if required.

(2020)12ILR A577
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.11.2018

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE RAJIV JOSHI, J.

Crl. Misc. W.P. No. 32551 of 2018

Bhola Nath Gupta ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sanjeev Kumar Shukla

Counsel for the Respondents:
A.G.A.

A. Constitution of India,1950 - Article 226 & Code of Criminal Procedure, 1973-Section 321-application-issuance of writ of mandamus to decide the representation-maintainability of- application for withdrawal of prosecution cannot be moved on behalf of the accused-under section 321 CrPC, it is the Public Prosecutor or Assistant Public Prosecutor in charge of the case with the consent of the Court, withdraw from the prosecution before the judgment is pronounced-the petitioner has no such right-in the absence of a judicially enforceable or a legally protected right, no writ in the nature of mandamus can be issued-Hence, application/representation at the instance of petitioner is not maintainable at all.(Para 3 to 12)

The Petition is dismissed. (E-6)

(Delivered by Hon'ble Rajiv Joshi, J.)

1. Heard learned counsel for the petitioner and learned AGA for the State.

2. Present writ petition under Article 226 of the Constitution has been filed for the issuance of writ of mandamus commanding the respondent no.1 to decide the representation dated 28.9.2018 dispatched through registered post on 1.10.2018 under Section 321 Cr.P.C. within stipulated time.

3. As per the averments made in the writ petition, petitioner's son is involved in Case Crime No. 446 of 2018, registered at Police Station Kotwali, District Maharajganj on the basis of F.I.R. dated 5.7.2018 under Section 66/67 of Information Technology Amendment Act, 2008 and 17/18 Protection of Children From Sexual Offences Act. It is further averred in the writ petition that against the son of the petitioner, Case Crime No. 546 of 2018, under Section 3 (1) Gangster and Anti Social Activities (Prevention) Act, 1986 has been registered. According to the petitioner, the police of concerned police station is investigating the matter but there is no hope for getting justice from the Investigating Officer and therefore,

application/representation dated 28.9.2018 has been filed through registered post on 1.10.2018 before the State Government under Section 321 Cr.P.C for withdrawal of prosecution, but no decision on the said representation has been taken. Hence, the present writ petition.

4. Preliminary objection has been raised by learned AGA that the prayer made by the petitioner in the writ petition cannot be granted in view of the fact that petitioner's claim is not covered under Section 321 Cr.P.C. and therefore, the writ petition deserves to be dismissed summarily.

5. We have considered the objection as raised by learned AGA and perused the record.

6. Section 321 of Cr.P.C. reads as under:

"321. Withdrawal from prosecution:- The Public Prosecutor or Assistant Public Prosecutor in charge of a case may, with the consent of the Court, at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried; and, upon such withdrawal,-

(a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;

(b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences: Provided that where such offence-

(i) was against any law relating to a matter to which the executive power of the Union extends, or

(ii) was investigated by the Delhi Special Police Establishment under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or

(iii) involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or

(iv) was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty, and the Prosecutor in charge of the case hag hot been appointed by the Central Government, he shall not, unless he hag been permitted by the Central Government to do so, move the Court for its consent to withdraw from the prosecution and the Court shall, before according consent, direct the Prosecutor to produce before it the permission granted by the Central Government to withdraw from the prosecution."

7. From a bare perusal of Section 321 Cr.P.C., it is apparent that it is the Public Prosecutor or Assistant Public Prosecutor in charge of a case, who may, with the consent of the Court, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried, before the judgment is pronounced.

8. Thus, it is clear that the application for withdrawal of prosecution under Section 321 Cr.P.C. cannot be moved on behalf of the accused himself and hence, the application/representation filed under Section 321 Cr.P.C. at the instance of the petitioner on behalf of his son is not maintainable at all.

9. Apart from above, it is well settled that for issuance of a writ in the nature of mandamus, the petitioner must satisfy the Court that he has a legal right to the

performance of statutory duty by the party, against whom mandamus is prayed for. In other words, in the absence of a judicially enforceable or a legally protected right, no writ in the nature of mandamus can be issued. The petitioner has no such right.

10. In view of the above, the application filed by the petitioner on behalf of accused-son is not at all maintainable, as the State respondent is not duty bound to decide the application filed by the petitioner.

11. Therefore, the preliminary objection so raised by the learned A.G.A. has force and is sustained.

12. The present writ petition is totally misconceived and is, accordingly, dismissed as not maintainable.

(2020)12ILR A579
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.10.2020

BEFORE

THE HON'BLE SHASHI KANT GUPTA, J.
THE HON'BLE VIPIN CHANDRA DIXIT, J.

First Appeal No. 305 of 2017

Smt. Neelam Devi ...Appellant
Versus
Vikas Singh ...Respondent

Counsel for the Appelant:
Sri Arun K. Singh Deshwal

Counsel for the Respondent:
Sri Manoj Kumar Tripathi, Sri Namit Srivastava, Sri Naresh Chandra Tripathi

Civil Law -Hindu Marriage Act (25 of 1955) – Section 13(1)(ia) - Divorce - On grounds of 'cruelty' - Cruelty in relation to matrimonial matters consists of acts where one spouse has so treated the other & manifested such feelings towards her or him as to have inflicted bodily injury, or to have caused reasonable apprehension of bodily injury, suffering – Cruelty consists of conduct of such nature as to cause a reasonable apprehension in petitioner's mind that it would be harmful or injurious to live with other party - Cruelty has to be distinguished from ordinary wear and tear of family life - Mere trivial irritations, quarrels, which happens in day to day life would not be adequate for grant of divorce - Ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that the wronged party finds it extremely difficult to live with the other party (Para 9, 14)

Husband filed divorce petition on the ground of cruelty and desertion by wife - allegation that wife had not performed her matrimonial obligations for last 6 years, putting pressure upon him to live separately, regularly talked on telephone to some unknown person and on being queried she used to quarrel - Family court disbelieved allegations of adultery however the divorce petition was allowed on the ground that wife used to live at her parental house & made allegations against her husband without any basis amounting to cruelty - *Held* - Wife not living separately on account of her own free-will but always ready and is still ready to live with husband but husband refused to live with wife - Husband failed to establish that wife committed cruelty or deserted him without any sufficient reasons - Decree of divorce set aside. (Para 17 18 19)

Appeal allowed. (E-5)

List of Cases cited: -

1. Savitri Pandey Vs Prem Chandra Pandey, (2002) 2 SCC 73, AIR 2002 SC 591

2. Hitesh Bhatnager Vs Deepa Bhatnagar AIR 2011 SC1637

3. Smt.Sarita Devi Vs Sri Ashok Kumar Singh 2018 (3) AWC 2328

4. Kusum Lata Vs Kamta Prasad AIR 1965 All 280

5. Narayan Ganesh Dastane Vs Sucheta Narayan Dastane AIR 1975 SC 1534

6. Manjeet Kaur Vs Avtar Singh 2001 Hindu Law Report 614.

(Delivered by Hon'ble V.C. Dixit, J.)

1. This first appeal has been filed by defendant appellant under Section 19 of Family Courts Act, 1984 (hereinafter referred as Act, 1984) against the judgment and decree dated 25.3.2017 passed by Principal Judge, Family Court, Hapur in Case No. 487 of 2011 (Vikas Singh Vs. Smt. Neelam Devi) filed under Section 13 of Hindu Marriage Act, 1955 (hereinafter referred as Act, 1955), by which the divorce suit filed by plaintiff respondent was decreed.

2. The divorce petition was filed by respondent husband with the allegation that his marriage was solemnized with the defendant appellant on 20.6.2002 in accordance with Hindu rituals without dowry at village Nayazpur Khaiya, Pargana and Tehsile Garh Mukteshwer, Ghaziabad, the parental house of the defendant appellant. After marriage the plaintiff respondent brought defendant appellant to his house at Garh Road, Kuvesher Chaupla, Pargana and Tehsile Hapur, Ghaziabad. He performed his obligations of being a husband and led a happy married life and fulfilled all genuine demand of his wife according to his status. Their daughter namely Km. Lavi was born on 1.1.2004. It is alleged that after two years of marriage the relationship of the parties strained and defendant started creating trouble asking to live separately with the family. It is further alleged that the defendant wife was not ready to do household chores and had starting quarreling with the plaintiff husband. It is further alleged that she started frequently visiting her parental house without plaintiff's permission. Apart from this she regularly talked on telephone to some unknown person and on being queried she used to quarrel. On 27.3.2010 when plaintiff was out of his house, the defendant was talking on telephone to some unknown person and on reaching home the plaintiff inquired with whom she was talking to, the defendant annoyingly threatened to murder him. On the very same day her father and brother came to the plaintiff's house to beat him and his mother. The father and brother took the defendant wife and Km. Lavi to her maternal home and while leaving removed Rs. 60,000/- and 20 'tola' gold from plaintiff's house. It is further submitted that the wife had not performed her matrimonial obligations for last 6 years. It is further alleged that the wife had lodged a false case which was registered as Case Crime 23 of 2010 in Mahila Thana, Meerut which was subsequently withdrawn on the intervention of respected people and relatives. parties agreed to pursue divorce by mutual consent. Divorce petition was filed under Section 13 B of Act, 1955 on 9.4.2010 which was registered as Case No. 176 of 2010 but the same was subsequently withdrawn on 16.8.2011 on the application filed by the defendant appellant. When the defendant appellant refused to live together, under compelling circumstances the present divorce petition was filed seeking divorce on the ground of cruelty.

3. The defendant appellant on being notice had contested the divorce petition by filing written statement denying the allegations of the divorce petition. It was stated that her father had spent Rs.15 lakhs

and had provided all house hold articles at the time of marriage but the family of husband were not happy with the dowry furthermore they demanded a car and Rs. 2 lakhs cash. This illegal demand of dowry was not fulfilled by her father and as such the family members of husband had started abusing and harassing the appellant defendant. It is further alleged that the husband had an illicit relation with a married woman of the locality and was leading an adulterous life. When the illegal demand of dowry was not fulfilled she was beaten by the husband and his family members and was thrown out of the house along with her daughter Km. Lavi on 27.3.2010. She lodged a first information report in Mahila Thana which was registered as Case Crime No. 23 of 2010 under Sections 498A, 323 I.P.C and 3/4 Dowry Act. A meeting was held at the residence of brother in law (Jija) of the plaintiff husband at Hapur on 4.4.2010 in absence of defendant and the plaintiff husband had refused to keep the defendant as his wife. He asked for the divorce and was ready to pay Rs.8 lakhs to the defendant as permanent alimony and Rs.12 lakhs for maintenance of Km. Lavi. On the pressure of father and other family members the criminal case was withdrawn by her. A divorce petition was filed under Section 13B of Act, 1955 on 9.4.2010 which was registered as Case No. 176 of 2010, but even after filing of divorce petition earlier filed with mutual consent the plaintiff respondent neither paid agreed amount to the defendant appellant nor deposited the amount in the name of Km. Lavi and as such divorce petition earlier filed with mutual consent was withdrawn subsequently on her application on 16.8.2011. It is also pleaded that she never deserted the plaintiff respondent but the plaintiff respondent himself had deserted her for such a long period without any sufficient reason and is not ready to keep her as his wife. The allegations alleged in the plaint regarding cruelty was specifically denied and it was stated that she was always ready and is still ready to live with the plaintiff respondent and prayed that the divorce suit filed by plaintiff respondent is liable to be dismissed.

4. On the pleadings of the parties following 2 issues were framed by the learned Family Court:

1. Whether on the grounds mentioned in the plaint, the marriage dated 20.06.2002 is liable to be dissolved ?

2. Relief ?

5. Both the parties had led their evidence in support of their case. Plaintiff respondent himself had appeared as P.W.1 and also produced copy of divorce petition filed under section 13 B of Act, 1955 and order passed therein whereas defendant appellant herself had appeared as D.W. 1.

6. The learned Family Court had allowed the divorce petition vide judgment and decree dated 25.3.2017, which is impugned in the present appeal.

7. Heard learned counsels for the parties and perused the record as well as written submissions and case laws filed by respective parties.

8. The plaintiff-respondent had filed the divorce petition seeking divorce on the ground of cruelty alleging therein that the wife frequently visited her parental house without his permission and had put pressure to live separately with the family of plaintiff-respondent. Apart from this she regularly talked on telephone to some

unknown person whereas the defendant appellant had denied these allegation. It was pleaded that on account of non-fulfilment of dowry, the husband and the family members had harassed the appellant. It was also alleged that the plaintiff respondent had an illicit relationship with a married women of the locality and was living an adulterous life. Learned family court had disbelieved the allegations of adultery alleged by both the husband and the wife against each other but the divorce petition was allowed by the judgment and decree dated 25.3.2017 on the ground that behaviour of wife is not like an ideal lady as she used to live at her parental house and make allegations against her husband without any basis which amounting to cruelty.

9. The decree of divorce has been challenged in the present appeal by the defendant appellant on the ground that the learned family court has not recorded any finding regarding persistent or repeated cruelty on the part of appellant as required by Section 13-(ia) of Hindu Marriage Act, 1955. The learned court below had wrongly shifted the burden to prove the ground of cruelty on the appellant-defendant rather it was to be proved by plaintiff-respondent. The counsel for the appellant-wife relied upon the para-6 of the judgment of Hon'ble Supreme Court in the case of Savitri Pandey vs. Prem Chandra Pandey reported in AIR 2002 SC 591, which is quoted herein below:

6. Treating the petitioner with cruelty is a ground for divorce under Section 13(1)(ia) of the Act. Cruelty has not been defined under the Act but in relation to matrimonial matters it is contemplated as a conduct of such type which endangers the living of the petitioner with the respondent. Cruelty consists of acts which are dangerous to life, limb or health. Cruelty for the purpose of the Act means where one spouse has so treated the other and manifested such feelings towards her or him as to have inflicted bodily injury, or to have caused reasonable apprehension of bodily injury, suffering or to have injured health. Cruelty may be physical or mental. Mental cruelty is the conduct of other spouse which causes mental suffering or fear to the matrimonial life of the other. "Cruelty", therefore, postulates a treatment of the petitioner with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party. Cruelty, however, has to be distinguished from the ordinary wear and tear of family life. It cannot be decided on the basis of the sensitivity of the petitioner and has to be adjudged on the basis of the course of conduct which would, in general, be dangerous for a spouse to live with the other. In the instant case both the trial court as well as the High Court have found on facts that the wife had failed to prove the allegations of cruelty attributed to the respondent. Concurrent findings of fact arrived at by the courts cannot be disturbed by this Court in exercise of powers under Article 136 of the Constitution of India. Otherwise also the averments made in the petition and the evidence led in support thereof clearly shows that the allegations, even if held to have been proved, would only show the sensitivity of the appellant with respect to the conduct of the respondent which cannot be termed more than ordinary wear and tear of the family life.

10. Learned counsel for the appellant has further submitted that the court below had failed to consider that the wife wants to

live with her husband and has erroneously ignored the specific averment in written statement as well as the oral statement of the wife in this regard before the court below. It has further been argued by the learned counsel for the appellant-defendant that the impugned judgment was also passed on the ground of irretrievable breakdown of marriage eventhough it is not the statutory ground under Section 13 of the Hindu Marriage Act, 1955, infact husband himself had denied to keep the appellant with him. The reliance has been placed on para 7, 7A, 13 & 16 of Savitri Pandey's case (supra).

7. No decree of divorce could be granted on the ground of desertion in the absence of pleading and proof. Learned counsel for the appellant submitted that even in the absence of specific issue, the parties had led evidence and there was sufficient material for the Family Court to return a verdict of desertion having been proved. In the light of the submissions made by the learned counsel, we have opted to examine this aspect of the matter despite the fact that there was no specific issue framed or insisted to be framed.

7A. "Desertion", for the purpose of seeking divorce under the Act, means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. In other words it is a total repudiation of the obligations of marriage. Desertion is not the withdrawal from a place but from a state of things. Desertion, therefore, means withdrawing from the matrimonial obligations, i.e., not permitting or allowing and facilitating the cohabitation between the parties. The proof of desertion has to be considered by taking into consideration the concept of marriage which in law legalises the sexual relationship between man and woman in the society for the perpetuation of race, permitting lawful indulgence in passion to prevent licentiousness and for procreation of children. Desertion is not a single act complete in itself, it is a continuous course of conduct to be determined under the facts and circumstances of each case. After referring to host of authorities and the views of various authors, this Court in Bipinchandra Jaisinghbhai Shah v. Prabhavati [AIR 1957 SC 176] held that if a spouse abandons the other in a state of temporary passions, for example, anger or disgust without intending permanently to cease cohabitation, it will not amount to desertion. It further held:

"For the office of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively. Here a different between the English law and the law as enacted by the Bombay Legislature may be pointed out. Whereas under the English law those essential conditions must continue throughout the course of the three years immediately preceding the institution of the suit for divorce, under the Act, the period is four years without specifying that it should immediately precede the commencement of proceedings for divorce. Whether the omission of the last clause has any practical result need not detain us, as it does not call for decision in the present

case. Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact, there has been a separation, the essential question always is whether that act could be attributable to an animus deserendi. The offence of desertion commences when the fact of separation and the animus deserendi co-exist. But it is not necessary that they should commence at the same time. The de facto separation may have commenced without the necessary animus ort it may be that the separation and the animus deserendi coincide in point of time; for example, when the separating spouse abandons the marital home with the intention, express or implied, of bringing cohabitation permanently to a close. The law in England has prescribed a three years period and the Bombay Act prescribed a period of four years as a continuous period during which the two elements must subsist. Hence, if a deserting spouse takes advantage of the locus poenitentiae thus provided by law and decide to come back to the deserted spouse by a bona fide offer of resuming the matrimonial home with all the implications of marital life, before the statutory period is out or even after the lapse of that period, unless proceedings for divorce have been commenced, desertion comes to an end and if the deserted spouse unreasonably refuses to offer, the latter may be in desertion and not the former. Hence it is necessary that during all the period that there has been a desertion, the deserted spouse must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable. It is also well settled that in proceedings for divorce the plaintiff must prove the offence of desertion, like and other matrimonial offence, beyond all reasonable doubt. Hence, though corroboration is not required as an absolute rule of law the courts insist upon corroborative evidence, unless its absence is accounted for to the satisfaction of the court."

13. In any proceedings under the Act whether defended or not the court would decline to grant relief to the petitioner if it is found that the petitioner was taking advantage of his or her own wrong or disability for the purposes of the reliefs contemplated under Section 23(1) of the Act. No party can be permitted to carve out the ground for destroying the family which is the basic unit of the society. The foundation of the family rests on the institution of a legal and valid marriage. Approach of the court should be to preserve the matrimonial home and be reluctant to dissolve the marriage on the asking of one of the parties.

16. This Court in Ms.Jorden Diengdeh v. S.S. Chopra [AIR 1985 SC 935] suggested for a complete reform of law of marriage and to make a uniform law applicable to all people irrespective of religion or caste. The Court observed:

"It appears to be necessary to introduce irretrievable breakdown of marriage and mutual consent as grounds of divorce in all cases. .... There is no point or purpose to be served by the continuance of a marriage which has so completely and signally broken down. We suggest that the time has come for the intervention of legislature in these matters to provide for a uniform code of marriage and divorce and to provide by law for a way out of the unhappy situation in which couples like the present have found themselves."

Marriage between the parties cannot be dissolved only on the averments made by one of the parties that as the marriage between them has broken down, no useful purpose would be served to keep it alive. The legislature, in its wisdom, despite observation of this Court has not thought it proper to provide for dissolution of the marriage on such averments. There may be cases where, on facts, it is found that as the marriage has become dead on account of contributory acts of commission and omission of the parties, no useful purpose would be served by keeping such marriage alive. The sanctity of marriage cannot be left at the whims of one of the annoying spouses. This Court in V. Bhagat v. Mrs.D.Bhagat [AIR 1994 SC 710] held that irretrievable breakdown of the marriage is not a ground by itself to dissolve it.

11. It is also submitted by the learned counsel for the appellant defendant that the court below had relied upon the averment of plaint that the petition for mutual divorce under Section 13-B of Hindu Marriage Act, 1955 was filed, which proves readiness of wife to seek divorce but had failed to consider that the consent given by the defendant appellant had already been withdrawn before the stage of second motion. Reliance has also been placed on the paragraphs 7, 8 & 9 of the judgment of Supreme Court in the case of Hitesh Bhatnager vs. Deepa Bhatnagar reported in AIR 2011 Supreme Court 1637, which are reproduced herein below:

"7. The appellant, appearing in-person, submits that at the time of filing of the petition, a settlement was reached between the parties, wherein it was agreed that he would pay her 3.5 lakhs, of which he states he has already paid 1.5 lakhs in three installments. He further states in his appeal, as well as before us, that he is willing to take care of the respondent's and their daughter's future interest, by making a substantial financial payment in order to amicably settle the matter. However, despite repeat efforts for a settlement, the respondent is not agreeable to a decree of divorce. She says that she wants to live with the appellant as his wife, especially for the future of their only child, Anamika.

8. The question whether consent once given can be withdrawn in a proceeding for divorce by mutual consent is no more res integra. This Court, in the case of Smt.Sureshta Devi vs. Om Prakash (1991) 2 SCC 25 : (AIR 1992 SC 1904), has concluded this issue and the view expressed in the said decision as of now holds the field.

9. In the case of Sureshta Devi (supra), this Court took the view:

"9. The 'living separately' for a period of one year should be immediately preceding the presentation of the petition. It is necessary that immediately preceding the presentation of petition, the parties must have been living separately. The expression 'living separately', connotes to our mind not living like husband and wife. It has no reference to the place of living. The parties may live under the same roof by force of circumstances, and yet they may not be living in different houses and yet they could live as husband and wife. What seems to be necessary is that they have no desire to perform marital obligations and with that mental attitude they have been living separately for a period of one year immediately preceding the presentation of the petition. The second requirement that they 'have not been able to live together' seems to indicate the concept of broken down marriage and it would not be possible to reconcile themselves. The third requirement is that they have mutually

agreed that the marriage should be dissolved.

10. Under sub-section (2) the parties are required to make a joint motion not earlier than six months after the date of presentation of the petition and not later than 18 months after the said date. This motion enable the court to proceed with the case in order to satisfy itself about the genuineness of the averments in the petition and also to find out whether the consent was not obtained by force, fraud or undue influence. The court may make such inquiry as it thinks fit including the hearing or examination of the parties for the purpose of satisfying itself whether the averments in the petition are true. If the court is satisfied that the consent of parties was not obtained by force, fraud or undue influence and they have mutually agreed that the marriage should be dissolved, it must pass a decree of divorce."

On the question of whether one of the parties may withdraw the consent at any time before the actual decree of divorce is passed, this Court held:

"13. From the analysis of the section, it will be apparent that the filing of the petition with mutual consent does not authorize the court to make a decree for divorce. There is a period of waiting from 6 to 18 months. This interregnum was obviously intended to give time and opportunity to the parties to reflect on their move and seek advice from relations and friends. In this transitional period one of the parties may have a second thought and change the mind not to proceed with the petition. The spouse may not be a party to the joint motion under sub-section (2). There is nothing in the section which prevents such course. The section does not provide that if there is a change of mind it should not be by one party alone, but by both. The High Courts of Bombay and Delhi have proceeded on the ground that the crucial time for giving mutual consent for divorce is the time of filing the petition and not the time when they subsequently move for divorce decree. This approach appears to be untenable. Tat the time of the petition by mutual consent, the parties are not unaware that their petition does not by itself snap marital ties. They know that they have to take a further step to snap marital ties. Sub-section (2) of Section 13-B is clear on this point. It provides that "on the motion of both the parties. ...if the petition is not withdrawn in the meantime, the court shall ... pass a decree of divorce ...". What is significant in this provision is that there should also be mutual consent when they move the court with a request to pass a decree of divorce. Secondly, the court shall be satisfied about the bona fides and the consent of the parties. If there is no mutual consent at the time of enquiry, the court gets no jurisdiction to make a decree for divorce. If the view is otherwise, the court could make en enquiry and pass a divorce decree even at the instance of one of the parties and against the consent of the other. Such a decree cannot be regarded as decree by mutual consent.

12. Learned counsel for the plaintiff respondent had supported the impugned judgment of family court on the ground that the court below had recorded the finding to the effect that the wife does not have a conduct of an ideal lady and she has committed cruelty against the husband and had made false allegations of adultery against him but failed to prove by adducing any cogent evidence. It is further submitted by learned counsel for the plaintiff respondent that the wife had left the house of the husband without any sufficient reason and was residing at her parental house for last three years. There was no

relationship of husband and wife between the parties. The learned counsel for the respondent had relied upon the following case laws:

a. Kusum Lata vs. Kamta Prasad AIR 1965 All 280,

b. Narayan Ganesh Dastane vs. Sucheta Narayan Dastane AIR 1975 SC 1534,

and

c. Manjeet Kaur vs. Avtar Singh 2001 Hindu Law Report 614.

13. The aforesaid judgments were also relied by the learned Family Court, while dealing with the terms 'cruelty'.

14. The Division Bench of this Court in the case of Smt.Sarita Devi vs. Sri Ashok Kumar Singh reported in 2018 (3) AWC 2328 has considered very widely the term 'cruelty' after relying the several judgments of Hon'ble Apex Court. The relevant paragraphs 18, 19, 20, 21, 22, 23, 24, 25, 27 and 29 of the judgment are reproduced herein below:

18. The concept of cruelty has been summarized in Halsbury's Laws of England, Vol.13, 4th Edition Para 1269, as under:

"The general rule in all cases of cruelty is that the entire matrimonial relationship must be considered, and that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations or taunts. In cases where no violence is averred, it is undesirable to consider judicial pronouncements with a view to creating certain categories of acts or conduct as having or lacking the nature or quality which renders them capable or incapable in all circumstances of amounting to cruelty; for it is the effect of the conduct rather than its nature which is of paramount importance in assessing a complaint of cruelty. Whether one spouse has been guilty of cruelty to the other is essentially a question of fact and previously decided cases have little, if any, value. The court should bear in mind the physical and mental condition of the parties as well as their social status, and should consider the impact of the personality and conduct of one spouse on the mind of the other, weighing all incidents and quarrels between the spouses from that point of view; further, the conduct alleged must be examined in the light of the complainant's capacity for endurance and the extent to which that capacity is known to the other spouse. Malevolent intention is not essential to cruelty but it is an important element where it exits."

19. In 24 American Jurisprudence 2d, the term "mental cruelty" has been defined as under:

"Mental Cruelty as a course of unprovoked conduct toward one's spouse which causes embarrassment, humiliation, and anguish so as to render the spouse's life miserable and unendurable. The plaintiff must show a course of conduct on the part of the defendant which so endangers the physical or mental health of the plaintiff as to render continued cohabitation unsafe or improper, although the plaintiff need not establish actual instances of physical abuse. "

20. One of the earliest decision considering "mental cruelty" we find is, N.G. Dastane v. S. Dastane (1975) 2 SCC 326, wherein Court has said:

"The enquiry therefore has to be whether the conduct charges as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension

that it will be harmful or injurious for him to live with the respondent. "

21. In Sirajmohmedkhan Janmohamadkhan v. Haizunnisa Yasinkhan and Anr. (1981) 4 SCC 250 Court said that a concept of legal cruelty changes according to the changes and advancement of social concept and standards of living. With the advancement of our social conceptions, this feature has obtained legislative recognition, that a second marriage is a sufficient ground for separate residence and maintenance. Moreover, to establish legal cruelty, it is not necessary that physical violence should be used. Continuous ill-treatment, cessation of marital intercourse, studied neglect, indifference on the part of the husband, and an assertion on the part of the husband that the wife is unchaste are all factors which lead to mental or legal cruelty.

22. In Shobha Rani v. Madhukar Reddi, (1988) 1 SCC 105, Court observed that word 'cruelty' has not been defined in Act, 1955 but legislature, making it a ground for divorce under Section 13(1)(i)(a) of Act, 1955, has made it clear that conduct of party in treatment of other if amounts to cruelty actual, physical or mental or legal is a just reason for grant of divorce. Cruelty may be mental or physical, intentional or unintentional. If it is physical, it is a question of fact about degree. If it is mental, the enquiry must begin as to the nature of cruel treatment and then as to the impact of such treatment on the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other, ultimately, is a matter of inference to be drawn by taking into account the nature of conduct and its effect on the complaining spouse. There may, however, be cases where conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or injurious effect on the other spouse need not be enquired into or considered. In such cases, cruelty will be established if conduct itself is proved or admitted. The absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of could otherwise be regarded as cruelty.

23. In V. Bhagat v. D. Bhagat (Mrs.), (1994) 1 SCC 337 considering the concept of "mental cruelty" in the context of Section 13(1)(i)(a) of Act, 1984, Court said that it can be defined as conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party. It is not necessary to prove that mental cruelty is such as to cause injury to the health of other party. While arriving at such conclusion, regard must be had to the social status, educational level of parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is thus has to be determined in each case having regard to the facts and circumstances of each case.

24. In Chetan Dass v. Kamla Devi, (2001) 4 SCC 250, Court observed that matrimonial matters relates to delicate human and emotional relationship. It demands mutual trust, regard, respect, love and affection with sufficient play for reasonable adjustments with spouse. The

relationship has to conform to the social norms as well. There is no scope of applying the concept of "irretrievably broken marriage" as a straitjacket formula for grant of relief of divorce but it has to be considered in the backdrop of facts and circumstances of the case concerned.

25. In Savitri Pandey v. Prem Chandra Panadey, (2002) 2 SCC 73, Court held that mental cruelty is the conduct of other spouse which causes mental suffering or fear to matrimonial life of other. Cruelty postulates a treatment of party to marriage with such conduct as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious to live with other party. Cruelty has to be distinguished from ordinary wear and tear of family life.

27. In Vinita Saxena v. Pankaj Pandit, (2006) 3 SCC 778 Court held that complaints and reproaches, sometimes of ordinary nature, may not be termed as 'cruelty' but their continuance or persistence over a period of time may do so which would depends on the facts of each case and have to be considered carefully by the Court concerned.

29. In Samar Ghosh vs. Jaya Ghosh (supra) Court said that though no uniform standard can be laid down but there are some instances which may constitute mental cruelty and the same are illustrated as under:

"(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behavior of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be

persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behavior of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty."

15. In the case in hand, the husband had appeared himself as PW1 and stated the same story as alleged in the divorce petition but had not produced any other witness or evidence in support of his case. The family court itself had recorded the finding that the husband had not lodged the complaint against the wife and her family members regarding quarrel with him and his mother in the year 2010. Apart from this, the learned family court had also recorded the finding to the effect that the plaintiff husband had failed to prove that the wife was talking on telephone with some unknown person. The learned Family Court had relied upon the judgments in the case of Kusum Lata vs. Kanta Prasad reported in AIR 1965 All 280, Narayan Ganesh Dastane vs. Smt.Sucheta Narayan Dastane reported in AIR 1970 Bombay 812, Manjeet Kaur vs. Avtar 2011 (1) HLR 614 and Hanumant Rao vs. Shamani AIR 1999 SC 1318 as regards cruelty but failed to discuss any evidence which could establish the allegations of cruelty made against the appellant.

16. The divorce petition was decreed by the learned Family Court on the ground that the behaviour of the wife was not of an ideal lady, she used to live at her parental house, quarrel with his family members as well as false allegations were leveled by her against the husband which is itself would amount to cruelty by the wife.

17. We have gone through the judgment of the family court and found that the learned court below had failed to consider that the defendant appellant herself was harassed by the plaintiff respondent and his family members for dowry following which a First Information Report was lodged by the wife and from the perusal of evidence it is apparent that the wife was always willing and is still willing to live with the husband and she was neglected and deserted by her husband. It is a well settled law that no party can take benefit of his/her own wrong and since the husband is not ready to live with his wife, he cannot take benefit of his own wrong. Allegations regarding quarrel by

family members of the wife was already disbelieved by the Family Court at page-9 of the judgment and apart from this, the allegations of adultery by both the parties against each other was also disbelieved by the court below but still passed the decree of divorce without any cogent evidence on record. The learned family court had also granted divorce on the ground that the wife had deserted her husband and used to live at her parental house, but failed to consider the evidence adduced by the wife regarding harassment for dowry and her willingness to live with the husband.

18. From the evidence available on record, we find that the appellant-wife is not living separately on account of her own free-will. The defendant appellant was always ready and is still ready to live with the plaintiff respondent but he refused to live with defendant-appellant. The defendant appellant has herself not deserted plaintiff-respondent. The plaintiff respondent has failed to establish that the defendant-appellant had committed cruelty or deserted him without there being any sufficient reasons.

19. In view of aforesaid discussion, the appeal is liable to be allowed. The appeal is, accordingly, allowed and judgment and decree dated 25.3.2017, passed by Principal Judge, Family Court, Hapur is hereby set aide and divorce suit filed by plaintiff respondent stands dismissed.

17. However, there shall be no order as to costs.

(2020)12ILR A591
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.11.2020

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Misc. Single No. 6016 of 2008

Smt. Uma Mukerji ...Petitioner
Versus
The Board of Revenue, Allahabad ...Respondent

Counsel for the Petitioner:
D.C. Mukerji, Devendra Mohan Shukla, Dhruv Mathur, K.K. Sharma, Lalta Prasad Misra, Rajeiu Kumar Tripathi, Sharvan Kumar Shukla.

Counsel for the Respondents:
C.S.C., G.S. Nigam, Mohammad Aslam Khan, Mohd. Adil Khan.

A. Practice & Procedure -Review- admissibility of engaging fresh counsel to argue a review petition - not open for a fresh counsel engaged for arguing the review petition to say that certain arguments were advanced at the time of initial hearing of the writ petitions but same were not considered by the Court - Constitution of India - Article 22 - has no concern with the right of a fresh counsel to be engaged and to argue a review petition relating to certain property dispute between the parties - Article 22 relates to life and liberty, arrest and detention being carried out without the grounds of such arrest being communicated to the detenue (Para 21)

B. Practice & Procedure - Written Submission filed after judgment reserved - Court is only bound to consider those arguments that are raised and pressed during the hearing in open Court - practice of introducing new grounds by way of written submissions after arguments are over and judgment is reserved not only prejudice the opponents of such parties, but amounts to taking unfair and undue advantage of the liberty granted by the Court (Para 15,16)

Writ Petition dismissed. (E-5)

List of Cases cited :-

1. M. Poornachandran Vs St. of T.N. (1996) 6 SCC 755

2. T.N. Electricity Board & anr. Vs N. Raju Reddiar & anr. (1997) 9 SCC 736

3. Raj. Agricultural University Vs Ram (1999) 4 SCC 196

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)

1. Heard.

2. Dr. L.P. Misra, Advocate, assisted by Sri Devendra Mohan Shukla, and Sri Rajeiu Kumar Tripathi, learned counsel for the review petitioners, has pointed out that this Court in its order dated 03.11.2020 has wrongly referred to the arguments raised by him in its paragraph-4. He says that it has inadvertently been stated in the order dated 03.11.2020 that Sri Rajieu Kumar Tripathi, Advocate, had also argued the matter and was present in the Court, however now he has been instructed to say that Sri Rajeiu Kumar Tripathi, Advocate, was not present during the arguments of Writ Petition No.6016 (M/S) of 2008 connected with Writ Petition No.5292 (M/S) of 2010 and only Sri Devendra Mohan Shukla, Advocate, was present along with Sri Dhruv Mathur, Advocate, who have argued both the writ petitions.

3. Dr. L.P. Misra, Advocate, has tried to distinguish the judgements cited by the learned counsel for the private respondents on earlier occasion regarding the admissibility of engaging a fresh counsel to argue a review petition. He says that in the judgment rendered by Hon'ble Supreme Court in M. Poornachandran Vs. State of Tamil Nadu, (1996) 6 SCC 755, the civil appeal was filed by one Sudarsh Menon, the Advocate-on-Record and it was heard and decided on merits. Later on, a review petition was filed by one Prabir Chowdhury, who was neither the arguing counsel nor he was present at the time of arguments. It was in this context, the Hon'ble Supreme Court has observed that it is not known on what basis the new counsel had written the grounds in the Review Petition, as if it is hearing of an Appeal against the court's own order and had taken grounds which were beyond the scope of the review. The Hon'ble Supreme Court had therefore observed that it would not be in the interest of the profession to permit such practice. Moreover, the new counsel had not taken the No Objection Certificate from the Advocate-on-Record in the Appeal inspite of the fact that Registry had pointed out this fact to him. Filing of the No Objection Certificate would be the basis for him to come on record and an Advocate-On-Record is answerable to the Court. The failure to obtain No Objection Certificate from the erstwhile counsel had dis-entitled the new counsel to file the review petition. The review petition was therefore dismissed by Hon'ble Supreme Court with the observations that it was an attempt to re-argue the matter by the new counsel.

4. Dr. L.P. Misra, Advocate, says that the judgment in M. Poornachandran (supra), is inapplicable to the facts of this particular case as Sri Devendra Mohan Shukla, Advocate, who was the Advocate-on-Record in the earlier round of litigation, is the person who has drafted the review petition, and as also the Advocate who is assisting Dr. L.P. Misra, Advocate in his argument in the review petition. Hence this Court may ignore the judgment of Hon'ble Supreme Court as it is distinguishable on facts.

5. It has also been submitted by Dr. L.P. Misra, Advocate, that the judgment rendered by Hon'ble Supreme Court in Tamil Nadu Electricity Board and another Vs. N. Raju Reddiar and another, (1997) 9

SCC 736, the other judgment on which the counsel for the private respondent has relied, is also inapplicable to the facts of the present case. He says that in Tamil Nadu Electricity Board (supra), the review petition had been styled as 'application for clarification', on the specious plea that the order was not clear and unambiguous. The counsel who had filed the said application for clarification was not the Advocate-on-Record and had neither appeared nor was a party in the main case. The Hon'ble Supreme Court had also observed that the change of counsel had been carried out without obtaining consent of the earlier Advocate-on-Record, which was not conducive to healthy practice of the Bar which has the responsibility to maintain the salutary tradition of profession. The Court had referred to its earlier order passed in M. Poornachandran (supra) and observed that Advocate-on-Record being answerable to the Court, only he should have been heard or at least his No Objection Certificate should have been taken before filing the application for clarification. It has been submitted that Sri Devendra Mohan Shukla, Advocate, was the Advocate-on-Record in the earlier round of litigation and he has also drafted the review petition and is also instructing Dr. L.P. Misra, Advocate, who is the arguing counsel, therefore, the judgment rendered in Tamil Nadu Electricity Board (supra) is distinguishable.

6. Dr. L.P. Misra, Advocate, has also argued that under Article 22 of the Constitution of India, a litigant is entitled to protect his life and liberty by engaging a counsel of his choice and it would be a violation of Article 22 of the Constitution of India, in case this Court does not permit the litigant/ review petitioner to engage any counsel of its choice to argue on the review petition as the judgment affects the life and liberty of the review petitioner.

7. Sri Mohd. Arif Khan, learned Senior Advocate, assisted by Mohd. Aslam Khan, learned counsel for the private respondent, has countered such argument made by Dr. L.P. Misra, Advocate, to the preliminary objection raised by him as recorded in the order dated 03.11.2020 passed by this Court. He says that Dr. L.P. Misra was not arguing the matter at the time when the Court heard the parties in detail and passed its judgment dated 30.07.2020. Sri Devendra Mohan Shukla, Advocate, may have assisted Sri Dhruv Mathur but the arguing counsel was Sri Dhruv Mathur at the time of initial hearing of the writ petitions and regarding their consideration in the judgment.

8. Learned counsel has referred to the strict language of Hon'ble Supreme Court in the case of M. Poornachandran (supra), which refers to change of counsel to file and argue the review petition and says that "it would be not in the interest of the profession to permit such practice. More so, when there was an attempt to re-argue the matter by the new counsel."

9. Learned Senior Advocate has also referred to the language of the judgment rendered by Hon'ble Supreme Court in Tamil Nadu Electricity Board (supra) to say that it is a new practice which is unbecoming and not worthy of, or conducive to the profession to engage fresh counsel to argue a review petition or clarification application as the earlier Advocate-on-Record is answerable to the Court and being answerable is also responsible.

10. Learned Senior Advocate has referred to placitum 'b' of paragraph-1 of

the judgment in Tamil Nadu Electricity Board (supra) to say that change in counsel leads to fresh arguments being raised which is only an attempt for hearing the matter again on merits. He has referred to paragraph-2 of the judgment also to say that this practice of changing the advocates and filing repeated review petitions should be deprecated with a heavy hand for purity of administration of law and salutary and healthy practice of the Bar.

11. Sri Mohd. Arif Khan, learned Senior Advocate, has also referred to certain grounds raised in the review petition to say that the review petitioner attempts to argue afresh before this Court by placing before this Court certain arguments saying that they were advanced at the time of initial hearing of the writ petitions but were not considered by the Court. It has been stated in the review petition also that in the written submissions certain grounds were taken by the writ petitioners which have not been considered while dictating the judgment by this Court.

12. Dr. L.P. Misra, Advocate, says that such preliminary objection as raised by Sri Mohd. Arif Khan, learned Senior Advocate, must be confined only to the permissibility of hearing of another advocate engaged for arguments in the review petition, and learned senior advocate of the respondents should desist from pointing out paragraphs/ grounds in the review petition as it would amount to arguing the review petition also on merits.

13. This Court finds from the arguments raised by both the counsel that on one hand Sri Mohd. Arif Khan, learned senior advocate, seeks to rely upon the judgments rendered by Hon'ble Supreme Court as cited hereinabove, and on the other hand Dr. L.P. Misra, Advocate, seeks to distinguish the judgments only on the ground that in those cases the Advocate-on-Record has been changed while filing the review petition without obtaining the No Objection Certificate from the earlier counsel.

14. This Court does not find any merits in the arguments raised by Dr. L.P. Misra, Advocate, that the Advocate-on-Record in this case is the same i.e. Devendra Mohan Shukla. It is the case of Sri Devendra Mohan Shukla, Advocate that Sri Dhruv Mathur, Advocate, is now unavailable for arguments for reasons best known to him.

15. This Court is of the considered opinion that the arguments should be made by the counsel before this Court accepting full responsibility regarding correctness and also for the consequences that may arise therefrom. It is not good practice to first argue the matter and when the judgment is reserved with liberty to file written arguments, pointing out in the review petition that written arguments have not been considered in their entirety. This Court is only bound to consider those arguments that are raised and pressed during the hearing in open Court, as has been held by Hon'ble Supreme Court in **Rajasthan Agricultural University Vs. Ram 1999 (4) SCC 196.**

16. The practice of introducing new grounds by way of written submissions after arguments are over and judgment is reserved not only prejudice the opponents of such parties, but amounts to taking unfair and undue advantage of the liberty granted by the Court. Later on, if the Court refuses to consider these new grounds, a grievance is invariably made either in a

review petition or otherwise, that the Court has omitted certain material from consideration and therefore the order is erroneous.

17. It is not open for a fresh counsel engaged for arguing the review petition to say that the matter was argued in a particular manner by the arguing counsel in the writ petition and certain points were raised by that arguing counsel while the arguing counsel has not come forward to point out the mistake of the Court or the error apparent on the face of the record, in the limited scope for review petition.

18. This Court would have permitted Sri Devendra Mohan Shukla, Advocate, to argue the matter as he was present at the time when the writ petitions were heard and judgment was reserved. It cannot permit Dr. L.P. Misra, Advocate, to now come forward and raise arguments regarding the review petition saying that there is an error apparent on the face of the record only because certain arguments raised by Sri Dhruv Mathur, Advocate, were not considered by this Court at the time of passing of the judgement. More so, when Dr. L.P. Mishra, Advocate, claims that such instructions have been given to him by Sri Devendra Mohan Shukla, Advocate. It would only amount of hearsay as Dr. L.P. Misra was not present at the time of arguments and he has been instructed by Sri Devendra Mohan Shukla to say that Sri Dhruv Mathur had argued the matter on certain points which were not considered by the Court while passing the judgment.

19. As regards the arguments made by Dr. L.P. Misra, Advocate, regarding Article 22 of the Constitution of India and that it would be a violation of Article 22 of the Constitution if this Court does not permit a litigant to engage a counsel of his choice; it would be suffice to say that the language of Article 22(1) of the Constitution of India is very clear, which is quoted herein below:-

"22. Protection against arrest and detention in certain cases.- (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice."

20. Dr. L.P. Misra, Advocate, wants this Court to ignore the first half of clause-1 of Article 22 only to consider the second half of clause-1 of Article 22, which says that a person may not be denied " the right to consult, and to be defended by, a legal practitioner of his choice."

21. This Court cannot ignore the context in which such an observation has been made by the framers of the Constitution. It relates to life and liberty, arrest and detention being carried out without the grounds of such arrest being communicated to the detenue and it has no concern at all with the right of a fresh counsel to be engaged and to argue a review petition relating to certain property dispute between the parties.

22. Sri Devendra Mohan Shukla, Advocate, at this stage has submitted that he may be permitted to approach Sri Dhruv Mathur, Advocate, for arguing this review petition and in case of his inability to argue, Sri Devendra Mohan Shukla, Advocate, may be permitted to argue the review petition.

23. The permission as prayed for is granted.

24. List this case in the first week of December, 2020.

(2020)12ILR A596
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.08.2020

BEFORE

THE HON'BLE SHASHI KANT GUPTA, J.
THE HON'BLE SHAMIM AHMED, J.

P.I.L. No. 746 of 2020

Rubi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ali Qambar Zaidi.

Counsel for the Respondents:
C.S.C.

A. Constitution of India,1950-Article 226-Public Interest Litigation-maintainability of-petitioner challenge the compassionate appointment of the respondent/Stenographer at Zila Panchayat, Muzaffarnagar-Apex Court Propounded in a series of Cases that PIL is not maintainable in service matters. (Para 1 to 24)

B. Whenever any public interest is invoked, the court must examine the case to ensure that there is in fact, genuine public interest is involved. The court must maintain strict vigilance to ensure that there is no abuse of the process of court. (Para 22)

The Petition is dismissed. (E-6)

List of Cases cited:-

1. Dr. Duryodhan Sahu & ors. Vs Jitendra Kumar Mishra & ors., (1998) 7 SCC 273,

2. Jasbhai Motibhai Desai Vs Roshan Kumar Haji Bashir Ahmed & ors, (1976) 1 SCC 671,

3. Ashok Kumar Pandey Vs St. of W.B., (2004) 3 SCC 349

4. Janata Dal Case (1992) 4 SCC 305 :(1993) SCC (Cri) 36

5. Dr. B Singh Vs UOI,(2004) 3 SCC 363,

6. Gurpal Singh Vs St. of Punj. , JT (2005) 5 SC 389,

7. Indian Consumers Welfare Council Vs UOI & anr. (2005) 3 L. W. 522,

8. N. Veerasamy Vs UOI, (2005) 2 MLJ 564,

9. Neetu Vs St. of Punj., (2007) 10 SCC 614,

10. Seema Dharmdhere, Secy, Mah. Public Service Commission Vs St. of Mah., (2008) 2 SCC 290,

11. Hari Bansh Lal Vs Sahodar Prasad Mahto & ors., (2010) 9 SCC 655

12. Girjesh Shrivastava & Ors Vs St. of M.P. & ors., (2010) 10 SCC 707

13. B. Srinivasa Reddy V. Karnataka Urban Water Supply & Drainage Board Employees Association & ors. (2006) 11 SCC 731 (II)

14. Bholanath Mukherjee & ors. Vs Ramakrishna Mission Vivekananda Centenary College & ors.,(2011) 5 SCC 464

15. Ayaaubkhan Noorkhan Pathan Vs St. of Mah. & ors., (2013) 4 SCC 465

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Shri Ali Qambar Zaidi, learned counsel for the petitioner, learned Standing Counsel appearing for the respondents and perused the material placed on record.

2. This Public Interest Litigation (Writ Petition) under Article 226 of the Constituton of India has been filed by the petitioner with the following prayers;

"I. Issue a writ order or direction in the nature of QUO WARRANTO thereby

declaring the appointment of respondnt no.5 as null and void and directing the State to remove respondent no.5 from the office of stenographer at Zila Panchayat, Muzaffarnagar;

II. Issue a writ, order or direction in the nature of MANDAMUS thereby directing the State to terminate the services of respondent no.5 with immediate effect and issue fresh advertisements as prescribed by the relevant service rules;

III. Issue a writ, order or direction in the nature of MANDAMUS thereby directing the State to constitute a high level committee to enquire into the matter of illegal appointment of respondent no.5 to the post of stenographer at Zila Panchayat, Muzaffarnagar;

IV. Issue a writ, order or direction in the nature of MANDAMUS thereby directing the State to take appropriate action, penal or otherwise against such persons who are found complicit in the illegal appointment of respondent no.5;

V. Issue such other writ, order or direction as this Hon'ble Court may deem fit and proper having regard to the facts and circumstances of the case AND

VI. award cost of the petition to the petitioner.

3. This Public Interest Litigation (Writ Petition) has been filed by the petitioner who is a member of Zila Panchayat, Muzaffarnagar and was elected from Khatauli Block. The petitoner made an averments in the writ petition that being a public representative , the petitioner is bound to discharge her duty with utmost sincerity and vigilance and to put forth any misdoing or corrupt practice before the concerned appropriate authority. The petitioner believes that if on the basis of material on record, the appointment assailed in the present petition is cancelled by this Hon'ble Court then it would open way for fresh recruitment which in turn would benefit bonafide aspirants. He further submits that by way of present PIL, the petitioner seeks to highlight complete disregard to the existing laws, rules and guidelines with respect to an appointment made at the office of Zila Panchayat, Muzaffarnagr. The petitioner seeks to invite the attention of this Hon'ble Court towards the appointment of Respondent NO.5 who, over a period of time, has been regularized on the permanent post of stenographer. Not only the existing rules with respect to appointment on such post were deliberately flouted by the Zila Panchayat (respondent No.3) but also the orders/directions of the State Government were maliciously interpreted to extend unjust benefits to respondent No.5.

4. Learned counsel for the petitioner further made averments in the writ petition that respondent No.5 Shri Akshay Kumar Sharma got compassionate appointment as Grade II clerk on 15.12.1993 at Zila Panchayat, Muzaffarnagar in furtherance of order passed the then District Magistrate/ Zila Panchayat Adhyaksha.

5. Further vide order dated 3.12.2002, the AMA- Zila Panchayat issues an appointment letter to respondent no.5 at the post of stenographer on ad-hoc and temporary basis. No selection committee was constituted for the purpose of this appointment, which was made by the order of Adhyaksha, Zila Panchayat. This appointment order was totally contrary to the directions given by the government on 2.11.2002.

6. Upon perusal of the averments made in the public interest litigation and documents appended thereto, the petitioner

seeks direction declaring the appointment of respondent no.5 as null and void and directing the State to remove respondent no.5 from the office of Stenographer at Zila Panchayat, Muzaffarnagar.

7. When maintainability of the present public interest litigation (writ petition), in service matters, was raised by us no suitable reply was given by the learned counsel for the petitioner. The preliminary objection regarding maintainability of the instant PIL was raised by the learned Standing Counsel and submitted that in service matter PIL is no longer res-integra, lacks bonafide and rather it is a proxy petition.

8. After consideration of the aforesaid submission of the respondents, we consider it appropriate to take the question of maintainability of the PIL (writ petition) as a preliminary issue before we go to the merit of the case and, accordingly, the parties are heard on this preliminary issue.

9. The learned counsel for the petitioner was not able to give a reasonable answer to our querries when the Court made a pointed query as to the availability of any decision of the Apex Court on the maintainability of PIL, in service matters, no such authority is submitted by the counsel for the petitioner.

10. For adjudicating this issue, we have to go back in the year 1998. The Hon'ble Supreme Court in the case of Dr.Duryodhan Sahu and others vs. Jitendra Kumar Mishra and others, 1998 (7) SCC 273, the Hon'ble Supreme Court dealt with an issue, as to whether a Public Interest Writ Petition, at the instance of a stranger, could be entertained, by the Administrative Tribunal and held that in service matter PIL should not be entertained, the inflow of so called PILs involving service matter continues unabated in the Courts and strangely are entertained. After considering the decisions in Jasbhai Motibhai Desai vs. Roshan Kumar Haji Bashir Ahmed and others, (1976) 1.S.C.C. 671, the law declared in Chandra Kumar vs. Union of India (1997) 3 SCC 261, and the provisions of the Administrative Tribunals Act, 1985, the Hon'ble Supreme Court was pleased to observe in para 18, 19 and 21 as follows:-

18..... Section 3 (b) defines the word 'application' as an application made under Section 19. The latter Section refers to 'person aggrieved'. In order to bring a matter before the Tribunal, an application has to be made and the same can be made only by a person aggrieved by any order pertaining to any matter within the jurisdiction of the Tribunal. We have already seen that the work 'order' has been defined in the explanation to sub-s. (1) of Section 19 so that all matters referred to in Section 3 (q) as service matters could be brought before the Tribunal. It in that context, Sections 14 and 15 are read, there is no doubt that a total stranger to the concerned service cannot make an application before the Tribunal. If public interest litigations at the instance of strangers are allowed to be entertained by the Tribunal the very object of speedy disposal of service matters would get defeated.

19. Our attention has been drawn to a judgement of the Orissa Administrative Tribunal in Smt. Amitarani Khuntia Versus State of Orissa 1996. (1) OLR (CSR)-2. The Tribunal after considering the provisions of the Act held that a private citizen or a stranger having no existing right to any post and not intrinsically concerned with any service matter is not entitled to

approach the Tribunal. The following passage in the judgement is relevant: "....A reading of the aforesaid provisions would mean that an application for redressal of grievances could be filed only by a 'person aggrieved' within the meaning of the Act.

Tribunals are constituted under Article 323 A of the Constitution of India. The above Article empowers the Parliament to enact law providing for adjudication or trial by Administrative Tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or any local or other authority within the territory of India or under the control of the Government and such law shall specify the jurisdiction, powers and authority which may be exercised by each of the said Tribunals. Thus, it follows that Administrative Tribunals are constituted for adjudication or trial of the disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts. Its jurisdiction and powers have been well-defined in the Act. It does not enjoy any plenary power." We agree with the above reasoning.

21.In the result, we answer the first question in the negative and hold that the Administrative Tribunal constituted under the Act cannot entertain a public interest litigation at the instance of a total stranger.?

11. In Ashok Kumar Pandey vs. State of W.B., reported in (2004) 3 SCC 349, the Apex Court at paragraphs 5 to 16, held as follows:-

"5. It is necessary to take note of the meaning of the expression public interest litigation. In Strouds Judicial Dictionary, Vol. 4 (4th Edn.), public interest is defined thus:

Public interest.(1) A matter of public or general interest does not mean that which is interesting as gratifying curiosity or a love of information or amusement; but that in which a class of the community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected.

6. In Blacks Law Dictionary (6th Edn.), public interest is defined as follows:

Public interest. Something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, or as the interests of the particular localities, which may be affected by the matters in question. Interest shared by citizens generally in affairs of local, State or national Government.?

7. In Janata Dal case (1992 (4) SCC 305 = 1993 SCC (Cri) 36) this Court considered the scope of public interest litigation. In para 53 of the said judgment, after considering what is public interest, this Court has laid down as follows: (SCC p. 331, para 53) The expression litigation means a legal action including all proceedings therein initiated in a court of law with the purpose of enforcing a right or seeking a remedy. Therefore, lexically the expression ?PIL? means a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or a class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected.

8. In para 62 of the said judgment, it was pointed out as follows: (SCC p.

334) ?Be that as it may, it is needless to emphasise that the requirement of locus

standi of a party to a litigation is mandatory; because the legal capacity of the party to any litigation whether in private or public action in relation to any specific remedy sought for has to be primarily ascertained at the threshold.?

9. In para 98 of the said judgment, it has further been pointed out as follows: (SCC pp. 345-46) While this Court has laid down a chain of notable decisions with all emphasis at their command about the importance and significance of this newly developed doctrine of PIL, it has also hastened to sound a red alert and a note of severe warning that courts should not allow its process to be abused by a mere busybody or a meddlesome interloper or wayfarer or officious intervener without any interest or concern except for personal gain or private profit or other oblique consideration.

10. In subsequent paras of the said judgment, it was observed as follows: (SCC p. 348, para 109). It is thus clear that only a person acting bona fide and having sufficient interest in the proceeding of PIL will alone have a locus standi and can approach the court to wipe out the tears of the poor and needy, suffering from violation of their fundamental rights, but not a person for personal gain or private profit or political motive or any oblique consideration. Similarly a vexatious petition under the colour of PIL brought before the court for vindicating any personal grievance, deserves rejection at the threshold.

11. It is depressing to note that on account of such trumpery proceedings initiated before the courts, innumerable days are wasted, which time otherwise could have been spent for the disposal of cases of the genuine litigants. Though we spare no efforts in fostering and developing the laudable concept of PIL and extending our long arm of sympathy to the poor, the ignorant, the oppressed and the needy whose fundamental rights are infringed and violated and whose grievances go unnoticed, unrepresented and unheard; yet we cannot avoid but express our opinion that while genuine litigants with legitimate grievances relating to civil matters, persons suffering from undue delay in service matters? government or private, persons awaiting the disposal of tax cases are all standing in a long serpentine queue for years with the fond hope of getting into the courts and having their grievances redressed, the busybodies, meddlesome interlopers, wayfarers or officious interveners having absolutely no real public interest except for personal gain or private profit either of themselves or as a proxy of others or for any other extraneous motivation or for glare of publicity, break the queue muffling their faces by wearing the mask of public interest litigation and get into the courts by filing vexatious and frivolous petitions of luxury litigants who have nothing to lose but trying to gain for nothing and thus criminally waste the valuable time of the courts and as a result of which the queue standing outside the doors of the courts never moves, which piquant situation creates frustration in the minds of the genuine litigants.

12. Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity-seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be allowed to be used for suspicious products of mischief. It should be aimed at redressal

of genuine public wrong or public injury and not publicity-oriented or founded on personal vendetta. As indicated above, courts must be careful to see that a body of persons or member of public, who approaches the court is acting bona fide and not for personal gain or private motive or political motivation or other oblique consideration. The court must not allow its process to be abused for oblique considerations by masked phantoms who monitor at times from behind. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives and try to bargain for a good deal as well to enrich themselves. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busybodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs.

14. The court has to be satisfied about: (a) the credentials of the applicant; (b) the prima facie correctness or nature of information given by him; and (c) the information being not vague and indefinite. The information should show gravity and seriousness involved. Court has to strike a balance between two conflicting interests: (i) nobody should be allowed to indulge in wild and reckless allegations besmirching the character of others; and (ii) avoidance of public mischief and to avoid mischievous petitions seeking to assail, for oblique motives, justifiable executive actions. In such case, however, the court cannot afford to be liberal. It has to be extremely careful to see that under the guise of redressing a public grievance, it does not encroach upon the sphere reserved by the Constitution to the executive and the legislature. The court has to act ruthlessly while dealing with imposters and busybodies or meddlesome interlopers impersonating as public-spirited holy men. They masquerade as crusaders of justice. They pretend to act in the name of pro bono publico, though they have no interest of the public or even of their own to protect.

15. Today people rush to courts to file cases in profusion under this attractive name of public interest. Self-styled saviours who have no face or ground in the midst of public at large, of late, try to use such litigations to keep themselves busy and their names in circulation, despite having really become defunct in actual public life and try to smear and smirch the solemnity of court proceedings. They must really inspire confidence in courts and among the public, failing which such litigation should be axed with a heavy hand and dire consequences.

16. As noted supra, a time has come to weed out the petitions, which though titled as public interest litigations are in essence something else. It is shocking to note that courts are flooded with a large number of so-called public interest litigations, whereas only a minuscule percentage can legitimately be called as public interest litigations. Though the parameters of public interest litigation have been indicated by this Court in a large number of cases, yet unmindful of the real intentions and objectives, courts at times are entertaining such petitions and wasting valuable judicial time which, as noted above, could be otherwise utilized for disposal of genuine cases. Though in Duryodhan Sahu (Dr) v. Jitendra Kumar Mishra (1998) 7 SCC 273, this Court held that in service matters PILs should not be entertained, the inflow of the so-called PILs involving service matters continues unabated in the courts and strangely are entertained. The least the High Courts could do is to throw them out on the basis of the said decision. This tendency is being

slowly permitted to percolate for setting in motion criminal law jurisdiction, often unjustifiably just for gaining publicity and giving adverse publicity to their opponents. The other interesting aspect is that in the PILs, official documents are being annexed without even indicating as to how the petitioner came to possess them. In one case, it was noticed that an interesting answer was given as to its possession. It was stated that a packet was lying on the road and when out of curiosity the petitioner opened it, he found copies of the official documents. Apart from the sinister manner, if any, of getting such copies, the real brain or force behind such cases would get exposed to find out whether it was a bona fide venture. Whenever such frivolous pleas are taken to explain possession, the court should do well not only to dismiss the petitions but also to impose exemplary costs, as it prima facie gives impression about oblique motives involved, and in most cases shows proxy litigation. Where the petitioner has not even a remote link with the issues involved, it becomes imperative for the court to lift the veil and uncover the real purpose of the petition and the real person behind it. It would be desirable for the courts to filter out the frivolous petitions and dismiss them with costs as aforestated so that the message goes in the right direction that petitions filed with oblique motive do not have the approval of the courts."

12. In **Dr.B.Singh v. Union of India, (2004) 3 SCC 363**, the Hon'ble Supreme Court decided the case on the same lines and held that PIL is not maintainable in service matters.

13. In **Gurpal Singh vs. State of Punjab, JT 2005 (5) SC 389**, the Hon'ble Apex Court held that PIL is not maintainable in service matters.

14. In **Indian Consumers Welfare Council vs. Union of India and another, reported in 2005 (3) L.W. 522**, the abovesaid Council, filed a public interest writ petition, challenging a notification, issued by the 2nd respondent therein, by which, applications were invited, from degree holders, with degree in education, and consequently, prayed for a direction to the respondent therein, to appoint only those teachers, who were trained in teaching primary sections, for handling classes from 1st to 7th standards, to the post of Secondary Grade Teachers. Following the decision in Gopal Singh vs. State of Punjab, reported in 2005 J.T. [5] SC 389, the Hon'ble Apex Court ordered as follows:-

"This is a public interest litigation in respect of a service matter. It has been repeatedly held by the Supreme Court that no public interest litigation lies in service matters, the last decision being Gopal Singh vs. State of Punjab (2005 J.T. [5] SC 389. Accordingly, this writ petition is dismissed."

15. In **N.Veerasamy vs. Union of India, reported in (2005) 2 MLJ 564**, while considering a public interest litigation filed by a treasurer of a political party, praying to take action again Mrs.Lakshmi Pranesh, IAS, the fifth respondent therein, under the All India Services (Discipline and Appeal) Rules, 1969, for allegedly making allegations against a leader of a political party, following the above judgments of the Honourable Apex Court, a Hon'ble Division Bench of this Court held as follows:-

"It is settled law that no writ in the form of public interest litigation will lie under Article 226 of the Constitution in service matters. The petitioner has no locus

standi to file the public interest litigation. The extraordinary powers of the High Court under Art.226 of the Constitution in matters of this kind is required to be used sparingly and only in extraordinary cases." "The service matters are essentially between the employer and the employee and it would be for the State to take action under the Service Rules and there is no question of any public interest involved in such matters."

"The petition is not only not maintainable either in law of facts but also would amount to abuse of the process of Court."

16. In B.Srinivasa Reddy vs. Karnataka Urban Water Supply and Drainage Board Employees Association and others, **2006 (11) SCC 731**, at paragraph 61, the Apex Court held that in service matters only the non appointees can assail the legality of the appointment procedure.

17. In **Neetu vs. State of Punjab, reported in 2007 (10) SCC 614,** the Hon'ble Apex Court held as follows:-

"The scope of entertaining a petition styled as a public interest litigation, locus standi of the petitioner particularly in matters involving service of an employee has been examined by this court in various cases.? Referring to the decisions in Dr.Duryodhan Sahu and others vs. Jitendra Kumar Mishra and others, reported in 1998 (7) SCC 273 and Ashok Kumar Pandey v. State of W.B reported in (2004 (3) SCC 349), cited supra, the Apex Court held that PIL in service matters has been held as not maintainable."

18. In **Seema Dharmdhere, Secretary, Maharashtra Public Service Commission vs. State of Maharashtra, 2008 (2) SCC 290**, the Apex Court restated that PIL is not maintainable in service matters.

19. In **Hari Bansh Lal vs. Sahodar Prasad Mahto and others, 2010 (9) SCC 655**, claiming himself as Vidyut Shramik Leader, a writ petition was filed before the High Court, challenging the appointment of Mr.Hari Bansh Lal, who was appointed, as the Chairman of Jharkand State Electricity Board. The High Court declared that his appointment was not only arbitrary, but also, contemptuous, and ultimately, quashed his appointment, which gave rise to an appeal, before the Apex Court. Addressing the issue, as to whether a public interest writ petition, is maintainable in service matters, following the earlier decisions in Dr.Duryodhan Sahu and others vs. Jitendra Kumar Mishra and others, reported in 1998 (7) SCC 273 and Ashok Kumar Pandey v. State of W.B reported in (2004 (3) SCC 349) and other decisions, the Hon'ble Supreme Court held as follows:- PIL in service matters:

"11)About maintainability of the Public Interest Litigation in service matters except for a writ of quo warranto, there are series of decisions of this Court laying down the principles to be followed. It is not seriously contended that the matter in issue is not a service matter. In fact, such objection was not raised and agitated before the High Court. Even otherwise, in view of the fact that the appellant herein was initially appointed and served in the State Electricity Board as a Member in terms of Section 5(4) and from among the Members of the Board, considering the qualifications specified in sub-section (4), the State Government, after getting a report from the vigilance department, appointed

him as Chairman of the Board, it is impermissible to claim that the issue cannot be agitated under service jurisprudence.

12)We have already pointed out that the person who approached the High Court by way of a Public Interest Litigation is not a competitor or eligible to be considered as a Member or Chairman of the Board but according to him, he is a Vidyut Shramik Leader. Either before the High Court or in this Court, he has not placed any material or highlighted on what way he is suitable and eligible for that post.

.....

The same principles have been reiterated in the subsequent decisions, namely, Dr. B. Singh vs. Union of India and Others, (2004) 3 SCC 363, Dattaraj Nathuji Thaware vs. State of Maharashtra and Others, (2005) 1 SCC 590 and Gurpal Singh vs. State of Punjab and Others, (2005) 5 SCC 136.

15)The above principles make it clear that except for a writ of quo warranto, Public Interest Litigation is not maintainable in service matters."

20. In ***Girjesh Shrivastava and others vs. State of Madhya Pradesh and others, reported in 2010 (10) SCC 707****, appointments were challenged in PIL, on the grounds of contravention of rules, regarding reservation of ex- servicemen. The High Court allowed the writ petition and ordered cancellation of appointments, and dismissed the review petitions also. While considering the issue, as to whether the matter ought to have been taken, as service dispute and not PIL, the Hon'ble Supreme Court, after considering a catena of decisions, at paragraphs 14 to 19 has held as follows:-*

"14. However, the main argument by the appellants against entertaining WP (C) 1520/2001 and WP (C) 63/2002 is on the ground that a PIL in a service matter is not maintainable. This Court is of the opinion that there is considerable merit in that contention.

15. It is common ground that dispute in this case is over selection and appointment which is a service matter.

16. In the case of ***Dr. Duryodhan Sahu and others vs. Jitendra Kumar Mishra and others (1998) 7 SCC 273****, a three judge Bench please to hold a PIL is not maintainable in service matters. This Court, speaking through Srinivasan, J. explained the purpose of administrative tribunals created under Article 323-A in the backdrop of extraordinary jurisdiction of the High Courts under Articles 226 and 227. This Court held "if public interest litigations at the instance of strangers are allowed to be entertained by the (Administrative) Tribunal, the very object of speedy disposal of service matters would get defeated" (para 18). Same reasoning applies here as a Public Interest Litigation has been filed when the entire dispute relates to selection and appointment.*

17. In ***B. Srinivasa Reddy v. Karnataka Urban Water Supply & Drainage Board Employees' Association and others, reported in (2006) 11 SCC 731 (II)****, this Court held that in service matters only the non-appointees can assail the legality of the appointment procedure (See para 61, page 755 of the report).*

18. This view was very strongly expressed by this Court in Dattaraj Nathuji Thaware v. State of Maharashtra and others, reported in (2005) 1 SCC 590, by pointing out that despite the decision in Duryodhan Sahu (supra), PILs in service matters `continue unabated'. This Court opined that High Courts should `throw out' such petitions in view of the decision in

Duryodhan Sahu (supra) (Para 16, page 596).

19. Same principles have been reiterated in Ashok Kumar Pandey v. State of W.B., reported in (2004) 3 SCC 349, at page 358 (Para 16)"

In Soma Velandi vs. Dr.Anthony Elangovan, reported in 2010 (4) CTC 8, following Gurpal Singh vs. State of Punjab, reported in JT 2005 (5) SC 389, a Hon'ble Division Bench held that PIL is not maintainable in service matters."

21. In Bholanath Mukherjee and others vs. Ramakrishna Mission Vivekananda Centenary College and others, reported in 2011 (5) SCC 464, before the Hon'ble Supreme Court, a direction to set aside the appointment of the 3rd respondent therein, as Principal, was sought for, as the 3rd respondent was junior, to them, and did not have the requisite qualification. Reiterating the legal position that PIL is not maintainable in service matters, the Hon'ble Apex Court declined to entertain the challenge to the notices issued to Ramakrishna Mission to reconstitute the committees.

22. In **Ayaaubkhan Noorkhan Pathan vs. State of Maharashtra and others, 2013 (4) SCC 465**. At paragraphs 14 and 15, the Apex Court, observed as follows:-

"14.This Court has consistently cautioned the courts against entertaining public interest litigation filed by unscrupulous persons, as such meddlers do not hesitate to abuse the process of the court. The right of effective access to justice, which has emerged with the new social rights regime, must be used to serve basic human rights, which purport to guarantee legal rights and, therefore, a workable remedy within the framework of the judicial system must be provided. Whenever any public interest is invoked, the court must examine the case to ensure that there is in fact, genuine public interest involved. The court must maintain strict vigilance to ensure that there is no abuse of the process of court and that, ?ordinarily meddlesome bystanders are not granted a Visa. Many societal pollutants create new problems of non-redressed grievances, and the court should make an earnest endeavour to take up those cases, where the subjective purpose of the lis justifies the need for it.

15. Even as regards the filing of a Public Interest Litigation, this Court has consistently held that such a course of action is not permissible so far as service matters are concerned. (Vide: Dr. Duryodhan Sahu & Ors. v. Jitendra Kumar Mishra & Ors., AIR 1999 SC 114; Dattaraj Natthuji Thaware v. State of Maharashtra, AIR 2005 SC 540; and Neetu v. State of Punjab & Ors., AIR 2007 SC 758)"

23. At this juncture, we deem it is necessary to extract Article 141 of the Constitution of India, which reads as follows:-

"141. Law declared by Supreme Court to be binding on all courts.-- The law declared by the Supreme Court shall be binding on all courts within the territory of India."

24. In view of the above, when Public Interest Litigation (Writ Petition) is not maintainable in service matters and time and again been reiterated by the Hon'ble Supreme Court in series of decisions as referred above, the present Public Interest Litigation (writ petition) is not maintainable in law and the same is

dismissed accordingly. No order as to costs.

(2020)12ILR A606
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.11.2020

BEFORE

THE HON'BLE PANKAJ MITHAL, J.
THE HON'BLE SAURABH LAVANIA, J.

P.I.L. Civil No. 19497 of 2020

Narendra Kumar Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Shobhit Kant.

Counsel for the Respondents:
C.S.C., Rishabh Kapoor

A. Constitution of India,1950-Article 226-PIL-maintainability of-the firm in question was earlier inspected by the inspecting agency and was declared in Category 'C'-since the purchase from the firm would be taken subsequent to its certification by the inspecting agency-it is certainly not a petition on behalf of disadvantageous group of persons rather one on behalf of a competitor-a dispute between two warring groups is in the realm of a private dispute and is not allowed to be agitated as a Public Interest Litigation- the petition is not maintainable in public interest at the behest of the petitioner-the petitioner has no credentials to move PIL.(Para 2 to 23)

B. The petitioner claims to be a Social worker, but in order to substantiate the nature of the social work he is doing or seeks to do, he has not disclosed any experience that makes him suitable or perfect and no document in proof has been furnished. The person filing PIL should precisely and specifically, apart from other things, state his credentials and the public cause he is seeking to espouse. These are essential elements because the relaxation provided from the strict rule of locus standi lately came to be misused by unscrupulous persons seeking cheap publicity. (Para 5 to 9)

The Petition is dismissed. (E-6)

List of Cases cited: -

1. St. of U.K. Vs Balwant Singh Chaufal ,(2010) 3 SCC 402

2. Guruvayoor Devaswom Managing Committee Vs C.K. Ranjan, (2003) 7 SCC 546

3. Bandhua Mukti Morcha Vs UOI, (1984) 2 SCR 67

4. Ramsharan Autyanuprasi & Anr., Vs UOI & ors., (1989) AIR SC 549

(Delivered by Hon'ble Pankaj Mithal, J. & Hon'ble Saurabh Lavania, J.)

1. Heard Sri H. N. Singh, Senior Counsel assisted by Sri Shobhit Kant, learned Counsel for the petitioner, Sri H. P. Srivastava, learned Additional Chief Standing Counsel appearing for respondent No.1 and Sri Rishab Kapoor, learned Counsel for respondent Nos.2 to 5.

2. The petitioner is an Advocate by profession and has preferred this petition in Public Interest. In paragraph - 4 of the petition, he has stated that he is also involved in social work, but he has not disclosed his credentials or the nature of social work so far done by him.

3. The petitioner in Public Interest seeks quashing of letter dated 18.9.2020 of the Chief Engineer (Purchase) of U.P. Jal Nigam requesting M/s Crown Agents (India) Pvt. Ltd. to inspect M/s. Rashmi Metaliks Ltd., Kolkata and issuance of mandamus directing respondent Nos.2 and

3 not to permit re-inspection of M/s Rashmi Metaliks Limited, Kolkata.

4. The normal rule is that a person, who suffers a legal injury or whose legal right is infringed, alone has locus standi to invoke the writ jurisdiction to avoid miscarriage of justice. The said common rule of locus standi stands relaxed where the grievance is raised before the Court on behalf of poor, deprived, illiterate or the disabled persons, who cannot approach the Court independently for redressal of the legal wrong or the injury caused to them on account of violation of any constitutional or legal right. These are mostly cases in public interest, i.e., cases on behalf of class of persons mentioned above.

5. However, the relaxation so provided from the strict rule of locus standi lately came to be misused or abused by unscrupulous persons seeking cheap publicity. Therefore, the Supreme Court in State of Uttaranchal v. Balwant Singh Chaufal [(2010) 3 SCC 402] observed that as the process of the Court is frequently abused in the name of Public Interest Litigation, all High Courts need to frame Rules to prevent such abuse. In compliance with the directions of the Supreme Court, the Allahabad High Court Rules were also amended and Sub-Rule (3-A) was added under Chapter XXII Rule 1 w.e.f. 1.5.2010. The aforesaid Rule reads as under:-

"(3-A) In addition to satisfying the requirements of the other rules in this chapter, the petitioner seeking to file a Public Interest Litigation, should precisely and specifically state, in the affidavit to be sworn by him giving his credentials, the public cause he is seeking to espouse; that he has no personal or private interest in the matter; that there is no authoritative pronouncement by the Supreme Court or High Court on the question raised; and that the result of the litigation will not lead to any undue gain to himself or anyone associated with him, or any undue loss to any person, body of persons or the State."

6. A simple reading of the aforesaid Rule reveals that in addition to the other requirements mentioned under the Chapter for filing a writ petition, the person filing the petition in Public Interest should precisely and specifically, apart from other things, state his credentials and the public cause he is seeking to espouse. Therefore, disclosure of credentials and the public purpose sought to be espoused are also essential elements to be stated in initiating proceedings in public interest.

7. The petitioner in the writ petition, except for mentioning that he is a Lawyer and is involved in a social work, has not stated anything covering any of the above essential requirements. In short, he has not disclosed his credentials.

8. The dictionary meaning of the word 'credentials' is the qualities and the experience of a person that make him suitable for doing a particular job. The Oxford English-English-Hindi Dictionary, 2nd Edition, explains credentials as the quality which makes a person perfect for the job or a document that is a proof that he has the training and education necessary to prove that he is a person qualified for doing the particular job.

9. The petitioner herein claims to be a Social Worker, but in order to substantiate the nature of the social work he is doing or seeks to do, he has not disclosed any experience that makes him suitable or perfect for doing the said job and no document in proof has been furnished.

10. Black's Law Dictionary, 10th edition, defines 'credential' a document or other evidence that proves one's authority or expertise; a testimonial that a person is entitled to credit or to the right to exercise official power.

11. The petitioner, in the absence of any documentary proof to establish his authority or expertise in doing social work, does not have the requisite credentials to initiate petition in Public Interest.

12. Considering the aforesaid definition(s) of the term 'credential' and the law on entertaining the PIL what we feel is that for maintaining the PIL the petitioner in the writ petition, in brief, should state, with proof, that what he has done and what expertise he has on the subject matter of PIL as also that what exercise (sufficient) has been carried out by the petitioner before the administration prior to knocking the door of the Court and that what injury would be caused to the downtrodden of the society or public at large if cause under PIL is not espoused by the Court.

13. In **Guruvayoor Devaswom Managing Committee v. C.K. Ranjan [(2003) 7 SCC 546],** it has been observed that the Courts are constitutionally bound to protect the fundamental rights of disadvantageous people and therefore, can entertain petitions under Articles 32/226 of the Constitution of India filed by any interested person in the welfare of the people who are in a disadvantageous position and are unable to knock the doors of the Courts.

14. The petitioner in filing this petition in Public Interest has not even disclosed that he is filing this petition on behalf of such disadvantageous persons or that injustice is meted out to a large number of people and therefore it has become necessary for him to come forward on their behalf.

15. It is well-settled that Public Interest Litigation is for ensuring basic human rights to the deprived and to secure social, economic and political justice. The Apex Court in **Bandhua Mukti Morcha v. Union of India [(1984) 2 SCR 67**] observed that the public interest litigation is not in the nature of adversary litigation but a challenge to the Government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community. It is only to protect such class of persons against violation of their basic human rights which is the constitutional obligation of the executive that ordinarily recourse to public interest litigation may be permitted.

16. In view of the aforesaid reasons and the law as laid down by the Apex Court, the petitioner is not a person, who has any credentials to move in Public Interest. Simply on the allegation that he is a Lawyer and a person involved in social work without disclosing his credentials and in the absence of the fact that the petition has been preferred in the interest of justice for large number of downtrodden persons who are unable to approach the Courts of Law, the petitioner is not entitled to maintain this petition in public interest that too in a matter which does not involve basic human rights.

17. The firm, i.e., M/s Rashmi Metaliks Ltd., Kolkata in question was earlier inspected and was declared in Category 'C'.

18. The letter dated 28.08.2020 (Annexure - 3) of the Chief Engineer

(Purchase), U.P. Jal Nigam, Lucknow on record clearly stated that the inspecting agency, i.e., M/s Crown Agents (India) Pvt. Ltd., New Delhi may inspect the aforesaid firm and it is only on its certification that the firm meets the standards provided the supply from the firm-M/s Rashmi Metaliks Ltd., would be taken.

19. It is pertinent to mention here that U.P. Jal Nigam is not directly involved in the purchase of any material from any firm, rather it awards contracts on turn-key basis and it is the contractor who makes purchases of the material from amongst firms prescribed by the U. P. Jal Nigam, provided there is otherwise no legal impediment.

20. In view of the aforesaid facts and circumstances and the letter of the Chief Engineer (Purchase) on record, since the purchases from the aforesaid firm would be taken subsequent to its certification by the inspecting agency, we do not find that this matter requires interference by us in exercise of extraordinary jurisdiction.

21. Moreover, the controversy sought to be raised is one relating to award of contracts and the possibility of the petitioner being set-up by the rival groups cannot be ruled out. It is certainly not a petition on behalf of any disadvantageous group of persons rather and one on behalf of a competitor.

22. It is trite to mention here that a dispute between two warring groups is in the realm of a private dispute and is not allowed to be agitated as a Public Interest Litigation vide Ramsharan Autyanuprasi and another v. Union of India and others [AIR 1989 SC 549].

23. Accordingly, in the facts and circumstances of the case, as narrated above, the petition is dismissed as not maintainable in public interest at the behest of the petitioner.

(2020)12ILR A609
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.08.2020

BEFORE

THE HON'BLE SHASHI KANT GUPTA, J.
THE HON'BLE SHAMIM AHMAD, J.

Special Appeal (D) No. 286 of 2020

Pradeep Kumar Goswami ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Sandeep Kumar, Sri Govind Kumar Singh

Counsel for the Respondents:
C.S.C., Sri Alok Dwivedi

A. Service Law - U.P. Intermediate Education Act, 1921- U.P. High School and Intermediate College (Payment of Salaries of Teachers and other Employees) Act, 1971

Respondent no. 5 being senior to the appellant and having requisite qualification was illegally denied promotion by the Committee of Management by playing fraud as no such affidavit expressing no objection to the promotion of the appellant prior to the respondent no. 5 was ever filed by him. Learned Singe Judge after fully considering the nature of the dispute, nature and the extent of evidence that may have to be appreciated, the complexity of the issues that arise for determination has remitted the matter to the concerned authorities for reconsideration. (Para 14 & 19)

Appeal disposed of. (E-10)

List of Cases cited: -

1. Ladli Prasad Vs Kamal Distillery AIR 1963 SC 1279

2. Kaku & ors. Vs Savitri & ors. (1995) SCC Online P & H 1199

3. Mahadeo Prasad Saraf Vs S.K. Srivastava AIR 1963 Cal. 152

4. Maya Devi (Dead) through Lrs. Vs Raj Kumari Batra (Dead) through Lrs. & ors. (2010) 9 SCC 486

(Delivered by Hon'ble Shamim Ahmad, J.)

Order on Exemption Application

1. Learned counsel for the appellant has submitted that due to the Pandemic Covid-19, he has not been able to get the certified copy of the impugned judgment and order dated 3.3.2020 passed by this Court in spite of his best efforts. In this regard, the appellant has filed an exemption application. Therefore, he prays that the filing of the certified copy of the impugned judgment and order dated 3.3.2020 may be exempted.

2. The reasons shown in the exemption application are sufficient. The exemption application is allowed.

3. Accordingly, the appellant is exempted to file certified copy of the judgment and order dated 3.3.2020.

4. Office is directed to allot regular number to the appeal.

Order on Memo of Appeal

5. This special appeal has been filed against the judgment and order dated 3.3.2020 passed by the learned Single Judge in Writ-A No.14271 of 2014 whereby the matter has been remitted back to the authorities concerned to initiate fresh exercise for the promotion from Class IV post to the post of Assistant Clerk in the institution namely Shri Mahatma Doodhadhari Inter College, Nagla Vishnu, District Agra (hereinafter referred to as the 'Institution') strictly in accordance with law taking into note seniority of the candidates of the Institution in question.

6. Heard Sri Sandeep Kumar, learned counsel for the appellant as well as learned Standing Counsel for the State and Sri Alok Dwivedi, learned counsel for the respondent no.5 and perused the record.

7. Learned counsel for the appellant has submitted that the aforesaid institution is on the grant-in-aid list of the State Government and the provisions of U.P. Intermediate Education Act, 1921 and the regulations framed thereunder as well as the Uttar Pradesh High School and Intermediate College (Payment of Salaries of Teachers and other Employees) Act, 1971 are applicable.

8. Learned counsel for the appellant has further submitted that on 21.03.2012 a proposal was made by the Committee of Management to fill up the one post of Assistant Clerk in the Institution, which was fell vacant due to retirement of Shri Kishori Lal, Assistant Clerk. By proposal no.2, the appellant was proposed for promotion by the Committee of Management. Further, in the proposal no.2 it has been mentioned that other persons including the respondent no.5 has given their consent as well as notarized affidavit by giving their right of promotion and have no objection in case the appellant Pradeep Kumar Goshwami is promoted.

9. Learned counsel for the appellant has next submitted that in pursuance of the proposal so made by the Committee of

Management, the District Inspector of Schools called explanation to the concerned employees for clarification in respect of filing their affidavit, wherein no person/employee filed any objection against the affidavit filed by them. The District Inspector of Schools, Agra sent a letter dated 6.11.2012 to the Manager of the Committee of Management calling for the record of the other employees. However, as no vacancy was found under the promotional quota in the Institution, hence the claim of promotion of the appellant as Assistant Clerk was rejected by the District Inspector of Schools by the order dated 16.4.2013. Learned counsel for the appellant further submits that the respondent no.5 was fully aware of the above facts regarding the promotional quota of the institution.

10. Learned counsel for the appellant further submits that again on 30.11.2013, one post of Assistant Clerk was fell vacant due to retirement of one Sri Ramveer Singh, Assistant Clerk working in the Institution, hence the appellant made an application dated 30.11.2013 before the respondent no.4 for his promotion. Further it is submitted that no other person had filed any application before respondent no.4 for the same post till the promotion order was passed by the competent authority in favour of the appellant. The respondent no.5 namely Ranvir Singh was not considered for promotion on the post of Clerk by the Committee of Management because of an adverse entry in service record and also on the ground that he has filed an affidavit by giving his right of promotion in favour of the appellant earlier.

11. Learned counsel for the appellant further submits that on the application dated 30.11.2013 submitted by the appellant, the Committee of Management made a proposal/resolution for promotion of the appellant and accordingly, the Committee of Management sent a letter along with all the relevant documents before the District Inspector of Schools, Agra for further action on 30.12.2013, which was duly received on the same date i.e. 30.12.2013. Learned counsel for the appellant further submits that in furtherance of the proposal so made by the Committee of Management, the Finance and Accounts Officer, Secondary Education, Agra wrote a letter dated 27.1.2014 granting financial approval in favour of the appellant and forwarded the same to the respondent no.4 for further action.

12. Learned counsel for the appellant further submits that in pursuance of the letter dated 27.1.2014, the District Inspector of Schools Agra passed an order dated 31.1.2014 granting promotion in favour of the appellant, which was challenged by the respondent no.5 by means of writ petition no.14271 of 2014 by concealing material facts. The said writ petition was allowed by the learned Single Judge vide order dated 3.3.2020 and the resolution dated 2.12.2013 passed by the Committee of Management as well as the orders dated 27.1.2014 and 31.1.2014 passed by the respondent Nos.3 and 4 were quashed and the matter was remitted back to the authorities concerned to initiate fresh exercise for promotion.

13. In reply to the arguments raised by the learned counsel for the appellant, Sri Alok Dwivedi, learned counsel for the respondent no.5 has submitted that the learned Single Judge has rightly passed the impugned judgment. In support of his argument, learned counsel for the respondent no.5 has submitted that the

respondent no.5 had never filed any affidavit before the Committee of Management or any of the Educational authorities for giving up his right to the promotion as Assistant Clerk in the institution. He has invited the attention of the Court to the seniority list of Class IV employees of the Institution of the year 2012, wherein respondent no.5 has been placed at serial no.2 and his date of appointment is 1.5.1988, whereas the appellant has been placed at serial No.8 and his date of appointment is 2.1.2007. Similarly, attention was drawn regarding the seniority list of Class IV employees of the institution which was published on 26.12.2013, wherein the situation was more or less the same and the respondent no.5 was at serial No.2 while appellant was at serial No.7. Further, it is contended that the respondent No.2 i.e. District Inspector of Schools, Kanpur Nagar on 6.11.2012 had apprised the Principal of the Institution that the appellant was placed in the seniority list at serial No.8 and other class IV employees placed at serial No.1 to 7 have not submitted their affidavit for not accepting the promotion to the post of Assistant Clerk in the institution. On the basis of the affidavit alleged to have been filed by them before the institution, the respondent no.2 further fixed 12.11.2012 and instructed the concerned parties to appear in person before him. It is next contended that after the said letter, the orders dated 27.1.2014 and 31.1.2014 were passed exparte without giving any opportunity of hearing to the respondent no.5 appointing appellant on the post of Clerk.

14. Learned counsel for the respondent no.5 further submits that the respondent no.5 being senior to the appellant, being appointed in the year 1988 and having requisite qualification is entitled to be promoted on the post of Assistant Clerk in the institution, but was illegally denied by the Committee of Management by playing fraud as no such affidavit was ever filed by the respondent no.5 and submitted that the learned Single Judge has rightly allowed the writ petition and the matter has been remitted back to the authorities concerned to initiate fresh exercise for the promotion from Class IV post to the post of Assistant Clerk in the institution.

15. Learned counsel for the respondent no.5 has placed reliance on the judgment passed by the Hon'ble Apex Court in **Ladli Prasad vs Kamal Distillery**, **AIR 1963 SC 1279**. The Hon'ble Apex Court has observed as under:

"Where an appeal lies to a Division Bench of the High Court against a judgment of a single judge of the High Court exercising original or appellate jurisdiction, the decision of the single judge should be regarded as a decision of the Court immediately below the Division Bench which hears the appeal, but the single judge of the High Court cannot be regarded as a Court subordinate to the High Court."

16. Further reliance has been placed on the Division Bench judgment of Punjab and Haryana High Court in **Kaku and others vs Savitri and others**, **1995 SCC Online P & H 1199**. The Division Bench after considering Ladli Prasad's case (supra) has observed as under:

"When a judgment of a learned single judge is appealed against, the single judge does not become subordinate to the appellate Bench though as observed by the Supreme Court above, the decision of the

single judge should be regarded as a decision of the Court immediately below the Division Bench which hears the appeal. Nature of the appellate power exercised by the Division Bench is not curtailed in any way merely for the reason that the writ appeal is intra- Court appeal. The Bench while dealing with the appeal may be faced with various problems, i.e. the learned single judge may allow a Writ Petition and issue a writ on a pure question of law without going into the other questions. The Division Bench in appeal may disagree with the interpretation of law which would result in the reversal of the order of the single judge. Resultantly, the other questions would survive for consideration. In such a situation the Bench may choose to decide the other questions itself. But there will be nothing wrong for the Bench to remand the case for consideration by the learned single judge of the other questions to be decided on merits. The appeal is against the decision of a learned single judge. The Bench should have the benefit of the opinion of the learned single judge on all points. If the Bench does not have the opinion and findings of the learned single judge will it not be handicapped to some extent while deciding the other questions by itself? Ordinarily, the Bench in appeal does not interfere with the findings arrived at by a learned single judge on facts. In such a case it would be more appropriate to obtain the benefit of the opinion of the learned single judge.

17. Further reliance has been placed on the Division Bench judgment of the Calcutta High Court in **Mahadeo Prasad Saraf vs S.K. Srivastava, AIR 1963 Cal. 152** and the Hon'ble Court has observed as under:

"With regard to the question whether the appellate Court's power is limited only to the consideration of the question whether a Rule Nisi should issue or not and to remit the case to the lower Court in the event of its coming to the conclusion that a case for a Rule Nisi had been made out, it is to be observed that such limitation or restriction on the power of the appellate Court is not warranted. There may be cases in which the appellate Court may consider it desirable and proper to dispose of the proceeding under Article 226 of the Constitution finally at the appellate stage without sending the case back for disposal by the trial Court. To take an example if an application under Article 226 is made for challenging the legality of an act on the ground that the provisions of a statute pursuant to which the action is taken are ultra vires and that is the sole ground on which the application is based and the trial Court after hearing the petitioner on the question dismisses the application in limine and refuses to issue a Rule Nisi and the petitioner prefers an appeal against the order of dismissal, can it be said that the appellate Court is bound to remand the case to the trial Court if it is satisfied that there is substance in the contention of the appellant? The answer, in my view, must be in the negative. No investigation into any question of fact is necessary in such a case and no filing of affidavit setting out any fact may be called for in such 3 case. The only question for determination before the appellate Court in such a case is a question of law and there is therefore no reason why the appellate Court cannot dispose of the proceeding under Article 226 finally instead of sending the case back for disposal by the trial Court and driving the parties to incurring of further unnecessary costs. It is true that when question of facts are to be gone into and it is necessary to give an opportunity to the respondents to meet the allegations contained in the

petition, the Court may think it fit to remit the case to the trial Court with directions for giving an opportunity to the respondents and for filing of affidavits but I do not think any hard and fast rule can be laid down that in each and every case of an appeal from an order summarily rejecting an application under Article 226, the Appellate Court is bound to remit the case for disposal by the trial Court."

18. This Court has also considered the judgment passed by the Hon'ble Apex Court in **Maya Devi (Dead) through Lrs. Versus Raj Kumari Batra (Dead) through Lrs. and others, (2010) 9 SCC 486** wherein the Hon'ble Apex Court has observed as under:

"Recording of reasons in cases where the order is subject to further appeal is very important from yet another angle. An appellate Court or the authority ought to have the advantage of examining the reasons that prevailed with the Court or the authority making the order. Conversely, absence of reasons in an appealable order deprives the appellate Court or the authority of that advantage and casts an onerous responsibility upon it to examine and determine the question on its own. An appellate Court or authority may in a given case decline to undertake any such exercise and remit the matter back to the lower Court or authority for a fresh and reasoned order. That, however, is not an inflexible rule, for an appellate Court may notwithstanding the absence of reasons in support of the order under appeal before it examine the matter on merits and finally decide the same at the appellate stage. Whether or not the appellate Court should remit the matter is discretionary with the appellate Court and would largely depend upon the nature of the dispute, the nature and the extent of evidence that may have to be appreciated, the complexity of the issues that arise for determination and whether remand is going to result in avoidable prolongation of the litigation between the parties. Remands are usually avoided if the appellate Court is of the view that it will prolong the litigation."

19. Having heard the rival submissions and perusal of the record as well as the judgments cited by learned counsel for the respondent no.5 and the judgment and order passed by the learned Single Judge, we find that while disposing of the writ petition the learned Single Judge has fully considered the nature of dispute, the nature and the extent of evidence that may have to be appreciated, the complexity of the issues that arise for determination and the learned Single Judge has merely remitted the matter to the concerned authorities to initiate fresh exercise for the promotion from class IV post to the post of Assistant Clerk in the institution, hence we do not see any justification to interfere in the impugned judgment and order passed by learned Single Judge.

20. However, considering the peculiar facts and circumstances of the case, the appellant is permitted to raise his grievances before the authorities concerned along with computerized/certified copy of this order enclosing therewith a copy of the writ petition and its annexures. In case any such grievance is raised by the appellant, the authorities concerned shall look into the grievances of the appellant while initiating fresh exercise for promotion in question in accordance with law and pass a speaking and reasoned order after affording opportunity of hearing to all parties concerned. The above exercise be completed by the authorities concerned

within a period of two months from the date of production of the computerized/certified copy of this order.

21. With this observation, the appeal stands finally disposed of.

22. The parties shall bear their own costs.

(2020)12ILR A615
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.10.2020

BEFORE

THE HON'BLE GOVIND MATHUR, C.J.
THE HON'BLE SIDDHARTH VARMA, J.

Special Appeal (D) No. 389 of 2020

C/M Sant Ravidas Primary Pathshala, Azamgarh & Ors. ...Appellants
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Gautam Baghel

Counsel for the Respondents:
C.S.C.

A. Practice & Procedure - Delay & Laches - The law of no statutory limitation is not applicable for invoking writ jurisdiction. Doctrine of delay and laches are certainly applicable ad required to be looked into while entertaining a petition under Article 226 of the Constitution of India. **The objections pertaining to delay, laches, alternative remedy, conduct of the party, etc. are self-evolved restrictions and these are to be asserted and examined by the Court and not by its ministerial staff including Stamp Reporters. (Para 7)**

Delay and laches are two different concepts. Laches certainly posses an essence of delay but every delay does not reflect laches also. Laches is an equitable defence available to a defendant ad it should include certain other factors in addition to delay in agitating the equitable relief. (Para 8)

The first instance copy of the order dated 13.12.2017 was supplied to the appellant-petitioner on 22.11.2018. The appellant-petitioner thereafter filed a writ petition in the month of April, 2019. Such period looking to the facts of the case even cannot be treated sufficient to dismiss the writ petition on the count of delay. (Para 10)

Writ Petition allowed. (E-10)

(Delivered by Hon'ble Govind Mathur, C.J. , & Hon'ble Siddhartha Varma, J.)

1. Testing correctness of the order passed by learned single Bench dated 7th November, 2019 in Writ-A No.35379 of 2019, instant appeal has been preferred.

2. Brief facts leading to filing of this appeal are that the appellant-petitioner, a society registered under Societies Registration Act, 1860 mainly involved in imparting education to the children coming from scheduled castes submitted an application to have grant-in-aid. Acting upon the application, the Director, Department of Social Welfare by a letter dated 29th May, 2014 directed the District Social Welfare Officer to enlist the appellant-petitioner for grant-in-aid as an institution of scheduled castes. After necessary inquiry, a detailed report was also said to be given in this regard by the District Minority Officer, Azamgarh on 16th April, 2015. Being failed to have any response the appellant-petitioner preferred a petition for writ before this Court that came to be disposed of on 27th October, 2016 with a direction to the authority competent to decide the issue relating to grant-in-aid expeditiously. Despite the

order aforesaid, no decision was taken by the competent authority. Hence, the appellant-petitioner preferred an application to initiate proceedings under Contempt of Courts Act, 1971 against the competent authority. The contempt petition aforesaid came to be disposed of on 25th October, 2017 with a fresh direction to decide claim of the appellant-petitioner within a period of six months.

3. As per the averments contained in the petition for writ, no decision at all was communicated to the appellant-petitioner, which is said to be taken in compliance of the directions given on 25th October, 2017. An application thus was filed under Right to Information Act, 2005 and in pursuance thereto on 12th October, 2018 the appellant-petitioner received copy of a communication dated 13th December, 2017 declining the claim for grant-in-aid. Being aggrieved by the order dated 13th December, 2017 that was received by the appellant on 12th October, 2018, a petition for writ was filed on 12th April, 2019.

4. On filing the writ petition, the Stamp Reporter made a note to the effect that the petition suffers from laches of 589 days. Learned single Judge by the order dated 7th November, 2019 dismissed the writ petition on the ground of laches. The relevant part of the order aforesaid reads as under:-

"The stamp reporter has reported a laches of 589 days in filing the present petition.

Present petition has been filed with following prayers:-

(a) a writ, order, rule or direction in the nature of Certiorari quashing the impugned order dated 13.12.2017 passed by respondent no. 2 (Annexure no. 15 to the writ petition).

(b) any other suitable writ, order or direction as this Hon'ble Court may deem fit and proper in the circumstances of the present case.

(c) award the cost of petition in favour of the petitioner.

Learned counsel for the petitioners by drawing attention to paragraph 28 submitted that the petitioners came to know about the impugned order on 22.11.2018 thereafter, they came to this Court after arranging money on 17.10.2019 and the present petition has been filed.

Paragraph 28 of the writ petition is quoted as under:-

"That the petitioner no.6 was aware with regard to the impugned order dated 13.12.2017 on 22.11.2018, thereafter, petitioner came to this Hon'ble Court for filing the Writ Petition on 17.04.2019 and obtained the photo identification card, but in lack of money, he could not file the writ petition before this Hon'ble Court. The petitioner no. 6 came this Hon'ble Court. The petitioner no. 6 came to this Hon'ble Court before his counsel after arranging the money on 17.10.2019 and thereafter he is filing the same before this Hon'ble Court.

In the present case, petitioners are Committee of Management of five institutions and petitioner no. 6 is the alleged manager of all the institutions, therefore, paragraph 28 of the petition does not inspire confidence that five Committee of Management and the alleged manager thereof, took six months' time to collect the money for the purpose of filing of the present petition. Admittedly, even as per allegations of the petitioners, petitioners came to know about the impugned order passed on 13.12.2017 at least by 22.11.2018. Even the photo verification affixed on the affidavit is dated 14.8.2019.

Accordingly, petition stands dismissed on the ground of laches in filing the present petition."

5. In appeal, the argument advanced by learned counsel appearing on behalf of the appellant-petitioner is that there was no laches in filing the petition for writ and, therefore, learned single Bench erred in dismissing the petition for writ without examining merits. Learned counsel also tried to explain the delay in filing the petition for writ.

6. As already stated, learned single Bench dismissed the petition for writ on the ground of laches and, therefore, the issue under consideration is that whether any laches exist that may be sufficient to dismiss the petition for writ.

7. At the threshold, it would be appropriate to state that the law of no statutory limitation is not applicable for invoking writ jurisdiction. Doctrine of delay and laches are certainly applicable and required to be looked into while entertaining a petition under Article 226 of the Constitution of India. The objections pertaining to delay, laches, alternative remedy, conduct of the party, etc. are self evolved restrictions and these are to be asserted and examined by the Court and not by its ministerial staff including Stamp Reporters. We failed to understand as to why in the instant matter Stamp Reporter made a note about "laches" in filing the writ petition. Such reporting is absolutely unwarranted being a question that is to be decided by the Court.

8. Though, it is a very fundamental issue but a petition for writ being dismissed on the count of laches, we would like to mention that laches must not be confused with delay in filing writ petition. Delay and laches are two different concepts. Laches certainly possess an essence of delay but every delay does not reflect laches also. Laches is an equitable defence available to a defendant and it should include certain other factors in addition to delay in agitating the equitable relief. While invoking the defence of laches it is to be asserted that the party claiming relief not only slept on its rights but non persuasion on its part has changed the circumstances to the extent that the grant of relief shall not be just and proper. No such defence at all was taken by any of the party and that could have even not be taken as there was no circumstance that would have created any right in favour of the State or against the appellant-petitioner.

9. Precisely, the issue was regarding entitlement of the appellant-petitioner for grant-in-aid in accordance with the applicable rules. The legal right of the appellant-petitioner was supposed to be decided on the scale of the statute applicable and for examining that there was no hurdle what to talk of laches even on delay as no right otherwise accrued in favour of the respondents. There was also no question of losing the evidence.

10. It would also be appropriate to state that there was no dispute that at the first instance copy of the order dated 13th December, 2017 was supplied to the appellant-petitioner on 22nd November, 2018. The appellant-petitioner thereafter filed a writ petition in the month of April, 2019. Such a period looking to the facts of the case even cannot be treated sufficient to dismiss the writ petition even on the count of delay.

11. Learned single Bench in light of the law discussed above and the factual background noticed, erred in dismissing the petition for writ. The appeal, hence is allowed. The order dated 7th November,

2019 is set aside. The writ petition is restored to its original number and is remitted to learned single Bench for its adjudication on merits. The other just objections shall be available to the respondents while contesting the petition.

(2020)12ILR A618
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.11.2020

BEFORE

THE HON'BLE GOVIND MATHUR, C.J.
THE HON'BLE SIDDHARTHA VARMA, J.

Special Appeal No. 422 of 2020

Chandra Shekhar Srivastava ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Poonam Mishra, Radha Kant Ojha

Counsel for the Respondents:
C.S.C., Ram Prakash Shukla

A. Service Law - Baroda Uttar Pradesh Gramin Bank (Officers and Employees) Service Regulations, 2010: Regulation 48(2)

Regulation 48(2) itself provides the competent authority to consider and pass appropriate orders treating the period of suspension as either one which has been spent on duty or otherwise. This implies that the Regulation 48(2) can be invoked only where no penalty of dismissal or removal is imposed. In other words, the competent authority must not invoke this power if a penalty of removal or dismissal is inflicted. The learned Single Judge erred in treating the period of suspension as not a period spent on duty and further disentitling him from the payment of any difference of salary except the subsistence allowance. The provision in unambiguous terms mandates that the period of suspension is always to be treated as the period spent on duty. The other part having the phrase "or otherwise" implies that if the employee has suffered a penalty of removal or dismissal the competent authority may pass appropriate directions. (Para 12, 13 & 15)

Special Appeal allowed. (E-10)

(Delivered by Hon'ble Govind Mathur, C.J. & Hon'ble Siddharth Varma, J.)

1. As a consequence to a disciplinary action, the petitioner (appellant herein) was subjected to a punishment in the following terms:-

"Reduction to a lower stage in his time scale of pay by -01- stage for a period of -03- months without cumulative effect'

And

Further, the period of suspension of Mr. Chandra Shekhar Srivastava will be treated as period not spent on duty. Hence, no difference of salary will be payable to him except subsistence allowance, which he has already received."

2. Aggrieved by the same, he preferred a petition for writ with a ground, inter alia, that second part of punishment relating to period of suspension is bad being without jurisdiction. Learned Single Bench dismissed the petition for writ relying upon clause (2) of Regulation 48 of the Baroda Uttar Pradesh Gramin Bank (Officers and Employees) Service Regulations, 2010 that reads as under:-

"48. Treatment of suspension period and allied matters-

(1) The Competent Authority may, while imposing penalty, direct whether the other or employee shall be paid the difference between the subsistence allowance and the emoluments which he would have received but for such

suspension or the period he was under suspension and that, if the Competent Authority decides otherwise, no order shall be passed which shall have effect of compelling the officer or employee to refund such subsistence allowance.

(2) The period during which an officer or employee is under suspension shall, if he is not removed or dismissed from the service, be treated as period spent on duty or otherwise as the Competent Authority may direct."

3. A challenge is given to the judgment impugned with submission that learned single Bench failed to appreciate and interpret provisions of Regulation 48 in correct perspective and that ultimately resulted into miscarriage of justice. It is submitted that clause (2) of Regulation 48 pertains to two different eventualities which are:-

(i) When the employee is under suspension but is not subjected to the penalty of removal or dismissal from service, and

(ii) When the petitioner or employee is under suspension and is subjected to a penalty otherwise to first eventuality, meaning thereby, he has been either removed or dismissed from service.

4. Learned single Bench, as per the appellant, failed to appreciate these two different eventualities by treating only one circumstance of not imposing the penalty of removal or dismissal and this interpretation leads to an absurdity, asmuch as even in a case of subjecting an employee by a minor punishment, the competent authority may treat the period of suspension as break in service, which is having effect of removal from service.

5. It is asserted that, in the case in hand, the disciplinary authority though subjected the appellant to a minor punishment being the appellant would not be treated in service during the period of suspension but the direction given under Regulation 48(2) imposes an additional major punishment.

6. While defending the judgment impugned on behalf of respondent-bank it is stated that clause (2) of Regulation 48 is quite specific and that extends a broad power for the competent authority to deal with the issues relating to period of suspension in the event of imposing a punishment that is not removal or dismissal.

7. Under the provision aforesaid, absolute discretion is available with the competent authority either to treat the period of suspension as part of service or to take a view otherwise. Such discretion is not at all dependent to nature of the punishment imposed.

8. Heard learned counsels.

9. Precisely, the issue that needs consideration in this appeal is the intent of clause (2) of Regulation 48 of the Regulations of 2010.

10. Before touching merits of the case, it would be appropriate to state that every word and/or phrase in a statute carries a specific meaning. While interpreting such statute workability of it must be ensured. No interpretation of a statute is required to be made that reduces its functionality or that leads to absurdity.

11. In light of this general principle, we have examined the intent of Regulation 48 of the Regulations of 2010.

12. As already stated, learned single Bench while dismissing the petition for

writ held that Regulation 48 (2) itself provides for competent authority to consider and pass appropriate orders treating the period of suspension as either one which has been spent on duty or otherwise and the competent authority as per clause (2) of Regulation 48 is well within its jurisdiction to treat the period of suspension spent on duty or not.

13. In light of the view taken by learned single Bench power under Regulation 48(2) of Regulations of 2010 can be invoked only where no penalty of dismissal or removal is imposed. In other words the competent authority must not invoke this power if a penalty of removal or dismissal is inflicted.

14. In our considered opinion, learned single Bench while concluding as above, failed to understand very purpose of the Regulation concerned.

15. It is well settled that suspension is an interim disciplinary action, if not otherwise provided as punishment. Such interim disciplinary action is required to be taken by the authority empowered in various eventualities including to have a fair inquiry by preventing the delinquent to be with any official power that may impress or tamper with the evidence against him and further to ensure general confidence in services. The interim action taken, during the course of disciplinary proceedings, is supposed to be settled by the competent authority on conclusion of the inquiry. In an inquiry, the delinquent Officer/employee may be held guilty of the alleged charges or may be acquitted from the same. On being held guilty, the delinquent Officer/employee may be subjected to a major punishment or a minor punishment. The penalty of dismissal and removal are major punishments and while imposing such penalties the competent authority is required to take a definite decision as to whether suspension of the employee is to be treated as a part of service or otherwise. The competent authority while doing so examines justification of placing the incumbent under suspension.

16. In normal course, while imposing a minor punishment most of the employers do treat the period of suspension as the period spent on duty and it is quite obvious as the eventuality otherwise would amount to break in service depriving the Officer/employee from continuity of service.

17. Looking to this aspect, clause (2) of Regulation 48 is introduced in the Regulations of 2010. Its first part clearly indicates that if an employee is not subjected to any punishment that is having effect from termination in service either by way of removal or dismissal, his period of suspension shall be treated as the period spent on duty. This provision in unambiguous terms mandates that the period of suspension is always to be treated as the period spent on duty. The other part having the phrase "or otherwise", as a matter of fact pertains to the eventuality when employee is subjected to punishment of removal or dismissal, meaning thereby, if the employee has suffered a penalty of removal or dismissal the competent authority may pass appropriate directions. The interpretation otherwise would make the clause (2) non-functional for the Officers or employees, who have suffered the punishment of dismissal or removal and at the same time would also lead to absurdity to the extent that an employee subjected to minor punishment may suffer

with a penalty of break in service which is having an essence of termination.

18. In view of whatever stated above, in our opinion, learned single Bench committed a gross error while interpreting the intent of clause (2) of Regulation 48. Hence, this appeal deserves acceptance. Accordingly, the same is allowed. The judgment impugned dated 10th February, 2020 passed by learned single Bench is set aside. The petition for writ is allowed. The order dated 16th March, 2018 passed by the competent authority/ General Manager, Baroda Uttar Pradesh Gramin Bank is quashed to the extent that relates to treating the period of suspension of the appellant as not a period spent on duty and further disentitling him from the payment of any difference of salary except the subsistence allowance already paid. The period aforesaid be treated as the period spent by the appellant on duty.

(2020)12ILR A621
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.04.2020

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.

Service Single No. 1111 of 2002

Hem Nath & Ors. ...Petitioners
Versus
U.P. State Sugar Corporation Ltd., Lko. & Ors. ...Respondents

Counsel for the Petitioner:
S.C. Gupta

Counsel for the Respondents:
P.K. Sinha, Brijesh Kumar Shukla, Rajesh Kumar Verma.

A. Service Law – Payment of Salary - Schedule II of U.P. Sugar Undertakings (Acquisition) Act, 1971; U.P. Sugar Undertakings (Acquisition) Act, 1971: Section 2(h), 3, 7(6)(c), 7(6)(d), 8; Employees Provident Fund Act, 1952; U.P. Industrial Disputes Act, 1947; Payment of Wages Act, 1936–The question raised in this writ petition is, "whether liability of dues of petitioners employees of erstwhile employer i.e. before taking over of Hardoi Mill by UPSSCL w.e.f. 28.10.1984, would be borne by UPSSCL and/or Respondent-3 or petitioners must set up their claim from the erstwhile Owner/Employer." (Para 10)

A conjoint reading of the provisions of Act, 1971, show that with effect from appointed day i.e. 28.10.1984, Scheduled Undertakings, specified in Schedule II of Act, 1971 stood transferred and vested in UPSSCL free from any debt, charge or encumbrance and any such debt, charge or encumbrance stood attached to compensation payable to erstwhile owner of scheduled undertakings. It was for State Government to deduct from compensation payable to erstwhile Employer, the provident fund or any other dues recoverable under Employees Provident Fund Act, 1952, in respect of any person employed in connection with Scheduled Undertaking immediately before appointed day. In respect of dues under Act, 1952 recoverable from erstwhile Employer, it was further open to Employees' Provident Fund Commissioner to stake a claim before Prescribed Authority appointed under Act, 1971. (Para 17)

The employees who continued in service on appointed date and stood transferred to UPSSCL, all their claims of entire period have to be borne by UPSSCL and authorities under Labour Welfare Legislation, like, EPF Commissioner or Employees State Insurance Corporation. It is not open to UPSSCL to dispute the claim of an employee who was in service on appointed date and retired while working in UPSSCL, to suggest, that dues of the period prior to appointed date must be settled by employee with erstwhile Owner. Such adjustment was permitted to be made from the compensation payable to erstwhile Owner and it was the responsibility of UPSSCL or authorities under Act, 1952 or Employees State Insurance Act, 1948 but **if they had not adjusted the amount from compensation payable to erstwhile Owner, it is then-fault, and, they**

cannot dismiss claim of employee who is allowed to retire on and after appointed date, i.e., while he/she was serving with UPSSCL. (Para 18)

The intention of legislature is very clear that employees shall not be allowed to suffer on account of a situation created due to compulsory acquisition of Schedule Industries under Act, 1971 but all the dues of employees who stood transferred to UPSSCL, on appointed date, would be borne by UPSSCL as also the various authorities under various labour laws, as the case may be, and, it is not for the employee to go to any litigation against erstwhile Employer. (Para 20)

The outstanding dues of petitioners cannot be denied by respondents only on the ground that the same relates to prior to appointed date, under Act, 1971, and employees must claim such dues from erstwhile Employer. (Para 22)

Writ Petitions partly allowed. (E-4)

Precedent distinguished:

1. M/s U.P. State Sugar Corporation Ltd. Vs Regional Provident Fund Commissioner, 2011 (131) FLR 521 (Para 19)

2. Rashtriya Mill Mazdoor Sangh Vs National Textile Corporation Ltd. & ors., (1996) 1 SCC 313 (Para 21)

3. U.P. State Sugar Corporation Limited Vs Ram Prasad & ors., Writ Petition No. 2018 (SS) 1993, decided on 25.05.2016 (Para 23)

Present petition assails letter dated 07.02.2001, issued by In-charge, General Manager, U.P. State Sugar Corporation Limited.

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

1. This writ petition under Articel 226 of Constitution of India has been filed by 14 petitioners, namely, Hem Nath, Ram Shanker Gupta, Ram Narain, Smt. Meera Devi, Ram Babu, Subedar, Raja Ram, Suresh Chandra Pandey, Natthu Singh, Ram Roop Singh, Jai Kumar Singh, Smt. Savitri Devi, Jagroop Lal and Mool Chand, with a prayer to issue a writ of certiorari and quash letter dated 07.02.2001 (Annexure-7 to the writ petition) issued by In-charge, General Manager, U.P. State Sugar Corporation Limited (hereinafter referred to as the "UPSSCL") stating that it is making all efforts to clear the dues payable to employees under Voluntary Retirement Scheme (hereinafter referred to as "VRS") and payment shall be made in due course of time except the dues which are not payable by UPSSCL. Petitioners have also sought a writ of mandamus commanding respondents to make entire payment along with interest at the rate of 18 per cent per annum.

2. Facts, in brief, giving rise to present writ petition are that petitioners were appointed and absorbed as Seasonal Permanent Employee in UPSSCL, Unit Hardoi. As per the terms and conditions of service, petitioners were entitled to get salary in the full pay scale during running period of sugar factory while during the period of shut down they were entitled for half salary. On 01.10.2000 respondent-1 introduced scheme of VRS and circulated cyclostyle form to the employees to exercise their option. All the petitioners submitted applications opting VRS. However, respondents did not pay salary for crushing season 1981-82 and Retaining Period Allowance from February 1999 to 20.11.2000 as also the Provident Fund amount accrued to petitioners. Details of dues of petitioners are given in para-5 of writ petition as under:

"Petitioner No.1, Hem Nath

(i). The salary for the month of April, May and June of crussing season 1981-82 @ Rs. 592/- P.M. including Bonus of One

Year plus interest @18% have not been paid, which comes out to about...Rs. 30,000/-.

(ii) The retaining period allowance from Feb.1999 to 20.11.2000 has not been paid by the opposite party No.1 & 2, which come out as per calculation as 4776.50 x 22= Rs. 1,05,083 and it comes to 50% 1,05,083/2 Approx.= Rs. 52,541.00

(iii) Provident Fund from the year 1972 to 20.11.2000 has not been paid which comes out according to the calculation Rs.1,85,000/- against which Rs.60,000/- was taken as a loan and, therefore, the petitioner is entitled to get remaining balance amount of Provident Fund with interest 18% including compd. Interest.

Petitioner No.2, Ramshanker Gupta Appointed- 23.03.1976, VRS-08.12.2000

(i) Retaining allowance February 1999 to 08.12.2000 @ Rs.4512.50 p.m.

4513.50X 23 = Rs.1,03,810/- and its 30% which comes to approx. Rs.31,143.15 and interest thereon @ 18% p.a. Compound interest.

(ii) Salary for Crushing Season 1981-82

@ Rs.600/- p.m. Rs.1,800.00/-

Bonus 1981-82 Rs.600.00/-

Rs.2,400.00/-

18% interest on Rs.2400/-

uptill date, comes to approx. Rs.25,000.00/-

including compound interest Rs.27,400/- Approximate

(iii) Provident Fund amount Rs.1,40,000/-

vide Account No.UP/176/580-B

Fund Commissioner, Lucknow.

Petitioner No.6, Subedar,

Appointed on 11.01.1979, V.R.S. On 07.11.2000

(i) Retaining allowance/salary 22 months

@ 4428.50 p.m.

4428.50 X 22 = 97427/-

and its 30% comes to Rs.32,475/- approx. Rs.32,475/-

Plus Interest and Compound Interest @ 18% p.a.

(ii) 3 months salary for Crushing Season 1981-82

@ 600/- p.m. Rs.1800.00

Bonus for 1981-82 Rs.600.00 3

Rs.2400.00

Plus interest and compound interest @ 18% p.a. Rs.25,000.00 (approx.)

(iii) Arrears of provident fund of Rs.1,40,000/-

Petitioner No.7, Raja Ram

Appointed on 19.02.1971, V.R.S. On 20.11.2000

(i) Retaining allowance/salary of 22 months

@ 4443.50 p.m.

4443.50 X 22 = Rs.97,757/-

& its 30% comes to Rs.32,552.00 Approx. Rs.32,552.00

Plus interest and compound interest @ 18% p.a.

(ii) 3 months salary for Crushing Season 1981-82 @ 600/- p.m. Rs.1800.00

Bonus for 1981-82 Rs.600.00

Interest & Compound interest @ 18% p.a. Rs.25000.00

on Rs.2400/-

(iii) Arrears of provident fund of Rs.1,50,000/-

Petitioner No.8, Suresh Chandra Pandey

Appointed on 04.12.1968, V.R.S. On 02.12.2000

(i) Retaining allowance/salary of 22 months @4916.50

4916.50 X 22 = Rs.1,08,163/-

& its 50% 1,08,163/2 = Rs.54081/- Approx.

Plus interest and compound interest @ 18% p.a.

(ii) 3 months salary for Crushing Season 1981-82

@600/- p.m. Rs.1800/-

Bonus for one year 1981-82 Rs.600/-

Rs.2400/-

Plus interest and compound interest @ 18% approx. Rs.25000/-

(iii) Arrears of Provident Fund Rs.1,90,000/-

Petitioner No.9, Natthu Singh

Appointed on 11.11.1970, V.R.S. On 12.12.2000

(i) Retaining allowance/ salary for 22 months @ 4881.50 p.m.

4881.50 X 22 = Rs.1,07,393/-

and its 50% comes to Rs.53,696.50/- Rs.53,696.50/-

Plus interest and compound interest @18% p.a.

(ii) 3 months salary for Crushing Season 1981-82

@600/- p.m. Rs.1800.00/-

Bonus for one year 1981-82 Rs.600.00/-

Plus interest and compound interest @18% p.a. Rs.2400.00/-

(iii) Arrears of Provident Fund of Rs.2,00,000/- Approximately

Petitioner No.10, Ram Roop Singh

Appointed on 02.04.1987, V.R.S. On 10.12.2000

(i) Retaining allowance/ salary for 22 months @ 4631.50 p.m.

@ 4631.50 X 22 = Rs.1,01,893/-

and its 50% comes to Rs.50,946.50 Rs.50,946.50

Plus interest and Compound interest @ 18% p.a.

(ii) 3 months salary for Crushing Season 1981-82

@ 600/- p.m. Rs.1800.00

Bonus for one year 1981-82 Rs.600.00

Plus interest and compound interest @ 18% p.a.

(iii) Arrears of Provident Fund of Rs.90,000/-

Petitioner No.11, Jai Kumar Singh

Appointed on 22.06.1987, V.R.S. On 15.12.2000

(i) Retaining allowance/ salary for 22 months @ 4631.50 p.m.

@ 4631.50 X 22 = Rs.1,01,893/-

and its 50% comes to Rs.50,946.50 Rs.50,946.50

Plus interest and Compound interest @ 18% p.a.

(ii) 3 months salary for Crushing Season

1981-82 i.e. April, May and June @ 600/- p.m. Rs.1800.00

Bonus for one year 1981-82 Rs.600.00

Plus interest and compound interest on Rs.2400 @ 18% p.a.

(iii) Arrears of Provident Fund of Rs.95,000/-

Petitioner No.12, Savitri Devi

Appointed on 01.12.1998, V.R.S. On 15.12.2000

(Appointed on 1.12.1997 in place of her husband under the Dying-in-harness)

(i) Retaining allowance/ salary for 22 months @ 4203.50 p.m.

@ 4203.50 X 22 = Rs.92,477/-

and its 30% comes to Rs.30,825/- approximately Rs.30,825

Plus interest and Compound interest @ 18% p.a.

(ii) 3 months salary for Crushing Season 1981-82

@ 600/- p.m. Rs.1800.00

Bonus for one year 1981-82 Rs.600.00

Plus interest and compound interest @ 18% p.a.

(iii) Arrears of Provident Fund of Rs.40,000/-

Petitioner No.13, Jagroop Lal

Appointed on 08.12.1975, V.R.S. On 08.12.2000

(i) Retaining allowance/ salary for 22 months @ 4513.50 p.m.

4513.50 X 22 = Rs.99,297.00/-

and its 30% comes to Rs.33,099/- (approx.) Rs.33099.00

Plus interest and Compound interest @ 18% p.a.

(ii) 3 months salary for Crushing Season 1981-82

@ 600/- p.m. Rs.1800.00

Bonus for 1981-82 (one year) Rs.600.00

Plus interest and compound interest on Rs.2400/- @ 18% p.a.

(iii) Arrears of Provident Fund of Rs.1,45,000/-

Petitioner No.14, Mool Chand

Appointed on 27.01.1978, V.R.S. On 02.12.2000

(i) Retaining allowance Rs.23,000/-, 1981-82 salary 3 months Rs.1800+600= 400/-, Provident Fund Rs.1,10,000/-"

3. Respondents issued computation letters as per office memorandum dated 23.09.2000 circulating VRS and terminating petitioners w.e.f. 08.12.2000. Total amount due to petitioners was shown as under:

1. Petitioner-1, Hem Nath - Rs. 1,42,264.70

2. Petitioner-2, Ram Shanker Gupta - Rs. 1,17,737.78

3. Petitioner-3, Ram Narain - Rs. 1,52,226.60

4. Petitioner-4, Smt. Meera Devi - Rs. 3,5054.58

5. Petitioner-5, Ram Babu - Rs. 1,23,065.74

6. Petitioner-6, Subedar - Rs. 1,04,793.13

7. Petitioner-7, Raja Ram - Rs. 1,34,649.51

8. Petitioner-8, Suresh Chhandra Pandey -Rs. 62,601.56

9. Petitioner-9, Nathu Singh - Rs. 1,49,903.58

10.Petitioner-10, Ram Roop Singh - Rs. 66,805.35

11.Petitioner-11, Jai Kumar Singh - Rs. 66,827.35

12.Petitioner-12, Smt. Savitri Devi - Rs. 11,337.94

13.Petitioner-13, Jagroop Lal - Rs. 1,17,120.20

14.Petitioner-14, Mool Chand - Rs. 1,18,326.45

4. With respect to provident fund it was mentioned in aforesaid letters that balance amount under the head of provident fund shall be made available separately. However, entire dues have not been paid to petitioners despite demand and representations. Subsequently impugned letter dated 07.12.2001 has been issued stating that no retaining allowance was payable since Mill was closed in February 1999.

5. In the counter affidavit filed by respondent it is said that vide Government

Order dated 12.11.1999 of UPSSCL, Unit in question was closed for crushing season 1999-2000 on account of the fact that Unit had become sick. This order applied to six units including Hardoi Unit. VRS Forms submitted by petitioners were accepted and they were paid dues in accordance with scheme. Hardoi Unit was acquired by UPSSCL w.e.f. 28.10.1984 under U.P. Sugar Undertakings (Acquisition) Act, 1971 (hereinafter referred to as the "Act 1971"), hence dues payable from the date of acquisition only are the liability of respondents UPSSCL and not for earlier period. Petitioners' erstwhile employer was M/s. Laxmi Sugar and Oil Mills, Hardoi and petitioners have remedy to claim the same from erstwhile employer/owner. Petitioners are not entitled for any retaining allowance w.e.f. February 1999 as Unit was already closed.

6. By means of an Application No. 9713 of 2012 it was brought on record that by means of Slump Sale Agreement dated 22.01.2011, Hardoi Unit has been sold to M/s. Agile Sugar Pvt. Limited.

7. During pendency of writ petition an order was passed on 12.10.2012 directing Regional Provident Fund Commissioner (hereinafter referred to as "RPFC") to release entire amount of Provident Fund to petitioners within one month. In furtherance thereof respondent-3 has filed a short reply and in para-2 thereof it has said as under:

"2. That from perusal of the entire pleading and main prayer of the writ petition in which no claim has been made out against the opp. party no. 3. However, so far as the Provident fund dues are concerned in regard to the petitioners as mentioned in para 5 of the writ petition, the status are being given herein under on the basis of record:

(i) That the petitioner no. 1 Sri Hem Nath bearing P.F. A/c No. UP/176/685 has been made out earlier on 20.06.2001 amounting to Rs. 48,182/- and Rs. 76314/- on 12.01.2007.

(ii) That the P.F. A/c No. UP/176/580-B of petitioner no. 2 i.e. Sri Ram Sanker Gupta is not correct as mentioned in the writ petition.

(iii) That so far as the petitioner no. 3 Sri Ram Narayan bearing P.F. A/c No. UP/176/532 A is concerned, the Claim Form-19 is not yet received in the office of the opp. party no. 3 for which vide office letter No. 45786 dated 11.10.2007, the petitioner was called for but the same remained in vain.

(iv) That the P.F. A/c No. UP/176/825 of petitioner no. 4, i.e. Smt. Meera Devi is not orrect as per office record.

(v) That the petitioner no. 5, Sri Ram Babu bearing P.F. A/c No. UP/176/728 has been made out earlier on 24.01.2003 amounting to Rs. 72620/-.

(vi) That the petitioner no. 6 Sri Subedar bearing P.F. A/c No. UP/176/803 has been made out earlier on 08.02.2003 amounting to Rs. 71494/-.

(vii) That the petitioner no. 7 Sri Suresh Chandra Pandey bearing P.F. A/c No. UP/176/1432 has been made out earlier on 13.02.2003 amounting to Rs. 1,31,679/- and on 23.12.2005 amounting to Rs. 10,087/-.

(viii) That the petitioner no. 8 Sri Natthu Singh bearing P.F. A/c No. UP/176/1092 has been made out earlier on 24.09.2003 amounting to Rs. 1,25,544/-.

(ix) That the petitioner no. 9 Sri Roop Singh bearing P.F. A/c No. UP/176/1188 has been made out earlier on 12.01.2003 amounting to Rs. 89,947/-.

(x) That the petitioner no. 10 Sri Jai Karan Singh bearing P.F. A/c No. UP/176/81 is not correct as per office record.

(xi) That the petitioner no. 11 Sri Savitri Devi w/o late Daya Shanker bearing P.F. A/c No. UP/176/211 has been made out earlier on 23.04.1999 amounting to Rs. 1,12,063/-, wherein 60% Rs. 25,990/- is included.

(xii) That the petitioner no. 12 Sri Raja Ram bearing P.F. A/c No. UP/176/1474 has been made on 14.02.2003 amounting to Rs. 70,781/-.

(xiii) That the petitioner no. 13 Sri Jagroop bearing P.F. A/c No. UP/176/763 has been made on 24.01.2003 amounting to Rs. 1,30,154/-.

(xiv) That the petitioner no. 14 Sri Mool Chandra bearing P.F. A/c No. UP/176/806 has been on 15.06.2001 amounting to Rs. 30,894/- and on 26.09.2005 amounting to Rs. 62,041/-.

As such the P.F. Dues have been made to the petitioners from the office of the opposite party no. 3 as per statutory E.P.F. deposits made by the employer i.e. opposite parties no. 1 and 2 and returns i.e. F-3A/F-6A submitted by the opposite party no. 1 and 2."

8. Thus as per Respondent-3, except Petitioners-2 and 10, all other petitioners have been paid due amount of Provident Fund.

9. I have heard Sri S.C. Gupta, Advocate for petitioners, Sri P.K. Sinha, Advocate for Respondents-1 and 2 and Sri R.K. Verma, Advocate for Respondent-3. Learned counsel for respondents contended that whatever amount due to petitioners has already been paid while petitioners claim is that the dues of the period up to appointed date under Act, 1971 have not been paid. The second dispute relates to payment of retaining allowance.

10. Thus the question raised in this writ petition is, "whether liability of dues of petitioners employees of erstwhile employer i.e. before taking over of Hardoi Mill by UPSSCL w.e.f. 28.10.1984, would be borne by UPSSCL and/or Respondent-3 or petitioners must set up their claim from the erstwhile Owner/Employer.

11. Admittedly, Respondent-1, Uttar Pradesh State Sugar Corporation Limited i.e., UPSSCL is a Government Company incorporated under Section 617 of Companies Act, 1956.

12. Act, 1971 was enacted for acquisition and transfer of certain sugar undertakings and for matters connected therewith or incidental thereto. M/s Laxmi Sugar and Oil Mills, Hardoi, an undertaking specified in Schedule II of Act, 1971 stood transferred and vested in UPSSCL with effect from 28.10.1984.

13. The expression "appointed day' in relation to the undertakings specified in Schedule II of the Act means 28.10.1984. In Section 2(h) of Act, 1971 the expression "scheduled undertaking' has been defined to mean an undertaking engaged in the manufacture or production of sugar by means of vacuum pans and with the aid of mechanical power in a factory specified in the Schedule to Act, 1971. The assets included in the expression "scheduled undertaking' were specified in said sub-section.

14. Section 3 of Act, 1971 deals with vesting of "Scheduled Undertakings" in UPSSCL under the provisions of Act, 1971. Section 3 being relevant is extracted below:

"3. On the appointed day, every schedule undertaking shall, by virtue of this Act, stand and be deemed to have stood transferred to and vest and be deemed to have vested in the Corporation free from any debt, mortgage, charge and other encumbrance or lien trust or similar obligation (excepting any lien or other obligation in respect of any advance on the security of any sugar stock or other stock-in-trade) attaching to the undertaking :

Provided that any such debt, mortgage, charge or other encumbrance or lien, trust or similar obligation shall attach to the compensation referred to in Section 7, in accordance with the provisions of that section, in substitution for the undertaking :

Provided further that a debt, mortgage, charge or other encumbrance or lien, trust or similar obligation created after the scheduled undertaking or any property or asset comprised therein had been attached or a receiver appointed over it, in any proceedings for realization of any tax or cess or other dues recoverable as arrears of revenue shall be void as against all claims for dues recoverable as arrears of revenue." (emphasis added)

15. Section 7 of Act, 1971 deals with determination and mode of payment of compensation by State Government. Sub-section (6) of Section 7 of Act, 1971 enumerates the amounts to be deducted from the compensation payable to Erstwhile Owners of Scheduled Undertakings. Section 7(6)(c) and 7(6)(d) being relevant are reproduced below:

"7(6) The State Government shall provisionally deduct from the compensation referred to in sub-sections (1), (2), (3), (4) and (5) the following amounts namely:-

.....

(c) Any amount of wages, retaining allowances, bonus, provident fund or other payments due to persons employed as workmen (within the meaning of the U.P. Industrial Disputes Act, 1947) in connection with the scheduled undertaking immediately before the appointed day.

(d) Any amount due in respect of either the employer's contribution or the employee's contribution realised by the employer or any other dues recoverable from the employer under the Employees Provident Fund Act, 1952 or the Employees State Insurance Act, 1948 in respect of persons employed in connection with the scheduled undertaking immediately before the appointed day that the employer may have failed to pay in accordance with the respective Acts."

(emphasis added)

16. Section 8 of Act, 1971 deals with the claims to be satisfied out of compensation payable by State Government to Erstwhile Owners of Scheduled Undertakings. Sub-sections (4) and (5) of Section 8 being relevant are being extracted below:

"8(4) - The Employees' Provident Fund Commissioner or the Employees' State Insurance Corporation may send to the prescribed authority a certificate in respect of either the employer's contribution or the employee's contribution realized by the employer or any other dues recoverable from the employer under the Employees' Provident Fund Act, 1952, or the Employees' State Insurance Act, 1948, as the case may be, in respect of any person who was employed in connection with the scheduled undertaking immediately before the appointed day, that the employer may have failed to pay in accordance with the respective Acts.

8(5) - Any person who was employed exclusively in connection with the

scheduled undertaking immediately before the appointed day, whether he does or does not become an employee of the Corporation under section 16, or ceases to be in such employment, or any trade union of which such person was member, may prefer to the prescribed authority any claim relating to any salary, wages relating allowance, leave salary, bonus pension, provident fund, gratuity or other payment due to him, or the proportionate amount thereof, in respect of any service rendered by him in connection with the undertaking before the said day."

17. A conjoint reading of the provisions of Act, 1971 extracted above, show that with effect from appointed day i.e. 28.10.1984, Scheduled Undertakings, specified in Schedule II of Act, 1971 stood transferred and vested in UPSSCL free from any debt, charge or encumbrance and any such debt, charge or encumbrance stood attached to compensation payable to erstwhile owner of scheduled undertakings. It was for State Government to deduct from compensation payable to erstwhile Employer, the provident fund or any other dues recoverable under Employees Provident Fund Act, 1952 (hereinafter referred to as "Act, 1952"), in respect of any person employed in connection with Scheduled Undertaking immediately before appointed day. In respect of dues under Act, 1952 recoverable from erstwhile Employer, it was further open to Employees' Provident Fund Commissioner (hereinafter referred to as "EPC Commissioner") to stake a claim before Prescribed Authority appointed under Act, 1971.

18. The aforesaid provisions also shows that liability as on appointed date in respect of items mentioned for amounts referable to Sections 7 and 8 are to be adjusted or borne or settled between erstwhile Owner, UPSSCL and statutory authorities like EPF Commissioner or Director General or Regional Director General, Employees State Insurance Corporation etc. but so far as the employees who continued in service on appointed date and stood transferred to UPSSCL, all their claims of entire period have to be borne by UPSSCL and authorities under Labour Welfare Legislation, like, EPF Commissioner or Employees State Insurance Corporation. It is not open to UPSSCL to dispute the claim of an employee who was in service on appointed date and retired while working in UPSSCL, to suggest, that dues of the period prior to appointed date must be settled by employee with erstwhile Owner. Such adjustment was permitted to be made from the compensation payable to erstwhile Owner and it was the responsibility of UPSSCL or authorities under Act, 1952 or Employees State Insurance Act, 1948 (hereinafter referred to as "Act, 1948") but if they had not adjusted the amount from compensation payable to erstwhile Owner, it is their fault, and, they cannot dismiss claim of employee who is allowed to retire on and after appointed date, i.e., while he/she was serving with UPSSCL.

19. Learned counsel appearing for Respondent-1, UPSSCL relied on the authority of this Court in M/s U.P. State Sugar Corporation Ltd. v. Regional Provident Fund Commissioner, 2011(131) FLR 521. Having gone through the aforesaid judgment I find that therein this Court with reference to Act, 1952 has not held that provident fund of workers of Ratna Sugar Mills Co., Ltd., Shahganj, Jaunpur, an undertaking specified in Schedule III of Act, 1971, of the period prior to the date of its vesting in

Corporation, cannot be recovered from UPSSCL. The relevant extract of judgment relied on is reproduced below: -

"In my opinion, the argument of learned counsel for the respondent E.P.F. Authorities is not tenable. Firstly, the word 'transfer' used in Section 17(B) of the E.P.F. Act cannot apply to compulsory acquisition. Secondly, rights of the EPF authorities are better protected by the U.P. Acquisition Act of 1971. E.P.F. Authorities could very well make a claim under Section 8(4) of the U.P. Acquisition Act of 1971.

Accordingly, it is held that after acquisition EPF authorities cannot proceed against the petitioner for realization of E.P.F. dues if any."

(emphasis added)

20. In the aforesaid judgment I do not find that the issue, whether dues payable to an employee, who is allowed voluntary retirement while serving under UPSSCL, whether in respect of period prior to appointed date, will have to be claimed by such employee from erstwhile Owner or from employer with whom his services stood dispensed with, was not an issue. Therefore, it is not an authority on the point which has been raised before this Court. Therein it appears that the authorities under Act, 1952 did not stake any claim against compensation payable to erstwhile Owner as permitted in Section 8(4) and (5) of Act, 1971 since they could have made their claim under Section 8(4) of Act, 1971 but having not done so, they could not have recovered the amount from UPSSCL. There is no law laid down in aforesaid judgment that an employee whose services stand terminated under Voluntary Retirement Scheme or otherwise by UPSSCL will have to make a claim against erstwhile Owner in respect of any amount whatsoever, whether in respect of period before appointed date or any other amount. The employees who stood transferred to UPSSCL under Act, 1971, after such transfer, will settle their claim irrespective of any period, from UPSSCL or the authorities under Act, 1952 and they cannot be made to run from one authority to another or to raise any claim from erstwhile Owner. The intention of legislature is very clear that employees shall not be allowed to suffer on account of a situation created due to compulsory acquisition of Schedule Industries under Act, 1971 but all the dues of employees who stood transferred to UPSSCL, on appointed date, would be borne by UPSSCL as also the various authorities under various labour laws, as the case may be, and, it is not for the employee to go to any litigation against erstwhile Employer.

21. Another authority relied on behalf of Respondent-1 is **Rashtriya Mill Mazdoor Sangh v. National Textile Corporation Ltd. and others, (1996) 1 SCC 313**. Therein dispute relates to a Mill transferred to National Textile Corporation under the provisions of Textile Undertakings (Take Over of Management) Act, 1983 (hereinafter referred to as "Act, 1983"). On the date of taking over of management, the employee was not in service and dispute was regarding gratuity amount of such an employee. Supreme Court, while dealing with Section 3 of Act, 1983 (provisions of which are pari materia with those of the Act, 1971), has held that liability to pay gratuity which became payable to a former employee of Mill, by the Mill prior to its vesting in National Textile Corporation, was that of Transferor Mill and not of National Textile Corporation. Relevant extract of paragraph 11 of said judgment is being quoted below:-

"The provisions of the Ordinance No. 6 of 1995 also show that the liabilities for

the period prior to the take over of the management are to be discharged from the amount payable to the owner of the textile undertaking for the acquisition of the undertaking and not by the NTC. It is, therefore, not possible to uphold the contention urged on behalf of the appellant that NTC is liable in respect of the gratuity amount payable under the Payment of Gratuity Act to Respondent No.2." (emphasis added)

22. In the above case, the employees were prior employees, i.e., one who retired/ Terminated before taking over by National Textile Corporation. The aforesaid judgment, therefore, also does not help respondents. In my view the outstanding dues of petitioners cannot be denied by respondents only on the ground that the same relates to prior prior to appointed date, under Act, 1971, and employees must claim such dues from erstwhile Employer.

23. There is one more authority of this Court which has been relied on behalf of Respondents. Relying upon the decision of Supreme Court in **Rashtriya Mill Mazdoor Sangh (supra), this Court, in Writ Petition No.2018 (SS) 1993, UP State Sugar Corporation Limited v. Ram Prasad and others**, decided on 25.05.2016 and other connected petitions, has held that liability for payment of gratuity to workmen of Nawabganj Sugar Mill Co. Ltd., Gonda, an undertaking specified in Schedule III of Act, 1971, who had retired prior to date of its vesting in Corporation, was not that of Corporation. The relevant portion of judgment is reproduced as under :

"In the case of Rashtriya Mill Mazdoor Sangh (supra), it has been held by the Apex Court that the liability of payment of gratuity to its employees/workmen whose management has been taken over under Textile Undertakings Act, 1983 by NTC in respect of period prior to taking of undertaking would not be of NTC and NTC is not liable to pay the amount of gratuity payable under the Payment of Gratuity Act....."

In the instant case, from the record it is evidently clear that the liability under Payment of Gratuity Act for payment of gratuity to the employees/workmen who had retired prior to the date of vesting of Nawabganj Sugar Mill Company Limited would not be of U.P. State Sugar Corporation Limited. Thus, the orders impugned are not sustainable in the eyes of law. They are accordingly set aside. The writ petitions are allowed."

24. The aforesaid judgment also related to an employee who had retired prior to date of vesting of Schedule Undertaking under Act, 1971 with UPSSCL, i.e., he was not employed on the appointed date hence he was not transferred to UPSSCL and thus this judgment also does not help respondents in any manner.

25. Now coming to question of retaining allowance, reliance is placed on Clause-K of Standing Orders governing Conditions of Employment of Workman in Vacuum Pan Sugar Factories of the State enforced vide notification dated 03.10.1958. Paras 1 to 4 thereof reads as under:

"K. Special Conditions Governing Employment of Seasonal Workmen

1. A seasonal workman who has worked or, but for illness or any other unavoidable cause, would have worked under a factory during the whole of the second half of the last preceding season

shall be employed by the factory in the current season and shall be entitled to get retaining allowance provided he joins the current season and works for at least one month. The payment of retaining allowance shall be made within two months of the date of the commencement of the season.

Explanation- Unauthorised absence during the second of the last preceding in season of a workman who has not been validly dismissed under these Standing Orders and of a workman who has been re-employed by the management in the current season, shall be deemed to have been condoned by the management.

2. Every seasonal workman who worked during the last season shall be put up on his old job whether he was in the 'R' shift or in any of the usual shifts.

However, if the exigencies of work so require, the management may transfer a workman from one job to another or from one shift to another including the 'R' shift, so however, that the number of workmen so transferred does not exceed five per cent of total number of the employers of the factory and that the wages and status of such workman is not affected in any way.

3. A seasonal workman, who is a retainer shall be liable to be called on duty at any time in the off season and if he does not report for duty within ten days, he shall lose his retaining allowance for the period for which he was called for duty.

4. Where owing to trade reasons or other reasons necessary for a bona fide Law Off, as given in Standing Order 'J' it becomes necessary for a factory so to do, it may discharge the seasonal workman before the close of the season with the previous permission of the state labour commissioner if he so directs Additional Labour Commissioner or Regional Additional/ Deputy Labour Commissioner of the area after paying such compensation to the discharged workman as may be determined by the authority granting the permission."

26. Applicability of aforesaid provision depends on certain incidents and facts in respect whereto I find no proper pleading in the writ petition. In absence of specific pleadings, disputed question of facts i.e. paybility of retaining allowance of workman which has been seriously disputed by Employer, cannot be decided in a writ petition. In this regard petitioners have statutory alternative remedy to settle their dispute by raising an industrial dispute under U.P. Industrial Disputes Act, 1947 (hereinafter referred to as the "U.P. Act 1947") or Payment of Wages Act, 1936 (hereinafter referred to as "Act, 1936").

27. In view of above writ petition is partly allowed. Respondents are directed to pay the outstanding dues of petitioners in respect of period when they claimed that erstwhile employer, i.e., appointed date under Act, 1971, i.e., 28.10.1984. This direction also include Respondent-3, who has to make such payment towards provident fund to petitioners, if not already paid. For entire amount which will be paid by respondents under this judgment, petitioners shall also be entitled to interest at the simple interest of 6% per annum, which shall be computed for the period from the date of filing of this writ petition, i.e., 11.02.2002 till payment is made. In respect of retaining allowance petitioners may avail their statutory alternative remedy under U.P. Act, 1947 or Act, 1936.

28. There shall be no order as to costs.

Hon'ble the Chief Justice has nominated me to pronounce this judgment vide order dated 17.4.2020. Due to lock-

down declared by the Central Government and Government of U.P., the judgment is pronounced by me today in Chamber as per Rule 1 sub-clause (1) (2) and (3) of Chapter VII of the Allahabad High Court Rules, 1952.

Dated20.04.2020
(Justice Virendra Kumar -II)

(2020)12ILR A633
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.10.2020

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ A No. 4419 of 2020

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

Counsel for the Petitioner:
Sri Bhagwan Dutt Pandey

Counsel for the Respondents:
C.S.C.

A. Service Law - Recruitment - Application of the petitioner, an ex-serviceman who applied for the post of constable in the Civil Police and the Provincial Armed Constabulary was rejected not on the ground that he did not possess the domicile certificate which was consistent with the terms of the advertisement but because he could not produce it at the time of scrutiny of documents. The Court directed to grant another opportunity to produce the domicile certificate dated 08.02.2018. (Para 22, 25)

Principles evolved by courts for administering benefits of reservation to various communities, can also be applied to the class of Ex-Servicemen. Reservation cannot be construed by the authorities in a pedantic manner. It has to be implemented in a fashion to achieve the object of reservations. (Para 21)

Writ Petition allowed. (E-10)

(Delivered by Hon'ble Ajay Bhanot, J.)

1. Heard Shri Bhagwan Dutt Pandey, learned counsel for the petitioner and Shri Jagdish Singh Bundela, learned Standing Counsel for the State-respondents.

2. The petitioner is aggrieved by the cancellation of his candidature in the Ex-Servicemen category for appointment on the post of Constable in the Civil Police and PAC.

3. The petitioner applied for appointment on the post of constable in the Civil Police and the Provincial Armed Constabulary, in response to the recruitment proceedings initiated with advertisement dated 16.11.2018, under the Ex-Servicemen category.

4. The last date of submission of application form was 08.12.2018. The application form of the petitioner was duly accepted. The petitioner was declared successful in initial phases of the examinations. The later phases of the examination were for scrutiny of the documents and physical standards test. Only the domicile certificates issued on or before 08.12.2018 were liable for consideration. The domicile certificate had to be tendered at the time of scrutiny of documents and was not required to be submitted along with the application form.

5. At the time of scrutiny of documents the petitioner produced a domicile certificate issued on 02.02.2019. The date of the said domicile certificate was subsequent to the last date of submission of the application form and was liable to be rejected.

6. On this foot the petitioner's candidature under the Ex-Servicemen category was cancelled.

7. It is not disputed by the respondents in the counter affidavit that the petitioner in possession of a domicile certificate dated 08.02.2018, which rendered him eligible. However, on the date of verification of the testimonials, the petitioner could not produce the domicile certificate dated 08.02.2018.

8. Last date of submission of application forms, is the cut off date for possessing eligibility qualifications. The requirement of submitting documents alongwith the application form is of an imperative nature. The sanctity of the last date of submission of application form is essentially to limit the eligibility of the candidates.

9. The last date of submission of application forms and the date for scrutiny of documents do not stand on the same footing. The former date is fixed in the advertisement and is determinative of eligibility. On the other hand the date of scrutiny of domicile certificates alongwith other eligibility testimonials has a separate purpose. The date of scrutiny of documents does not have a bearing on eligibility. It is only for verification of preexisting testimonials of admitted eligibility. At times, the dates may be varied by the authorities, without offending the selection. This is not to suggest that the time line of the recruitment process is not liable to be respected.

10. The date for scrutiny of documents was not fixed in the advertisement and was kept open. The lack of certainty in the said date is evident from perusal of the relevant part of the advertisement is extracted hereinunder:

"(6). आरक्षण / आयु में छूट का लाभ चाहने वाले उत्तर प्रदेश के आरक्षित श्रेणी के अभ्यर्थी आवेदन में अपनी श्रेणी अवश्य अंकित करें तथा निर्धारित प्रारूप पर सक्षम अधिकारी द्वारा जारी प्रमाण पत्र आवेदन करने से पूर्व प्राप्त कर लें एवं जब उनसे अपेक्षा की जाये तब वे उसे प्रस्तुत करें । राज्य सरकार द्वारा निर्धारित प्रारूप के अतिरिक्त किसी अन्य प्रारूप में प्रस्तुत प्रमाण पत्र मान्य नहीं होगा।"

11. The recruitment process in a public service, is intended to appoint the best and most eligible candidates, and also faithfully implement the reservation policy of the State Eligibility criteria is inviolable, and hence the cut off date in the advertisement for submitting applicable forms is inflexible. In later phases of the recruitment process in hand, documents of eligibility are scrutinized. Only preexisting testimonials in conformity with the declarations made in the application form and consistent with the requirements in the advertisement are liable to be considered. Further only candidates who have cleared the initial competitive stages of the recruitment process enter the subsequent stages. The subsequent stages of the recruitment are in the likeness of due diligence process into the authenticity of the testimonials of the candidates.

12. Hence, in these later selection stages room to correct any human errors has to be provided for to ensure that meritorious candidates are not denied appointments on the foot of technical defaults or marginal human errors. Current practices in recruitment processes evidence that authorities include a margin for correction of such human errors. This with

a view to prevent ouster of meritorious and eligible candidates and faithful implementation of reservation policy. This also ensures fairness, transparency, and makes the recruitment process compliant to norms of justice. Calling for objections to the provisional answers is an example of this trend. The opportunity of providing an appeal against medical board opinions, is another instance of creation of an environment to reduce exclusion of eligible candidates by human errors.

13. Of course, such opportunity should not adversely affect the recruitment schedule. The avenues of appeals or provisions for an opportunity to rectify marginal human errors, should be incorporated in the recruitment process. This moreso when aggrieved candidates are undisputedly eligible for participating in the recruitment.

14. The promise of equality under Article 14 and equal opportunity in public employment under Article 16 of the Constitution of India do not pre-suppose existence of a homogeneous society. On the contrary both judicial authorities and provisions in the Constitution like Article 16(4) reflect the quest of an egalitarian Constitution in an unequal and heterogeneous society to achieve equality.

15. To achieve the aim of equality often requires representation to lawfully classified groups of citizenry. Ex-servicemen is one such category of citizenry which has been organized as one well defined class by the legislature and the executive alike. There is good reason for classification of ex-servicemen into a separate class. Ex-servicemen as a class have spent prime years of their lives in conditions of extreme privations and separations from family in the service of the nation. Long years of coloured service in the armed forces ingrain in them the ethos of service before self. The Indian Armed Forces are amongst the most professional and best trained in the world. National treasure is spent in training of servicemen to achieve peak levels of proficiency. Rites of defence services equip the servicemen to reach highest standards of excellence and leadership in different walks of life.

16. With this rich background behind them, servicemen after hanging up their uniforms turn into most valuable national assets. The nation must derive full benefit from the values imbibed over long years of coloured service, professional training and leadership qualities.

17. Ex-servicemen are well placed to make peerless contribution to the civil services including the civil police services. The nation cannot afford to fritter away or lose these assets by bad policy and arbitrary decisions.

18. There is another aspect to the matter. Most of ex-servicemen superannuate at an early age. They lose their regular source of income at a young age, when their responsibilities to their families are at a peak.

19. By employing ex-servicemen the State achieves manifold objectives. Reemployment after superannuation absorbs the turbulence arising from early superannuation from military service. It also helps in the integration of armed forces personnel in civil society after superannuation. They become part of the mainstream of national life. This policy supports the morale of our defence forces,

and channelizes energies of young ex-servicemen in a positive direction.

20. The welfare of ex-servicemen can never be neglected by any society which values its freedom. A nation such as ours which has suffered from long centuries of foreign rule, and faces extant security threats cannot ignore the custodians of the sovereignty and integrity of the nation. The ex-servicemen did not have much representation in the State and were denied a proper look in into the civil administration. This created a sense of isolation, which was not in the interest of the nation. The State Government is doing its part by making endeavours to rectify this anomaly. Though more needs to be done, much undoubtedly has been done.

21. Principles evolved by courts for administering benefits of reservation to various communities, can also be applied to the class of Ex-Servicemen. Reservation cannot be construed by the authorities in a pedantic manner. It has to be implemented in a fashion to achieve the object of reservations.

22. In the facts of this case the denial of the benefits of ex-Servicemen, to the petitioner was not on the ground that he did not possess the domicile certificate which was consistent with the terms of the advertisement. But because he could not produce it at the time of scrutiny of documents.

23. In this case the recruitment programme is yet to attain finality. Nothing has been asserted in the counter affidavit that the grant of a short time or an opportunity to the petitioner to produce the requisite domicile certificate will create disarray in the recruitment process.

24. On the contrary, the refusal of the authorities to grant such opportunity to the petitioner, resulted in a failure on part of the authorities to implement the policy of reservation for ex-servicemen with an even hand.

25. The petitioner is an ex-serviceman who retired after years of coloured service in the Indian Army on the rank of Hawaldar on 31.12.2018. He was a Gunner. The respondents were liable to give him another opportunity to produce the domicile certificate dated 08.02.2018. Particularly, since the validity of the aforesaid certificate was not disputed.

26. In light of the preceding discussions, I find that the respondents erred in law by failing to grant the petitioner an opportunity to produce the eligibility certificate dated 08.02.2018, which he claims is in his possession.

27. The action of the authorities in denying the benefit of ex-servicemen category to the petitioner is arbitrary and illegal.

28. In such view of the matter, the matter is remitted to the respondent no.2-Chairman, U.P. Police Recruitment and Promotion Board, Lucknow.

29. A writ in the nature of mandamus is issued commanding the respondent no.2-Chairman, U.P. Police Recruitment and Promotion Board, Lucknow, to execute the following directions:

I. The petitioner shall be given five weeks time to produce his domicile certificate dated 08.02.2018.

II. The case of the petitioner shall be processed as per law after considering the

domicile certificate dated 08.02.2018 and ascertaining its authenticity.

30. The writ petition is allowed to the extent indicate above.

(2020)12ILR A637
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.12.2020

BEFORE

THE HON'BLE SHEKHAR KUMAR YADAV, J.

Writ A No. 4818 of 2020

Mohd. Majhar ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Yashwant Pratap Singh, Sri Sanjai Singh

Counsel for the Respondents:
C.S.C.

A. Service Law – Pension and Gratuity – Civil Service Regulations: Regulations 351, 251A - The question for consideration in the present case is as to whether the State Government can direct for not payment of pension and gratuity when the departmental or judicial proceedings have not yet been finalized. State Government order dated 28.10.1980, provides that those employees against whom on the date of retirement departmental, judicial or proceedings before Administrative Tribunal are proceeding or it is necessary to draw such proceedings shall be given interim pension, but gratuity be not paid till finalization of the proceeding. The same provision has again been reiterated by GO dated 28.07.1989, in which, reference has also been made to the GO dated 28.10.1980. (Para 9)

It is admitted that charge-sheet was submitted before the Court concerned in the matter, which is still pending consideration. The date of retirement of the petitioner is 31.12.2019, it is, thus, clear that on the date of retirement, judicial proceeding, as contemplated in Regulation 351A of Civil Service Regulations, have not been instituted against the petitioner. Under the circumstances, in bereft of any such proceeding, relying on the GO dated 28.10.1980, the pension and gratuity of petitioner cannot be stopped, whereas, final report has been submitted before the Competent Court on 16.9.2019 and the same has not been negated by the Court concerned. (Para 10,11)

The State Government was not justified in not paying the pension and gratuity to the petitioner. However, it is made clear that in case the petitioner is convicted in the criminal case pending against him, the Government is fully empowered to exercise its power under Regulation 351 to withhold or withdraw the pension or any part of it. (Para 12)

Writ Petition allowed. (E-4)

Precedent cited:

1. H.C. Sughar Singh (Retired) Vs Deputy Inspector General of Police (Establishment), 2004 LawSuit (All) 236 dated 27.02.2004 (Para 4)

2. Kameshwar Prasad Vs St. of U.P. & ors., W. P. No. 21773/2009 dated 25.04.2011 (Para 4)

Present petition challenges order dated 18.11.2019, passed by Superintendent of Police, Maharajganj.

(Delivered by Hon'ble Shekhar Kumar Yadav, J.)

1. To assail correctness of the order impugned dated 18.11.2019 passed by the respondent no.3-Superintendent of Police, Maharajganj, whereby regular pension and gratuity of the petitioner has been stopped by taking plea that a criminal case being No.767A/2014, under Sections 147, 323, 504, 506, 307, 352 and 392 I.P.C., Police Station Jataha Bazar, District Kushinagar, which is still pending against him, the instant writ petition has been filed.

2. Briefly, the facts of the present case are that on 01.11.1978 initially the

petitioner was appointed as a Constable in the Police Department. In the year 2014, after completion of 36 years of his service, he was promoted on the post of Naib Daroga at Police Station Jataha Bazar, District Kushinagar. During the aforesaid period, the petitioner was doing his service in the Department with full ability, sincerity, honesty and his career was unblemished in whole service period and his work and conduct was found satisfactory by the higher authority. It is alleged that on 21.11.2014, the then Station House Officer, Police Station Jataha, District Kushinagar lodged a first information report against 18 named persons being Case Crime No.767 of 2014, under Sections 147, 148, 149, 307, 395, 397, 333, 353, 189, 323, 504, 506 I.P.C. and Section 7 of Criminal Law Amendment Act. Thereafter, on 27.11.2014, as a counter blast to the above said first information report, a cross first information report was lodged by one Laxmi Yadav against the petitioner and 4 others, which has been registered as Case Crime No.767A of 2014, under Sections 147, 307, 352, 392, 323, 504 and 506 I.P.C., Police Station Jataha Bazar, District Kushinagar. On 30.12.2018, the investigating officer submitted final report against the petitioner. On 16.09.2019, Laxmi Yadav has filed a protest petition before the Court of Judicial Magistrate, Kushinagar at Padrauna against the said final report dated 30.12.2018. In the meantime, the petitioner was promoted as Sub Inspector at District Maharajganj. On 04.07.2019, a letter was sent by the Superintendent of Police, Maharajganj to the Prabhari Nirikshak Kotwali, District Maharajganj with the information that the petitioner is going to be superannuated on 31.12.2019. On 31.12.2019, the petitioner retired from the post of Sub Inspector. On 18.11.2019, an order has been passed by the Superintendent of Police, Maharajganj to provide pension and other retrial benefits to the petitioner.

3. On the same day i.e. on 18.11.2019, the respondent no.3-Superintendent of Police, Maharajganj has passed the impugned order, whereby the regular pension and gratuity of the petitioner has been stopped due to pendency of criminal case being Case Crime No.767A/2014 under the above mentioned sections, hence, this writ petition.

4. Learned counsel for the petitioner submits that in Criminal Case No767A/2014, final report had been submitted before the competent court on 30.12.2018 and the same is still pending consideration before the Chief Judicial Magistrate, Kushinagar. The date of retirement of the petitioner is 31st December, 2019 as admitted in the counter affidavit filed on behalf of State. It is, thus, clear that on the date of retirement, judicial proceeding as contemplated in Regulation 351A of Civil Service Regulations have not been instituted since according to Regulations, judicial proceedings shall be deemed to have been instituted on the date when a charge is submitted to a criminal court. Hence, the power under the G.O. dated 28.10.1980 and 28.07.1989 for stopping the pension cannot be exercised. In support of his submission, learned counsel for the petitioner has placed reliance on Government Order dated 28.07.1989 as well as the judgment passed by this Court in **H.C. Sughar Singh (Retired) vs. Deputy Inspector General of Police (Establishment), 2004 LawSuit (All) 236 dated 27.02.2004 and Kameshwar Pasad vs. State of U.P. and others, W.P. No.21773/2009 dated 25.04.2011**.

5. Countering the above said submissions, on the other hand, learned Standing Counsel has vehemently opposed the writ petition and submits that in view of the Government Order dated 28.10.1980, which provides that due to pendency of trial against an incumbent, the final pension and gratuity cannot be paid. The petitioner is being paid the pension, whereas, nothing has been brought before this Court to show and suggest that the said final report has been accepted by the competent court and as such, there is no infirmity or illegality in the order impugned passed by the respondent no.3-Superintendent of Police, Maharajganj. However, a final report was submitted before the court concerned in the matter, but until its adjudication, the said proceedings cannot be said to be cumulative, inasmuch as, the opportunity of protest is given to the opposite faction and the proceedings are still pending. However, in terms of G.Os. dated 28.10.1980 and 28.07.1989, the provisional pension has been granted in favour of the petitioner, inasmuch as, the said government order specifically provides that the payment of gratuity be not made until adjudication of any pending judicial proceedings. Apart from it, as per the report submitted by S.H.O. Jatha Bazar, Kushinagar, the proceedings under the above mentioned case crime are pending consideration before the court concerned.

6. Heard Sri Yashwant Pratap Singh, learned counsel for the petitioner, learned Standing Counsel for the State and perused the material available on record.

7. The first issue, which has arisen in the writ petition, is as to whether the petitioner is entitled for full pension and gratuity in the facts of the present case.

8. A Government Servant after attaining the age of superannuation is entitled for pension in accordance with the provisions of Civil Service Regulations (as applicable in the State of Uttar Pradesh). According to paragraph 41 of Civil Service Regulations, pension has been defined in following manner, "Except when the term "Pension" is used in contradistinction to gratuity "Pension" includes Gratuity." Regulations 351 and 351A relates to withdrawing a pension or any part of it and to order the recovery from the pension respectively. For ready reference, Regulations 351 and 351A of Civil Service Regulation are extracted below :

"351. Future good conduct is an implied condition of every grant of a pension. The State Government ..... Reserve to themselves the right of withholding or withdrawing a pension or any part of it, if the pensioner be convicted of serious crime or be guilty of grave misconduct.

The decision of the State Government on any question of withholding or withdrawing the whole or any part of pension under this regulation shall be final and conclusive.

Note.--This rule is applicable to all the officers enumerated in Article 349 except ..... Army Veterinary Officers of the Civil Veterinary Department.

"351-A. The Provincial Government reserve to themselves the right to order the recovery from the pension of an officer who entered service on or after 7th August, 1940 of any amount on account of losses found in judicial or departmental proceeding to have been caused to Government by the negligence or fraud of such officer during his service.

Provided that-

(1) such departmental proceedings, if not instituted while the officer was on duty.

(i) shall not be instituted save with the sanction of the specified period and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government, if the pensioner is found in departmental or judicial proceedings to have been guilty of grave mis-conduct, or to have caused, pecuniary loss to government by misconduct or negligence, during his service, including service rendered on re-employment after retirement.

Provided that

(a) such departmental proceedings, if not instituted while the officer was on duty either before retirement or during re-employment-

(i) shall not be instituted save with the sanction of the Governor,

(ii) shall be in respect of an event which took place not more than four years before the institution of such proceedings, and

(iii) shall be conducted by such authority and in such place or places as the Governor may direct and in accordance with the procedure applicable to proceedings on which an order of dismissal from service may be made.

(b) judicial proceedings, if not instituted while the officer was on duty either before retirement or during re-employment, shall have been instituted in accordance with sub-clause

(ii) (a), and

(c) the Public Service Commission, U.P., shall be consulted before final orders are passed.

Provincial Government:

(ii) shall be instituted before the officer's retirement from service or within a year from the date on which he was last on duty whichever is later;

(iii) shall be in respect of an event which took place not more than one year before the date on which the officer was last on duty and;

(iv) shall be conducted by such authority and in such places whether in India or elsewhere, as the Provincial Government may direct;

(2) all such departmental proceedings shall be conducted, if the officer concerned so requests in accordance with the procedure applicable to departmental proceedings on which an order of dismissal from service may be made; and

(3) such judicial proceedings, if not instituted while the officer was on duty, shall have been instituted in accordance with sub-clauses (ii) and (iii) of clause (1).

Note- As soon as proceedings of the nature referred to in this article are instituted the authority which institutes such proceedings shall without delay intimate the fact to the Audit Officer concerned.

Explanation-For the purpose of this article-

(a) departmental proceedings shall be deemed to have been instituted when the charges framed against the pensioner are issued to him, or, if the officer has been placed under suspension from an earlier date, on such date; and

(b) judicial proceedings shall be deemed to have been instituted;

(I) in the case of criminal proceedings, on the date on which a complaint is made, or a charge-sheet is submitted to a criminal court; and

(ii) in the case of civil proceedings, on the date on which the plaint is presented or, as the case may be, an application is made, to a civil court.

Note- As soon as proceedings or the nature referred to in this article are instituted the authority which institutes such proceedings shall without delay intimate the fact to the Audit Officer concerned."

9. The power under Regulation 351 is to be exercised by State Government for withholding or withdrawing a pension or any part of it, if the pensioner is convicted for serious crime or is guilty of grave misconduct. Regulation 351A empowers the State Government to order for recovery from the pension on account of losses found in judicial or departmental proceedings to have been caused to the Government by negligence or fraud of such officer during his service. There is no difficulty in exercising the power for ordering recovery of pension when finding comes in a judicial or departmental proceedings. The question for consideration in the present case is as to whether the State Government can direct for not payment of pension and gratuity when the departmental or judicial proceedings have not yet been finalized. The State Government has issued Government order dated 28th October, 1980 on the subject. By Government order dated 28th October, 1980, it has been provided that those employees against whom on the date of retirement departmental, judicial or proceedings before Administrative Tribunal are proceeding or it is necessary to draw such proceedings shall be given interim pension, but gratuity be not paid till finalization of the proceeding. The same provision has again been reiterated by Government order dated 28th July, 1989, in which, reference has also been made to the Government order dated 28th October, 1980.

10. So far as the present case is concerned, the petitioner has retired on 31.12.2019 and admittedly, the final report has been submitted in the matter on 16.09.2019.

11. In paragraph 8 of the counter affidavit, it is admitted that charge sheet was submitted before the court concerned in the matter, which is still pending consideration. The date of retirement of the petitioner is 31.12.2019 as admitted in the counter affidavit, it is, thus, clear that on the date of retirement, judicial proceeding, as contemplated in Regulation 351A of Civil Service Regulations, have not been instituted against the petitioner. Under the circumstances, in bereft of any such proceeding, relying on the Government Order dated 28.10.1980, the pension and gratuity of petitioner cannot be stopped, whereas, final report has been submitted before the Competent Court on 16.09.2019 and the same has not been negated by the Court concerned.

12. In above view of the matter and in the facts and circumstances of the present case, the State Government was not justified in not paying the pension and gratuity to the petitioner. However, it is made clear that in case the petitioner is convicted in the criminal case pending against him, the Government is fully empowered to exercise its power under Regulation 351 to withhold or withdraw the pension or any part of it. The petitioner, thus, has made out a case for direction to the respondents to finalize the pension and pay his gratuity.

13. Consequently, the writ petition succeeds and the same is allowed. The order impugned is set aside. Mandamus is issued to the respondent-authorities to ensure the entire payment as has been stopped by the order impugned dated 18.11.2019 within the period of two months from the date of production of certified copy of this order, failing which the petitioner is entitled for 12% interest on the delayed payment.

14. There will be no order as to cost.

(2020)12ILR A642
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.10.2020

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ A. No. 5044 of 2020

Shri Kishan Paswan ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Bholeshwar, Sri Jainendra Kumar Rai.

Counsel for the Respondents:
Sri Vivek Kumar, Sri Anand Kumar Roy.

A. Service Law –Cancellation of appointment –Suppression of information-Juvenile Justice (Care and Protection of Children) Act, 2000: Section 19 - Cancellation of the appointment of the petitioner on the foot of non disclosure of criminal prosecution faced as a juvenile vitiates the impugned order. The conviction by a Juvenile Justice Board under the Juvenile Justice Act, 2000 of a juvenile is not a disqualification for employment. Non disclosure of irrelevant facts is not "deliberate" or willful concealment of material facts. Hence non-disclosure of such criminal cases cannot invalidate the appointment of the said person. (Para 35, 36, 37)

B. Constitution of India: Article 14- Juveniles and adults form separate classes -Criminal prosecution of an adult is a lawful basis for determination of suitability of a candidate for appointment to public office. However prosecution of juveniles is in a separate class. Using criminal prosecution faced by a candidate as a juvenile to form an opinion about his suitability for appointment, is arbitrary illegal and violative of Article 14 of the Constitution of India. (Para 14, 35)

C. Constitution of India: Article 21 - The requirement to disclose details of criminal prosecutions faced as a juvenile is violative of the right to privacy and the right to reputation of a child guaranteed under Article 21 of the Constitution of India. It denudes the child of the protection assured by the Juvenile Justice Act, 2000 (as amended from time to time). Hence the employer cannot ask any candidate to disclose details of criminal prosecution faced as a juvenile. (Para 14, 35)

D. The candidate can hold his silence or decline to give information about the criminal prosecution faced as a juvenile. Denial of such information by the candidate will not amount to a false declaration or a willful suppression of facts. (Para 14, 35)

In the present case it was clarified that these holdings shall not apply to cases beyond the ambit of Juvenile Justice Act, 2000 (as amended from time to time) and also in cases of heinous crimes committed by persons in the age group of 16 to 18 years. (Para 35)

Writ Petitions allowed. (E-4)

Precedent followed:

1. Rajiv Kumar Vs St. of U.P. & anr., 2019 (4) ADJ 316 (Para 2)

2. Sumpurnanand Vs St. of U.P., 2018 (11) ADJ 550 (Para 20)

3. K.S. Puutaswamy Vs U.O.I., (2017) 10 SCC 1 (Para 20)

4. Shivam Maurya Vs St. of U.P. & ors., 2020 (5) ADJ 5 (Par 33)

5. Sahadeb Ghosh Vs The St. of W. B. & ors., (2012) 3 CALLT 697 (HC); 2012 (6) SLR 656 (Para 34)

Present petition assails the order dated 20.04.2020, passed by the I.G.- cum-Principal Chief Security Commissioner/RPF N.C. Railway, Prayagraj.

(Delivered by Hon'ble Ajay Bhanot, J.)

1. The petitioner has assailed the order dated 20.04.2020 passed by the respondent No.4-I.G.-cum- Principal Chief

Security Commissioner / RPF N.C. Railway, Prayagraj. The impugned order cancels the appointment of the petitioner on the foot that he had suppressed information about the criminal case pending against him while filling up the Attestation Form.

2. Sri Bholeshwar, learned counsel for the petitioner submits that the contents of the affirmation made by the petitioner in the Attestation Form and non disclosure of the criminal case pending against him are not disputed. He, however, contends that the respondent No.4 misdirected himself in law by overlooking the fact that the petitioner was being tried for an offence as a juvenile. The case of the petitioner is covered by the law laid down by this Court in **Rajiv Kumar Vs. State of U.P**. and another, reported at **2019 (4) ADJ 316**. The impugned order is arbitrary, illegal and violative of fundamental rights of the petitioner guaranteed under Articles 14, 16 and 21 of the Constitution of India.

3. Per contra, Sri Anand Kumar Roy, learned counsel for the Railways - respondents submits that the pendency of a criminal case and the suppression of the same in the Attestation Form by the petitioner are admitted. The offence against the petitioner was not of a trivial nature, and moreover the petitioner had been convicted by the learned trial court. He is not suitable for appointment in a disciplined force like the Railway Protection Force (RPF) and his candidature was lawfully invalidated. The impugned order is not liable to be interfered with.

4. Heard Sri Bholeshwar, learned counsel for the petitioner and Sri Anand Kumar Roy, learned counsel for the respondents.

5. The facts relevant for the adjudication of the controversy are established beyond the pale of any dispute. The facts being undisputed, the controversy turns on pure questions of law. No useful purpose will be served by exchange of pleadings and prolonging the litigation. The matter is being decided finally with consent of parties.

6. The petitioner applied for appointment as Constable in the Railway Protection Force (RPF) in response to the Employment Notice No.01/2018. After his empanelment the petitioner affirmed an Attestation Form regarding his character and antecedents. He did not disclose any pending criminal case in the Attestation Form. The Police Verification Report (PVR) sent by the District Magistrate, Gorakhpur, U.P. to the respondents authorities revealed that a criminal case bearing in NCR No.197/13 under Sections 323, 504 and 506 of the IPC, Police Station-Jhangaha, District-Gorakhpur was registered against the petitioner.

7. The competent authority found that the petitioner had deliberately concealed the criminal case pending against him to secure a government job. On this foot by order dated 03.01.2020 the candidature of the petitioner was rejected.

8. Aggrieved by the cancellation of his candidature, the petitioner instituted a writ petition registered as Writ-A No.2511 of 2020 (Shri Kishan Paswan Vs. Union of India and others) before this Court. The writ petition was decided by the judgement and order rendered by this Court on 14.02.2020. The operative portion of the judgment is extracted hereunder:

"Accordingly, the instant petition is disposed of with direction to respondent no. 2 to consider the claim of the petitioner in

the light of observations made above and the law laid down by Supreme Court in Avtar Singh (supra), within a period of ten weeks from the date of receipt of a certified copy of this order, along with fresh representation and supporting documents. The impugned order will abide by the decision that shall be taken by respondent no. 2 in compliance of the instant order."

9. In compliance of the judgement dated 14.02.2020 passed by this Court, the respondent No.4-I.G.-cum- Principal Chief Security Commissioner / RPF N.C. Railway, Prayagraj. revisited the controversy, but with the same result. The impugned order dated 20.04.2020 records that the petitioner filled up the Attestation Form on 19.09.2019 wherein he did not disclose the criminal case pending against him. The Police Verification Report (PVR) sent by the District Magistrate, Gorakhpur is also referenced. The impugned order finds that the petitioner had deliberately suppressed the information of his involvement in the said criminal case. The petitioner violated the para-03 containing the "warning", which clearly cautioned :

"If, the fact that false information has been furnished or that there has been suppression of any factual information in the Attestation Form comes to notice at any time during the service of a person his services would be liable to be terminated."

10. The order passed by the competent authority dated 03.01.2020 is also noticed. Finally the impugned order dated 20.04.2020 sets out the following consideration for concluding that the petitioner is not fit for government service and rejecting the representation of the petitioner :

"After careful examination and perusal of the representation of the petitioner as well as related documents pertaining to the case, it is observed that the subject police case was registered, when the petitioner was juvenile. The incident related to some dispute with a neighbour on a petty issue and Hon'ble Court had imposed a fine of Rs.500/- and also mentioned in its order that it will have no adverse effect on future pursuits. The case appears to be of a trivial nature. However, it is also observed that while the petitioner was awarded punishment by Hon'ble Court on 05.11.2019, he had filled up Attestation form on 19.09.2019, when the subject case was pending and thus has clearly suppressed the information about the criminal case pending against him, while filling up the Attestation Form.

It is also to mention that Item 38.4.1. of Supreme Court's guidelines relating to a case of trivial nature will not be applicable here, as conviction has not been recorded before filling up of verification/Attestation form and the petitioner was well aware of above criminal case pending against him, which he has clearly suppressed while filling Attestation Form.

Hence, I have applied mind and on evaluation of the facts on record, extant rules, and having accorded the opportunity of submission of representation to the petitioner in compliance to Hon'ble Courts order dated 13.02.2020 and keeping in view the principles of natural justice and in light of directions of the Hon'ble Supreme Court's judgment Avtar Singh Vs. Union of India and others, and in exercise of power vested under Rule 52.2 and 67.2 of RPF Rules, 1987, I hereby come to the considered conclusion as Appointing Authority that the above petitioner is not fit for Government Service and hence, representation of the petitioner is rejected. The petitioner may be informed accordingly. "

11. The criminal proceeding against the petitioner before the Juvenile Justice Board merits consideration. A criminal case registered against the petitioner as NCR No.197/2013 under Sections 323, 504 and 506 of the IPC, went to trial as case no.81/15 (State Vs. Kishan Paswan) before the Juvenile Justice Board, Gorakhpur. The learned Juvenile Justice Board, Gorakhpur convicted the petitioner under Sections 323 and 504 of the IPC in its judgment rendered on 05.11.2019.

12. The judgement of the learned Juvenile Justice Board finds that the petitioner was declared a juvenile delinquent by order dated 01.10.2019. He had confessed to the crime. In the wake of admission of guilt, the learned trial court convicted him under Sections 323 and 504 IPC.

13. The learned trial court holds that the purpose of the Juvenile Justice Board is not to punish but to adsorb the juvenile delinquent in the social mainstream. A penalty of Rs.500/- for each offence was imposed upon the petitioner. Thereafter, the learned trial court directed that the judgment shall not render the petitioner ineligible in any manner and in consonance with the provisions of the Juvenile Justice (Care and Protection of Children) Act, holds that the conviction would not adversely influence the future job prospects of the petitioner.

14. From these facts the following questions of law arise for consideration:

I. Whether the conviction of the petitioner by the Juvenile Justice Board by order dated 05.11.2019, can have any bearing on the candidature of the petitioner?

II. Whether the respondents authorities erred in law by requiring the petitioner to disclose details of criminal prosecution faced by him as a juvenile in the Attestation Form?

III. Whether the failure of the petitioner to disclose the proceedings instituted against him as a juvenile in the Attestation Form, amounted to a deliberate suppression of material facts which warranted the cancellation of his appointment?

15. Whether failure of a candidate to disclose criminal prosecution faced as a juvenile in the verification from/affidavit affirmed at the time of recruitment amounted to a false declaration was posed for determination before this Court in **Rajiv Kumar Vs. State of U.P. and another**, reported at **2019(4) ADJ 316**. The sequitor as to whether the authorities could lawfully enquire into criminal prosecution faced by a candidate as a juvenile also squarely came up for consideration in Rajiv Kumar (supra).

16. I find that the Rajiv Kumar (supra) is squarely applicable to the facts of this case. The judgment of Rajiv Kumar (supra) is of some length. However, some parts of the judgment will be extracted to take the narrative forward.

17. The judgment of this Court in Rajiv Kumar (supra) found that the aforesaid questions which arose for consideration, involved an interface between various branches of law:

"17. The controversy is defined by an interplay of different branches of law and competing rights of individuals and institutions. The interface of employers' rights, child rights and employees' rights

and a composite view and concerted implementation of different branches of law, constitutional rights, Juvenile Justice Acts, child rights regime, service law will provide the way for the resolution of the controversy."

18. The creation of children as a separate class in the Constitution was looked at in light of relevant constitutional provisions :

"20. The constitution makers understood the special needs of children and envisaged a distinct place for children in the Constitution. The children are constituted into a separate class of citizens under the Constitution. Various provisions devoted to the child in the text of the Constitution attest the paramount importance accorded to the welfare of the child in our Constitutional scheme."

19. Articles 15 (3), 21(a), 45, 47, 39(e) and 39(f) of the Constitution of India were specifically invoked.

20. Rajiv Kumar (supra) entrenched the right to reputation of a child as a fundamental right flowing from Article 21 of the Constitution of India relying on the law laid down by this Court in Sumpurnanand Vs. State of U.P., reported at 2018 (11) ADJ 550. Similarly, the fundamental right to privacy of the child was also engaged by applying the holding of the Hon'ble Supreme Court in K.S. Puttaswamy v. Union of India, reported at (2017) 10 SCC 1.

21. Various international instruments in regard to children in conflict with law were considered:

"38. The condition of children in conflict with law engaged the concerns of the world community. The concerns were put in the consciousness of the international community by the adoption of the Beijing Rules in 1985 and the UN Standard Minimum Rules for Administration of Juvenile Justice.

39. The United Nations Standard Minimum Rules For The Administration of Juvenile Justice is a document which reflects the consensus of international opinion and convergence of values amongst civilized nations. In fact, the United Nations Standard Minimum Rules For The Administration of Juvenile Justice is a statement of universal values. The Juvenile Justice Acts in India trace their origin to the aforesaid international standards and other UN Conventions on the subject. As will be seen the courts have readily incorporated the international treaties and conventions into the corpus of our case law jurisprudence."

22. The Juvenile Justice (Care and Protection of Children) Acts (enacted from time to time) were examined in the context of various international instruments on child rights:

"52. The child rights jurisprudence reached the next stage in its evolution, with the UN Convention on Rights of Child, 1989 and UN Juvenile Protection Rule, 1990. In the comity of civilized nations, the state of children in conflict with law was elevated from international consciousness to international conscience, from conception of philosophy to agenda for action. India honoured its international obligations and cemented its international standing by promulgating The Juvenile Justice Act, 2000 and then The Juvenile Justice Act, 2015.

53. The Juvenile Justice Act 1986 , the Juvenile Justice Act 2000 and the Juvenile

Justice Act 2015 are in consequence of and in consonance to the international covenants on child rights in general and children in conflict with law in particular. The enactments represent a conceptual shift from a strict retributive approach to benign rehabilitative justice. The enactments are a turning away of law from exclusion by penalizing to assimilation by reintegration. The objects of the legislations have been constant. The provisions have been amended to cope with needs of the times and benefit from the fruits of experience."

23. A survey of various provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 was made thus:

"Section 2.13 "child in conflict with law" means a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence;

Section 2.33 "heinous offences" includes the offences for which the minimum punishment under the Indian Penal Code or any other law for the time being in force is imprisonment for seven years or more;

Section 2.45. "petty offences" includes the offences for which the maximum punishment under the Indian Penal Code or any other law for the time being in force is imprisonment up to three years;"

Section 15 of the Act which contemplates a preliminary assessment into heinous offences by the court and the distinction created between heinous and non heinous offences under the scheme of the Act was part of the discussion.

59. Of course, it needs to be clarified that the Juvenile Justice Act, 2015 is prospective in its application. However, the fundamental principles of Child Rights Jurisprudence or position of law in regard to children in conflict with law which are incorporated in the Act infact predate the statute.

60. Sections 74 and 99 of the Juvenile Justice Act, 2015 provide for protecting the identity of a child who has faced criminal prosecution under the Juvenile Justice Act, 2015. Section 24 much likeSections 74 and 99, has been a consistent theme in the preceding enactments relating to children in conflict with law. Section 24 removes any disqualification of a child on the findings of an offence under the Act. Sections 24, 74 and 99 of the Juvenile Justice Act 2015 are as follows."

24. Other aspects of the Juvenile Justice (Care and Protection of Children) Act, 2015, supported the discussion in the following manner:

"24. Removal of disqualification on the findings of an offence.

1. Notwithstanding anything contained in any other law for the time being in force, a child who has committed an offence and has been dealt with under the provisions of this Act shall not suffer disqualification, if any, attached to a conviction of an offence under such law:

Provided that in case of a child who has completed or is above the age of sixteen years and is found to be in conflict with law by the Children's Court under clause (i) of sub-section (1) of section 19, the provisions of sub-section (1) shall not apply.

2. (2) The Board shall make an order directing the Police, or by the Children's court to its own registry that the relevant records of such conviction shall be destroyed after the expiry of the period of appeal or, as the case may be, a reasonable period as may be prescribed:

(emphasis supplied) Provided that in case of a heinous offence where the child is

found to be in conflict with law under clause (i) of sub-section (1) of section 19, the relevant records of conviction of such child shall be retained by the Children's Court.

74. Prohibition on disclosure of identity of children.

1. No report in any newspaper, magazine, news-sheet or audio-visual media or other forms of communication regarding any inquiry or investigation or judicial procedure, shall disclose the name, address or school or any other particular, which may lead to the identification of a child in conflict with law or a child in need of care and protection or a child victim or witness of a crime, involved in such matter, under any other law for the time being in force, nor shall the picture of any such child be published:

Provided that for reasons to be recorded in writing, the Board or Committee, as the case may be, holding the inquiry may permit such disclosure, if in its opinion such disclosure is in the best interest of the child.

2. The Police shall not disclose any record of the child for the purpose of character certificate or otherwise in cases where the case has been closed or disposed of.

3. Any person contravening the provisions of sub-section (1) shall be punishable with imprisonment for a term which may extend to six months or fine which may extend to two lakh rupees or both.

99. Reports to be treated as confidential.

1. All reports related to the child and considered by the Committee or the Board shall be treated as confidential:

Provided that the Committee or the Board, as the case may be, may, if it so thinks fit, communicate the substance thereof to another Committee or Board or to the child or to the child's parent or guardian, and may give such Committee or the Board or the child or parent or guardian, an opportunity of producing evidence as may be relevant to the matter stated in the report.

2. Notwithstanding anything contained in this Act, the victim shall not be denied access to their case record, orders and relevant papers."

61. Rule 14 of the Juvenile Justice (Care and Protection of Children) Model Rules, 2016 has relevance to the controversy. The Rule provides for destruction of records. The intention of legislature to efface the records of prosecution of a child is clearly evident in the said provision:

14. Destruction of records.-

The records of conviction in respect of a child in conflict with law shall be kept in safe custody till the expiry of the period of appeal or for a period of seven years, and no longer, and thereafter be destroyed by the Person-in-charge or Board or Children's Court, as the case may be:

Provided that in case of a heinous offence where the child is found to be in conflict with law under clause (i) of sub section (1) of section 19 of the Act, the relevant records of conviction of such child shall be retained by the Children's Court.

62. The Hon'ble Supreme Court in Jitendra Singh v. State of U.P. reported at (2013) 11 SCC 193, considered various aspects of child rights jurisprudence in the context of Juvenile Justice Act 2000 and also the International Convention on the Rights of the child and the Beijing Rules. The right to privacy and confidentiality of a juvenile, the inability of a child to know its rights, the imperative of rehabilitation and safeguards of law were issues on which the Hon'ble Supreme Court ruled that:

41. The Rules, particularly Rule 3, provide, inter alia, that in all decisions taken within the context of administration of justice, the principle of best interests of a juvenile shall be the primary consideration. What this means is that "the traditional objectives of criminal justice, that is retribution and repression, must give way to rehabilitative and restorative objectives of juvenile justice". The right to privacy and confidentiality of a juvenile is required to be protected by all means and through all the stages of the proceedings, and this is one of the reasons why the identity of a juvenile in conflict with law is not disclosed. (emphasis supplied)

Following the requirements of the Convention on the Rights of the Child, Rule 3 provides that institutionalisation of a child or a juvenile in conflict with law shall be the last resort after a reasonable inquiry and that too for the minimum possible duration.

(emphasis supplied)

42. Rule 32 provides that:

"32.Rehabilitation and social reintegration.--The primary aim of rehabilitation and social reintegration is to help children in restoring their dignity and self-worth and mainstream them through rehabilitation within the family where possible, or otherwise through alternate care programmes and long-term institutional care shall be of last resort."

43. It is quite clear from the above that the purpose of the Act is to rehabilitate a juvenile in conflict with law with a view to reintegrate him into society. This is by no means an easy task and it is worth researching how successful the implementation of the Act has been in its avowed purpose in this respect.

44. As regards procedurally dealing with a juvenile in conflict with law, the Rules require the State Government concerned to set up in every district a Special Juvenile Police Unit to handle the cases of juveniles or children in terms of the provisions of the Act (Rule 84). This Unit shall consist of a juvenile or child welfare officer of the rank of Police Inspector having an aptitude and appropriate training and orientation to handle such cases. He will be assisted by two paid social workers having experience of working in the field of child welfare of which one of them shall be a woman.

45. Rule 75 of the Rules requires that while dealing with a juvenile or a child, except at the time of arrest, a police officer shall wear plain clothes and not his uniform.

46. The Act and the Model Rules clearly constitute an independent code for issues concerning a child or a juvenile, particularly a juvenile in conflict with law. This code is intended to safeguard the rights of the child and a juvenile in conflict with law and to put him in a category separate and distinct from an adult accused of a crime.

(emphasis supplied)

25. It needs to be mentioned that the Juvenile Justice (Care and Protection of Children) Acts were amended from time to time. However, fundamental principles of child rights jurisprudence and constitutional rights of a child which have remained constant also guided the decision in Rajiv Kumar (supra).

26. The consideration of the scheme of the enactments is concluded in the following paragraphs:

"65. The diminished culpability of children rests on the premise of lack of maturity and an underdeveloped sense of responsibility in children and that the

deficiencies are reversible which will be reformed with advancing age and neurological development. The heightened capacity for change in juvenile delinquents holds the promise of a new sunrise.

67. From the features and the scheme of the Juvenile Justice Act (as amended from time to time) and law laid down by various courts, both the legislative intent and the position of law can be deduced with clarity. Intention of the legislature is to treat children as a separate class in prosecution of offences committed by the children.

68. Rigors of the prosecution have been diluted in the criminal procedure. The legislature and the law has gone the whole length to protect the identity of children who have faced prosecution. Non disclosure of the details of the crime committed by the child is another feature which reflects a sensitive approach of the legislature to children in conflict with law. (emphasis supplied)

69. Finally the legislations culminate in the overarching aim of rehabilitating children who had trouble with the law by assimilating them in the social mainstream.

70. By removing all disqualifications accruing from the finding of guilt or a conviction of a juvenile under the Acts, the final hurdle in the reintegration of a child in the society has been removed." (emphasis supplied)

27. The scope of the rights of the State as an employer to ascertain the criminal antecedents of its perspective employees were then adverted to:

"Rights of an employer:

80. The State employer examines the criminal antecedents of its employees prior to their induction in government service.

81. Criminal antecedents are an accepted criteria to form an opinion on criminal traits in an individual and his suitability for employment. A person may be denied entry into government service or removed from government service if found in possession of such criminal traits.

85. A false declaration on oath regarding past prosecution in a criminal case or a conviction in a criminal offence or pendency of a criminal case could invalidate the appointment and entail termination of services. Some authorities would have it that such false affidavit would ipso facto result in the termination of the services of the employee. The other view took mitigating circumstances into account. The divergence in judicial views was finally resolved by a three Judge Bench of the Hon'ble Supreme Court in the case of Avtar Singh v. Union of India and Others, reported at (2016) 8 SCC 471.

89. Clearly the right of the State as an employer to know the criminal antecedents of its employees is unexceptional. But the rights are not unrestricted in case of children. The rights of the employer are limited by three constraints. The rights of an employer have to be reconciled to provisions of the Constitution and the propositions of Constitutional law. Thirdly the employer's rights are also circumscribed by the statutory regimes of child rights." (emphasis supplied)

28. The interface of the rights of the State as an employer and a child's fundamental rights was made in the following enquiry:

"90. The rights of an employer are hedged, by the constitutional rights of a child. The interplay of the employer's rights with the constitutional rights of a child may now be considered.

91. A nuanced approach is required to understand the ambit of the right to reputation of a child and right to privacy of a child guaranteed under Article 21 of the Constitution of India.

92. In the wake of the preceding narratives, certain fundamental precepts can be distilled from the range of statutes and pronouncements of courts which form the first principles of child rights jurisprudence. These fundamental principles of child rights jurisprudence would lend perspective and aid the understanding of Constitutional rights of children under Article 14 and Article 21 of the Constitution of India.

93. The vulnerability of a child is an attribute of childhood which is recognized by all legislatures. The incapacity of a child to know its rights is a given in child rights' jurisprudence. The inability of a child to assert its rights is a disability which is understood by all courts. The aim of the legislatures and the endeavour of the courts is to insulate the child from the cruel vagaries of life which it cannot comprehend and lacks the capacity to defend against. Reform of children in conflict with law, their reintegration in society and creation of a salutary environment for children to grow and realize their potentialities is the high purpose to which the legislatures and the courts have directed their efforts. Children have special needs in life and require special protection in law. The indispensable feature of all child rights' legislations is the special protection to children provided by the legislature in a given field.

As an old writer observed on the incapacity of infants-

"The law protects their persons, preserves their rights and estates, excuseth their laches and assists them in their pleadings, the judges are their counsellors, the jury are their servants and law is their guardian.

94. As we have seen that fate of children in conflict with law has engaged the attention of the legislature, the courts and the larger comity of nations and international organizations. The collective endeavours have been guided by common purpose. Children in conflict with law need special care. The criminal justice system has to be sensitized to deal with the class of children in conflict with law. The child has to be protected from harsh treatment and should not be exposed to the rough edges of the criminal justice system. The child has to be shielded from all aspects and consequences of the criminal justice system which can cast a lasting trauma or precludes it from leading a normal life free from blemish and prevents the reintegration of the child in the society.

95. One most critical feature of child rights regime is the issue of the taint caused by criminal prosecution and the disability accruing from criminal conviction. The consequent impediments in the reintegration of the delinquent child in the society are issues which are addressed by the legislatures and the courts alike. Some measures like restricted access to records of trials sealing and destruction of records of prosecution of juvenile delinquents are finding acceptability among legislatures across the world. Courts have been anonymising trials of children conflict with law to protect their identities.

96. All these issues and first principles thus lie at the heart of child rights jurisprudence, animate the purpose of child rights legislation and engage the "life" of a child under Article 21 of the Constitution of India.

(emphasis supplied)

97. Of course, persons between 16-18 years of age prosecuted for heinous crimes,

have been put in a separate class by the legislature. They may be denied the protective cover of the child rights regime as per provisions of law.

98. A past prosecution of a child in a criminal case which remains in public records pertaining to employment becomes part of public discourse. In public employment, past prosecution of a child in a criminal case is often made a criteria for forming an opinion of the child's criminal antecedents. Such criteria revives the taint of a past prosecution to blight the prospects of future employment. A reference to a past prosecution will tarnish the reputation of a child and become a permanent stigma in his life. Consideration of a past prosecution of child in a criminal case for any purpose or in any discourse, will create a perpetual disability for the child. The practice of making the past prosecution a criteria for forming an opinion of the child's criminal antecedents or even making it a consideration in public employment will provoke consequences which the child rights regime seeks to prevent. The consideration of a past prosecution of a child in a criminal case will prevent reintegration of the child in the mainstream of the society. It will pose an impediment in the reformation of the child and the growth of the child into a responsible adult. It will disable the all around development of the child into a law abiding citizen. It will preclude realization of the mandate of Article 39 of the Constitution of India. These circumstances will violate the child rights regime and the "life" of a child as guaranteed under Article 21 of the Constitution of India will be devoid of meaning.

99. The right of privacy of a child would be meaningful if such prosecution is not made part of public discourse as a criteria for appointment to public posts or admission to any institution of learning or for that matter any other transaction in life.

100. Similarly, the right to privacy in the context of a child would include his right to deny information relating to his prosecution as a child under the Juvenile Justice Act and for offences which do not come in the category of heinous offences under the said Act.

101. The prerequisite for realizing the Fundamental Rights of a child vested by Article 21 of the Constitution of India, is to create all conditions essential for reintegration of the child in the social mainstream and to open opportunities for self development and self fulfillment, free from the taint of the past. The fact of the prosecution has to be purged from public records to rid the child of the taint.

(emphasis supplied)

102. The wide consensus of such values helps us in determining the rights of a child. The endeavours of the courts and the legislatures alike is to protect the identity of the child offender, and to shield the child in conflict with law from suffering lasting and traumatic consequences of criminal prosecution. A child who has been prosecuted for criminal offence is entitled to a fresh chance in life. The child has to begin life as an adult on a clean state, as if no such criminal prosecution happened. This is possible when the fact of such criminal prosecution is purged from public discourse and is not a consideration for appointment to an office. The denial of public space and legitimacy to the fact of such criminal prosecution is the sheet anchor of the right to privacy and right to reputation of a child. An employer cannot elicit any information from any candidate or employee regarding the prosecution of the latter in a criminal case as a minor child for non heinous offences. An employer is precluded from seeking a declaration from

a candidate or an employee regarding the prosecution of the latter in a criminal case as a child. (emphasis supplied)

103. These prerequisites create an environment which fosters a balanced growth of a child and enables it to realize its full potentialities. These prerequisites accord meaning to the life of a child as contemplated under Article 21 of the Constitution of India. This is the essence of the fundamental right guaranteed to a child by Article 21 of the Constitution of India. (emphasis supplied)

104. The Directive Principles of State Policy enshrined in Article 39 of the Constitution of India are infact the mandatory requirements of law to bring the rights of a child vested by Article 21 of the Constitution of India to fruition.

105. The meaning of life for children contemplated in Article 21 would be fruitful, if conditions of life for children envisaged under Article 39 are created."

29. The requirement posed by the State employer to a candidate to disclose the details of criminal prosecution faced as a minor / juvenile was also tested on the anvil of Article 14 of the Constitution :

"109. Legislative enactments treat children differentially from adults. Children are constituted in a separate class from adults in law. The treatment accorded to children in law is different from that of adults. This differential treatment underlies the sensitive approach to children in law. The criminal prosecution of a child is not at par with the prosecution of an adult for a similar crime. The said prosecution and the consequences of such prosecutions cannot be treated alike. Law ensures that the adverse consequences of prosecution of child are not only mitigated but are completely obviated.

110. Children in conflict with law are a well defined class. This class cannot be treated like adults. Children are not "miniature adults".

111. It has been held by good authority that treating unequals as equals will militate against the mandate of Article 14 of the Constitution of India.

112. The criteria of past criminal prosecution for forming an opinion about considering a criminal antecedents of a candidate is a valid one. This criteria which is valid for adults, would be flawed if applied to children. This would amount to treating unequals as equals. A logical sequitor is that fact of a past criminal prosecution of a child is not a relevant consideration for appointment to a public post or office and is violative of Article 14 of the Constitution of India. (emphasis supplied)

113. Arbitrariness is another facet of Article 14 of the Constitution of India. Arbitrary action or criteria is negated by Article 14. This aspect of Article 14 is also engaged in the instant controversy. Some facts stated in detail in the preceding part of judgment are reproduced in substance hereunder:

114. The personality of a child is in constant evolution and its character traits are not permanent. The causes which impel a child to be on the wrong side of law or commit deviant acts are often traceable to its environment. A child has no control over its environment and its deviant behaviour is reversible. A child's conduct is capable of correction and a child is reformed over the years. Good authority in law and the field of child psychology has concluded that the character traits which impelled a child into a criminal act are transient and will be reformed with age.

115. In such a situation, the criteria of considering the past crimes committed by

an employee as a child do not form a reliable, rational and a just basis for making an assessment of criminal traits and to determine suitability for employment. This criteria would be an irrelevant consideration for appointment to a public post. Above all such criteria is wholly arbitrary and flagrantly violates Article 14 of the Constitution of India." (emphasis supplied)

30. The line of enquiry then shifted to the restrictions created on the rights of an employer by various Juvenile Justice (Care and Protection of Children) Acts, which produced the undermentioned limitations:

"(B). Employers' Righs and Juvenile Justice Act, 1986 and Juvenile Justice Act, 2015

116. The critical feature and the guiding philosophy of child rights jurisprudence and Juvenile Justice Act, 1986 and also Juvenile Justice Act, 2015 is to prevent the child from reoffending and to reintegrate the child in the society, to enable the child to grow into a reformed and a responsible adult and a law abiding citizen. The aim can be achieved if the taint of a past criminal prosecution does not blight the future prospects of a child. A past aberration as a child cannot define his future life as an adult. The aim of reintegrating the child in the society would be defeated in detail if the fact of a past prosecution stigmatizes the future life of the child. Not only conviction but the criminal prosecution itself carries a stigma.

117. The future of a child, in conflict with law will be secure and the reintegration of child will be complete, only if the taint of a past criminal prosecution is purged from his life. The legislature, the prosecution agencies, the employers and the courts have a responsibility in this regard. The legislature has gone the whole length by providing that disqualification will result from a conviction of the child under the Juvenile Justice Act 1986 as well as the Juvenile Justice Act, 2015.

118. Salient features of the Juvenile Justice Act, 1986 protect the child not only from the rigor of the criminal prosecution but also from the consequences of conviction under the said Act.

119. As we have seen earlier that the Juvenile Justice Act, 1986 also provides for non disclosure of details of the child who faced prosecution and restricts access to the records relating to such prosecution. Destruction of records of prosecution faced by the child is another provision reflecting a clear intent of the Legislature.

120. Section 25 of the Juvenile Justice Act, 1986 quoted earlier, protects the child from the consequences accruing from the conviction under the Act and mandates that such conviction under the Act cannot operate as a disqualification against such child.

121. If the conviction of a child under the Juvenile Justice Act, 1986 is not a disqualification for appointment, it stands to reason that prosecution of a child in a criminal case cannot operate as a disqualification too. The important logical corollary is that the criminal prosecution faced by an employee as a child cannot become the criteria for forming an opinion about criminal antecedents and suitability for appointment. It is an irrelevant consideration. The material considered and standards adopted to form an opinion about the antecedents and suitability of adults for appointment on public posts cannot be applied to children who had trouble with the law or to a candidate who faced criminal prosecution as a child."

125. The Constitutional rights of a child and statutory rights of a child

guaranteed under the Juvenile Justice Act 1986 cannot be implemented in silos. Every agency of governance including State employers are under an obligation to implement the rights of a child guaranteed by the constitution and protected by the Juvenile Justice Act, 1986."

(emphasis supplied)

31. The current case falls in the ambit of Juvenile Justice (Care and Protection of Children) Act, 2000, but the above said reasoning would fully apply here.

32. Finally in Rajiv Kumar (supra) the holdings were summed up as follows:

"157.....The insistence of the State employer on a disclosure of criminal prosecution faced as a child reflected an impersonal attitude and a rote response to child rights. This is not an environment which fosters a healthy development of children and where rights of children flourish.

158. The requirement posed by the respondents to the petitioner to make a declaration disclosing details of criminal prosecution faced by the latter, insofar as it included the criminal prosecution faced by the petitioner as a minor child of 10 years was in violation of the fundamental rights of the petitioner guaranteed by Article 14 and 21 of the Constitution of India and in the teeth of Section 25 of the Juvenile Justice Act, 1986.

159. The details of past prosecution faced by the petitioner as a child was not a valid criteria nor a lawful consideration to judge his suitability for appointment. Such criteria was arbitrary and illegal.

160. The declaration made by the petitioner was not a relevant consideration in the appointment of the petitioner. Hence, even the falsity of the declaration made by the petitioner could not invalidate his appointment.

161. The petitioner in defence of his fundamental rights vested by Article 14 and 21 of the Constitution of India, could hold his silence or decline to disclose details of the prosecution in a criminal trial faced by him as a minor child of 10 years. Such action or declaration of the petitioner cannot be faulted with. The services of the petitioner cannot be terminated on the foot of such action or declaration."

(emphasis supplied)

33. A similar view was taken by a Division Bench of this Court in Shivam Maurya Vs. State of U.P. and others, reported at 2020 (5) ADJ 5:

"14. The said Act is a beneficial legislation. The principles of such beneficial legislation are to be applied only for the purpose of interpretation of this statute. The concealment of the pendency of criminal case against the appellant-petitioner was of no consequence. As per the requirement of law a conviction in an offence will not be treated as a disqualification for a juvenile. The records of the case pertaining to his involvement in a criminal matter are to be obliterated after a specified period of time. The intention of the legislature is clear that in so far as juveniles are concerned their criminal records is not to stand in their way in their lives. The cancellation of the candidature of the appellant-petitioner was thus bad. The authority concerned failed to appreciate the fact that the appellant-petitioner was entitled to benefit of the provisions of Act of 2000. The cancellation of the candidature of the petitioner goes contrary to the object sought to be achieved by the Act of 2000. Section 19 of the Act of 2000 protects a juvenile and any stigma attached

to his conviction is also removed. The Act of 2000 does not envisage incarceration of a juvenile which clearly shows that the intention and object was not to shut the doors of a disciplined and decent civilised life. It provides him an opportunity to mend his life for the future.

15. We thus hold that the authority concerned fell in complete error in not extending the benefit of Act of 2000 to the appellant-petitioner particularly when there are specific provisions provided therein to take care of a juvenile being implicated, tried and / or convicted in a criminal matter. We thus extend the benefit provided under Section 19 of the Act of 2000 to the appellant-petitioner."

34. While construing the provisions of Section 19 of the Juvenile Justice (Care and Protection of Children) Act, 2000, insofar as they remove any disqualification attaching to a conviction under the said Act, the Division Bench of the Calcutta High Court in the case of Sahadeb Ghosh (supra) held thus:

"Section 19 of the said Act of 2000 clearly says that, notwithstanding anything contained in any other law, a juvenile, who, has committed an offence and has been dealt with under the provisions of the said Act of 2000, shall not suffer disqualification, if any, attaching to a conviction of an offence under such law.

Therefore, if conviction does not become a bar and/or disqualification, it is unacceptable that pendency of a proceeding against a juvenile can be a bar.

A benefit sought to be given by the legislature under section 19 of the said Act of 2000 cannot be obliterated. Logical corollary of the said provision is that even if a juvenile is convicted, such conviction would not act as disqualification. Even, under sub-section (2) of section 19 of the said Act of 2000 records of such conviction are to be removed after the period of expiry of appeal or alter a reasonable period as prescribed under the rules.

We are of the opinion that inactions on the part of the authorities are against the provisions of the said Act of 2000. It goes contrary to the object sought to be achieved by the said Act of 2000. Section 19 of the said Act of 2000 protects a juvenile and any stigma attached to his conviction is, also, removed. The approach should be to condone minor indiscretions made by young people than to brand them as criminal for the rest of his life. The said Act of 2000 does not envisage incarceration of a juvenile nor wants to shut on him the doors of a decent and disciplined civilised life. On the contrary, it opens for him such a vista by providing him an occasion to amend and regulate his delinquency. The Courts are not to thwart such a course for him by either caprice, bias or any impractical or unimaginable reason.

We hold that benefits sought to be given to a convicted person under section 19 of the said Act of 2000 read with the said Rules of 2007 shall equally apply to a person against whom a case is pending before the Juvenile Justice Board. Thus, the authorities cannot refuse to give appointment to the writ petitioner on the sole ground of pendency of a criminal case before the said Board.

We are unable to accept the contention of Mr. Majumdar that this Court in exercise of the power of judicial review is unnecessarily interfering with the managerial functions of the State by extending the benefits of section 19 of the said Act of 2000 to the writ petitioner. We are simply extending the benefits provided under section 19 of the said Act of 2000 as

provided by the legislatures in their wisdom.

We, therefore, set aside the order of the tribunal and direct the authorities to complete the police verification of the petitioner irrespective of pendency of his case before the Juvenile Justice Board and to consider his case for appointment for the post of constable of police on the basis of such report, keeping in mind the intention of the legislature as enshrined in section 19 of the said Act of 2000."

35. From the preceding legal narrative, the following position of law emerges:

I. Juveniles and adults form separate classes. Criminal prosecution of an adult is a lawful basis for determination of suitability of a candidate for appointment to public office. However prosecution of juveniles is in a separate class. Using criminal prosecution faced by a candidate as a juvenile to form an opinion about his suitability for appointment, is arbitrary illegal and violative of Article 14 of the Constitution of India.

II. The requirement to disclose details of criminal prosecutions faced as a juvenile is violative of the right to privacy and the right to reputation of a child guaranteed under Article 21 of the Constitution of India. It also denudes the child of the protection assured by the Juvenile Justice Act, 2000 (as amended from time to time). Hence the employer cannot ask any candidate to disclose details of criminal prosecution faced as a juvenile.

III. The candidate can hold his silence or decline to give information about the criminal prosecution faced as a juvenile. Denial of such information by the candidate will not amount to a false declaration or a willful suppression of facts.

IV. The conviction by a Juvenile Justice Board under the Juvenile Justice Act, 2000 of a juvenile is not a disqualification for employment. As a sequitor prosecution faced as a juvenile is not a relevant fact for forming an opinion about the criminal antecedents and suitability of the candidate for appoinment. Non disclosure of irrelevant facts is not "deliberate" or willful concealment of material facts. Hence non-disclosure of such criminal cases cannot invalidate the appointment of the said person.

V. Clarification:

These holdings shall not apply to cases beyond the ambit of Juvenile Justice Act, 2000 (as amended from time to time) and also in cases of heinous crimes committed by persons in the age group of 16 to 18 years.

36. The questions posed earlier are answered in terms of the preceding holdings. I find that the respondents authorities have acted in a manner contrary to law by requiring the petitioner to disclose criminal prosecution faced by him as a juvenile. The petitioner in defence of his fundamental rights lawfully denied the said information. Hence the petitioner did not deliberately or wilfully conceal any material facts, to secure his appointment.

37. Cancellation of the appointment of the petitioner on the foot of non disclosure of criminal prosecution faced as a juvenile vitiates the impugned order. The respondent No.4 also acted in violation of law by attaching weight to the conviction of the petitioner in teeth of directions by the learned trial court, and in violation of imperative provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000.

38. The impugned order dated 20.04.2020 is arbitrary and illegal. The

order dated 20.04.2020 passed by the respondent No.4-I.G.-cum- Principal Chief Security Commissioner/ RPF N.C. Railway, Prayagraj is liable to be set aside and is set aside.

39. A writ in the nature of mandamus is issued commanding the respondents to execute the following directions:

i). The appoinment of the petitioner shall be processed in light of the observations made in this judgment.

ii). The appointment letter shall be issued to him in accordance with law.

iii). The petitioner shall be given the seniority, he would have been entitled to but for his cancellation of his candidature by the impugned order.

40. The writ petition is allowed.

(2020)12ILR A658
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.11.2020

BEFORE

THE HON'BLE MANISH KUMAR, J.

Service Single No. 5511 of 2015

Dinesh Chandra Tripathi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Devki Nandan Srivastava, Abhishek Srivastava

Counsel for the Respondents:
C.S.C., Jyoti Sikka.

A. Civil Law -U.P. Recognized Basic Schools (Juniors High Schools) (Recruitment and Conditions of Service of Teachers) Rules, 1978: Rule 7 - Practice & Procedure -A person who applies for appointment on a post in response to an advertisement is precluded from challenging the selection on the ground of defect in the advertisement. (Para 9)

Instead of challenging the advertisements on the ground that it was not published in two daily newspapers as provided under Rule 7 of the Rules, 1978, he had applied for the post of Assistant Teachers in response to the Advertisements dated 10.05.2015 and 14.05.2015. The petitioner had chosen not to participate in the interview, which was held on 31.05.2015 as per schedule advertised in the aforesaid advertisement. **Once the petitioner had chosen not to participate in the interview, he is neither a person aggrieved nor an affected party. (Para 7)**

Writ Petition rejected. (E-10)

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

1. Heard learned counsel for the petitioner, learned State Counsel for the respondent and Smt. Jyoti Sikka, learned counsel appearing for the respondent no. 2.

2. The notice was issued to the respondent nos. 4 and 5, whose appointments are under challenge and as per the office report dated 25.01.2016, the notice is sufficient but no one has filed vakalatnama on behalf of the respondent nos. 4 and 5.

3. The petitioner has submitted that the Manager Shivraji Janta Laghu Madhyamik Vidyalaya, Lalpur, Ayodhya, Shrawasti had published an advertisement for appointment on the post of Assistant Teachers in daily news paper Aaj on 14.05.2015 and on 10.05.2015 in Bhinga Times.

4. It is submitted that as per Rule 7 of the U.P Recognized Basic Schools (Junior

High Schools) (Recruitment and Conditions of Service of Teachers) Rules, 1978 (hereinafter referred to as, the Rules, 1978) the advertisement has to be published in two daily news papers, whereas it was published in two news papers i.e. daily news paper Aaj and weekly newspaper Bhinga Times. It is further submitted that the last date of submitting the application provided in the advertisement was 25.05.2015. The petitioner had duly applied within time on 21.05.2015. The interviews were held on 31.05.2015 as per schedule provided in the advertisement.

5. It is further submitted that the application forms of respondent nos. 4 and 5 were received on 26.05.2015 i.e. after the last date provided for submitting the application form, the committee of management of the institution has appointed the respondent nos. 4 and 5. In view of the aforesaid, the selection of the respondent nos. 4 and 5 is bad and is liable to be quashed.

6. On the other hand, learned Counsel for the B.S.A. has submitted that petitioner in pursuance of the advertisement dated 10.05.2015 and 14.05.2015 had submitted his application for appointment on the post of Assistant Teachers. The petitioner had not participated in the interview and once the petitioner had chosen not to turn up for the interview, he had given up his right to challenge the appointment of respondent nos. 4 and 5.

7. After hearing learned counsel for the parties, it is found that the petitioner, in place of challenging the advertisements on the ground that it was not published in two daily news paper as provided under Rule 7 of the Rules, 1978, he had applied for the post of Assistant Teachers in response to the advertisements dated 10.05.2015 and 14.05.2015. The petitioner had chosen not to participate in the interview, which was held on 31.05.2015, as per schedule advertise in the advertisement dated 10.05.2015 & 15.05.2015. Once the petitioner had chosen not to participate in the interview, he is neither a person aggrieved nor an affected party. The petitioner has no right to challenge the selection of respondent nos. 4 and 5 after having acted upon in pursuance of the advertisement, now the petitioner can not challenge the same.

8. The petitioner, in writ petition has no where pleaded that he had gone to participate in the interview but he was not permitted to participate in the same. Even in the para 26 of the counter affidavit, it has specifically been pleaded that petitioner was absent at the time of interview. This fact has not been rebutted on the other hand the statement was made on 20.07.2020 in the Court that no rejoinder affidavit is required to be filed in this regard.

9. A person who applies for appointment on a post in response to an advertisement is precluded from challenging the selection on the ground of defect in the advertisement. He acquiesces to the advertisement made and having taken advantage of the same in response thereto cannot turn around to point out in the manner of publication of the advertisement.

10. Yet again, it may be observed that in case a candidate after having applied for appointment for a post later voluntarily chooses not to appear in the interview i.e. the selection process has no locus to challenge the appointments of selected candidates.

11. In view of the aforesaid, the writ petition is devoid of any merit, accordingly, it is dismissed.

(2020)12ILR A660
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.11.2020

BEFORE

THE HON'BLE YASHWANT VARMA, J.

Writ A No. 5537 of 2020

Sumit Kumar ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shivendu Ojha, Sri Radha Kant Ojha

Counsel for the Respondents:
C.S.C., Sri Anil Kumar Singh, Sri Rohit Singh, Sri Manoj Kumar Yadav

A. Constitution of India, 1950-Article 226-application-seeking quashing of result of PGT examination where the correctness of an answer key is called in question-petitioner failed to establish a patent or palpable error-the onus is on the candidate to not only demonstrate that the key answer is incorrect but also that it is a glaring mistake which is totally apparent and no inferential process or reasoning is required to show that the key answer is wrong-the constitutional courts must exercise great restraint in such matters and should be reluctant to entertain a plea challenging the correctness of the key answers..(Para 2 to 13)

B. In the instant case, principal dispute is raised with respect to Question No. 35 and various options were provided by the examining authority. Question No. 35 required candidates to indicate the main objective of cost accounting. Petitioner has chosen "B" to be the correct answer while the answer key prepared by the respondents indicated the correct answer to be "C". When there are conflicting views, then the court must bow down to the opinion of experts-judges are not experts in all fields-they must exercise great restraint and should not overstep their jurisdiction to upset the opinion of the experts. (Para 9)

The Petition is dismissed. (E-6)

List of Cases cited:-

1. UPSC Vs Rahul Singh, (2018) 7 SCC 254

2. Ran Vijay Singh Vs St. of U.P., (2018) 2 SCC 357

3. BSSC Vs Arun Kumar, (2020) 6 SCC 362

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

1. Heard learned counsel for parties.

2. The instant petition has been preferred seeking quashing of the final result of the PGT Examination 2016 for recruitment of Lecturers in Commerce. The principal dispute is raised with respect to Question No.35 and the various options which were provided for that question by the examining authority.

3. Question No. 35 required candidates to indicate the main objective of cost accounting. Admittedly the petitioner while attempting that question has chosen 'B' to be the correct answer while the answer key which was prepared by the respondents indicated the correct answer to be 'C'.

4. Pursuant to the interim directions issued on this petition, the respondents have filed a counter affidavit in which they state that the said question was sent for the opinion of the Subject Expert who has

maintained the original position that the correct answer of Question No.35 would be 'C'.

5. According to Sri Ojha, the counter affidavit filed by the respondents itself places reliance on the extract of a publication titled "Cost & Management Accounting" in which the determination of selling price of goods is mentioned as one along with various other important objectives of Cost Accounting. According to Sri Ojha, in view of the aforesaid, the response submitted by the petitioner here to Question No.35 would also be deemed to be correct and that consequently the said question should be deleted. The submission essentially is that since response "B" could also be treated to be the correct answer, the petitioner is entitled to relief.

6. The Court finds itself unable to sustain the submission for the following reasons.

7. The question itself required the candidate to indicate the main objective of Cost Accounting. While in the process of cost accounting, the management may also be able to determine the selling price of goods, the question which still remains is whether that is the primary objective of cost accounting.

8. In the considered view of the Court, the expression "main objective" as employed in the question is clearly determinative. The expression "main" required candidates to indicate the primary or central objective of cost accounting. The extract from the publication taken into consideration by the respondents and on which alone Sri Ojha learned senior counsel relied during the course of his oral submissions, spells out the various important objectives of cost accounting. The extract relied upon does not indicate the determination of the selling price of goods to be the main objective. As held above, while the determination of cost price of goods may be one of the objectives of cost accounting, it has not been established before this Court that the same is its principal objective. The Subject Expert has chosen to consider the question principally in light of the manner in which it was worded, namely, requiring the candidate to indicate the main objective of cost accounting.

9. The Court further finds itself unconvinced to interfere with the decision of the respondents on a more fundamental plane. As has been settled by various precedents, in matters like the present where the correctness of an answer key is called in question, the Court must bear in mind the cautionary caveat enunciated in respect of the scope of judicial review and eloquently explained in **U.P. Public Service Commission Vs. Rahul Singh** as under:-

"12. The law is well settled that the onus is on the candidate to not only demonstrate that the key answer is incorrect but also that it is a glaring mistake which is totally apparent and no inferential process or reasoning is required to show that the key answer is wrong. The constitutional courts must exercise great restraint in such matters and should be reluctant to entertain a plea challenging the correctness of the key answers....."

14. In the present case, we find that all the three questions needed a long process of reasoning and the High Court itself has noticed that the stand of the Commission is also supported by certain textbooks. When there are conflicting

views, then the court must bow down to the opinion of the experts. Judges are not and cannot be experts in all fields and, therefore, they must exercise great restraint and should not overstep their jurisdiction to upset the opinion of the experts."

10. The width of judicial review as explained in the aforesaid decision has been reaffirmed by the Supreme Court in Ran Vijay Singh Vs. State of U.P. and more recently in Bihar Staff Selection Commission Vs. Arun Kumar.

11. The principles which emerge from the aforesaid decisions clearly establish that this Court while exercising its powers of judicial review can neither assume the function nor taken on the mantle of academic experts. The Courts while venturing into this field must exercise due caution and restraint before upsetting the opinion of experts. Additionally, interference would be warranted only in case it is established that the correct answer chosen by academicians is beset by a palpable and manifest error or mistake. Further, the error must be one which can be established without undertaking what the Supreme Court chose to describe as an "inferential process of reasoning or by a process of rationalisation". The error must be stark and apparent. Lastly, even where two views can possibly be taken or there be doubt, benefit must be extended to the examining body.

12. The petitioner in the present case has not only failed to establish a patent or palpable error nor has the challenge crossed the threshold as propounded in the decisions noticed above so as to warrant interference.

13. The petition is dismissed.

(2020)12ILR A662
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.12.2020

BEFORE

THE HON'BLE SHEKHAR KUMAR YADAV, J.

Writ A. No. 6262 of 2008

Ram Naresh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pankaj Srivastava, Sri S.M. Ali

Counsel for the Respondents:
C.S.C., A.G.

A. Service Law – Regularisation, Payment of Salary and other benefits – U.P. Retirement Benefits Rules, 1961: Rule 3(8); Civil Services Regulation of Uttar Pradesh: Regulation 370; U.P. Regularisation of Daily Wages Appointment on Group D Post Rules, 2001: Clause 4(1), 4(b), 4(3) – A temporary employee appointed on the regular establishment of the Government is entitled to pension under Fundamental Rule 56.

This is an admitted fact that the petitioner is continuously working since 23.1.1995 in Rural Engineering Services Department, Sumerpur Store as daily wager on the post of Chaukidar/Peon and getting salary on the basis of interim order dated 19.3.2010 passed by this Court. The GO dated 13.8.2015 issued by State Government to all the Government Department, Corporation as well as Local Bodies, directed regularization of all the employees, whose cutoff-date is 31.3.1996. At the time of filing of the present writ petition, Rules, 2001 fixed the cutoff-date as 29.6.1991 for regularization of daily wager, but during the pendency of the writ petition, subsequently, the GO was amended vide G.O. dated 13.8.2015 fixing cutoff-date for regularization as 31.3.1996. (Para 11, 12, 13)

B. A temporary employee who has rendered 20 years of service is entitled to pension – *Substantive Capacity* - The substantive capacity refers to capacity in which person holds the post and not necessarily to the nature and character of the post. In the expression 'substantive capacity' the emphasis imparted by the adjective 'substantive' is that a thing is substantive if it is essential part of the constituent or relating to what is essential. Therefore, when a post is vacant, however, designated in officilase, the capacity in which the person holds the post has to be ascertained by the State. A person is said to hold a post in a substantive capacity when he holds it for an indefinite period especially for a long duration in contradistinction to a person who holds it for a definite or a temporary period or holds it on probation subject to confirmation. (Para 17)

SC has held that services rendered in the work-charged establishment shall be treated as qualifying service for grant of pension. The arrears of pension shall be confined to three years only before the date of the order. Therefore, in the light of G.O. dated 13.8.2015 as well as decisions of the Apex Court, the petitioner was held entitled to get regularization of his service from the date of issuance of G.O. dated 13.8.2015 wherein the cut-off-date for regularization is mentioned as 31.1.1996. (Para 21, 22)

Writ Petition allowed. (E-4)

Precedent followed:

1. St. of U.P. Vs Putti Lal, Supreme Court, Civil Appeal No. 3634 of 1998 (Para 6)

2. Sheo Narain Nagar & ors. Vs St. of U.P. & ors. Civil Appeal No. 18510 of 2017, decided on 13.11.2017 (Para 15)

3. Yashwant Hari Katakkar Vs U.O.I. & ors. (1996)7 SCC 113 (Para 16)

4. A.P. Srivastava Vs U.O.I & ors. (1995) 3 UPLBEC 1842 (supplement) (Para 17)

5. Ram Pratap Vs St. of U.P., 2006 (4) ADJ 709 (Para 17)

6. Babu Singh Vs St. of U.P., 2006 (8) ADJ 371 (Para 17)

7. Kedar Ram-1 Vs St. of U.P., 2008 ILR (All) 659 (Para 17)

8. Ram Sajiwan Maurya Vs St. of U.P. & ors., W.P. No. 30301 (S/S) of 2004, decided on 12.08.2009 (Para 17)

9. Kanti Devi Vs St. of U.P., 2009 (9) ADJ 516 (Para 17)

10. Awadh Bihari Shukla Vs St. of U.P., 2015 (6) ADJ 186) (Para 17)

11. St. of U.P. & ors. Vs Mahendra Chaubey, 2018 (9) ADJ 829 (Para 18)

12. Prem Singh Vs St. of U. P., 2019 LawSuit (SC) 1557 (Para 20)

(Delivered by Hon'ble Shekhar Kumar Yadav, J.)

1. The instant writ petition under Article 226 of the Constitution has been filed, inter-alia, praying for the following reliefs:

i) Issue writ order or direction in the nature of mandamus directing the respondents to strictly comply the judgement and order dated 21.02.2002 passed by Hon'ble Supreme Court in Civil Appeal No.3624 of 1998 (State of U.P. vs. Putti Lal) and extend the benefit of the same in the case of the petitioner;

ii) Issue a writ order or direction for declaring Clause 4(1), 4(b), 4(3) of the U.P. Regularization of Daily Wages Appointment on Group D Post Rules, 2001 to be ultra virus and frame a scheme for the regularization of the employees who have rendered 10 years of service as per undertaking given before this Court in the case of State of U.P. vs. Putti Lal;

iii) Issue a writ order or direction in the nature of mandamus directing the

respondents to regularize the services of the petitioner on the post of Chaukidar and pay the minimum of regular pay scale pending writ petition on Group D Post;

iv) Issue a writ order or direction in the nature of mandamus directing the respondents not to orally remove the petitioner and permit him to work on the post of Chaukidar pending writ petition.

2. The facts, in brief, are that the petitioner is working in Rural Engineering Services Department, Sumerpur Store as a Chaukidar/Peon on 23.01.1995. The Rural Engineering Services Department (hereinafter referred to as the 'Department') is a permanent department having permanent officials, site, but still the petition is being paid the minimum daily wages of Rs.58 per day to be paid monthly. In the Department of Sumerpur Store, the petitioner and one Jai Ram are working as daily wager Chaukidar/Peon and there is no other permanent Chaukidar/Peon. Both are performing their duty day and night. They have completed more than 18 years of their services on 22.01.2013, but the respondent-department deliberately neither regularized their service nor provided the minimum wages as per Rules in spite of the order of this Court dated 19.03.2010.

3. On 23.05.2008, this Court passed the interim order and directed that as an interim measure, the respondents are restrained from dispensing with the services of the petitioner and petitioner will also be permitted to continue in service and shall be paid his salary till the next date of listing.

4. On 19.03.2010, this Court passed the following orders:

Heard Sri Pankaj Srivastava, learned counsel for the petitioner and learned Standing Counsel.

In an identical matter in writ petition no. 61128 of 2009 this court has passed interim order dated 19.11.2009 as under :-

"Heard Sri Pankaj Srivastava, learned counsel for the petitioner and learned Standing counsel.

The petitioners are Daily Wages Employees (Group - D) working in the Forest Department. Their services have not been regularised for want of vacancy. However, as they have completed ten years of continuous service as Daily Wagers they are entitle to minimum of the pay scale of 6th pay commission which is admissible to class - IV employees.

It is submitted that in view of the decision of the Apex Court in State of U.P. and others Vs. Putti Lal (2002)2 UPLBEC 1597 this Court has disposed of various petitions directing the Forest Department to pay minimum of the pay scale admissible to Class - IV employees. Reliance has been placed upon a judgment and order dated 17.2.2009 passed in Civil Misc. Writ Petition No.63684 of 2005 (Sada Ali Vs. Division Forest Officer). It has further been submitted that a similar order was passed on 23.10.2008 in Civil Misc. Writ Petition No.43443 of 2004 (Lakshmi Chandra Vs. State of U.P. and others). When the said order was not complied with proceedings for contempt were initiated by means of Contempt Application (Civil) of 2009 (Lakshmi Chandra Vs. Sri N.K. Janu). In the said contempt petition on behalf of Forest Department an undertaking was given that the minimum of the pay scale admissible to Class - IV employees i.e. Rs.2550/- per month, which has now been increased to Rs.6050/- per month as per the report of the VI Pay Commission shall be paid to Class - IV employees who have completed 10 years service.

In view of above facts and circumstances, an interim mandamus is

issued to the respondents either to pay the petitioners monthly salary as per the minimum of the pay scale admissible to Class - IV employees in the pay band of Rs. 6050/- or show cause within a period of one month from today."

Learned counsel for the petitioner has pointed out that the aforesaid order passed by this court has also been complied with by the respondents.

In view of above facts and circumstances, an interim mandamus is issued to the respondents either to pay the petitioner's monthly salary as per the minimum of the pay scale admissible to Class - IV employees in the pay band of Rs. 6050/- or show cause within a period of one month from today.

List after four weeks.

5. The petitioner is getting salary on the basis of above said interim order dated 19.03.2010 passed by this Court.

6. Learned counsel for the petitioner submits that petitioner is continuously working on the post of Chaukidar on daily wage basis w.e.f. 23.01.1995 and has completed 18 years of service on 22.1.2013. He further submits that neither any complaint nor any enquiry is pending against the petitioner, but the respondent-department deliberately neither regularized his services nor provided the minimum wages as per Rules in spite of the interim order of this Court dated 19.03.2010. Learned counsel for the petitioner further submits that in the forest department identically situated persons, who are working on daily wages in the department, the Division Bench of this Court directed to regularize their service and the order of this Court was affirmed by the Hon'ble Supreme Court in Civil Appeal No.3634 of 1998 (State of U.P. vs. Putti Lal) with slight modification and in the pending S.L.P. before the Hon'ble Supreme Court, the U.P. Regularization of Daily Wage Appointment on Group-D Post Rules, 2001, has been framed. Further submission is that these Rules are also applicable in all the Department of State of U.P. including the Rural Engineering Services Department. The Hon'ble Supreme Court has clearly observed that those candidates, who had rendered 10 years or more services, should be regularized and should be paid minimum of regular pay scale till they are regularized while interpreting the Rules, 2001. He further submits that on 11.01.2010, the respondent-Director Chief Engineer, Gramin Ahiyantram Sewa, U.P. Lucknow has prepared the seniority list of work charge/daily wager employees as per Rules in which the name of the petitioner was find place at Serial No.206-A. Copy of Senior List has been annexed as Annexure No. RA-3 to the rejoinder affidavit.

7. Learned counsel for the petitioner further submits that on 13.08.2015, G.O. has been issued by the State Government directing all the Government Department, Corporation as well as Local Bodies to regularize all the employees, whose cut-off-date is 31.03.1996, they have to be regularized, hence, the petitioner is entitled for regularization in the light of the interim order dated 23.05.208 passed by this Court as well as G.O. dated 13.08.2015. He further submits that since the above said prayer no.ii has already been granted by the State vide G.O. dated 13.08.2015, therefore, the present writ petition may be decided in light of the G.O. dated 13.08.2015.

8. Countering the above said submissions, on the other hand, learned Standing Counsel has vehemently opposed

the writ petition and submitted that the petitioner was engaged on the basis of availability of work and he was never engaged prior to cut-off-date, therefore, the petitioner is not entitled for the benefit of regularization as claimed by him as he himself has stated that he is working since 23.01.1995 i.e. much after the prescribed cut-off-date i.e. 26.06.1991. He further submits that under the U.P. Regularization of Daily Wages Appointment on Group-D Post Rules, 2001 (hereinafter referred to as the 'Rules, 2001'), the prescribed cut-off-date is 29.06.1991 and further the employee, who is continuously in service on the date of commencement, is eligible to be considered for regularization. He further submits that the petitioner has never been engaged by due process of law after obtaining sanction post, therefore, the relief claimed by the petitioner cannot be granted by this Court, hence, this writ petition may be dismissed.

9. I have heard the learned counsel for the petitioner, the learned Standing Counsel for the State and perused the material available on record.

10. Now the questions is whether the petitioner is entitled to regularize and get the benefit or not?

11. This is an admitted fact that the petitioner is continuously working since 1995 in Rural Engineering Services Department, Sumerpur Store as daily wager on the post of Chaukidar/Peon and there is no other permanent Chaukidar/Peon except the petitioner and one another Jai Ram, who is also working in Sumerpur Store as daily wager.

12. The Government order dated 13.08.2015 issued by State Government to all the Government Department, Corporation as well as Local Bodies to regularize all the employees, whose cut-off-date is 31.03.1996, they have to be regularized.

13. It is true that at the time of filing of the present writ petition, Rules, 2001 fixed the cut-off-date as 29.06.1991 for regularization of daily wager, but during the pendency of the writ petition, subsequently, the Government order was amended vide G.O. dated 13.08.2015 fixing cut-off-date for regularization as 31.03.1996.

14. Undisputedly, the petitioner was appointed and is continuously working since 23.01.1995 and getting salary on the basis of interim order dated 19.03.2010 passed by this Court, as such, apart from the G.O. dated 13.08.2015, the claim of the petitioner to regularize his services, be required to be taken in to consideration.

15. In the case of **Sheo Narain Nagar and others vs. State of U.P. and others in Civil Appeal No.18510 of 2017** decided on 13.11.2017, the Hon'ble Supreme Court while distinguishing the case of **Secretary, State of Karnataka and others s. Umadevi and others,(2006) 4 SCC 1**, held as under:

"8. When we consider the prevailing scenario, it is painful to note that the decision in Uma Devi (Supra) has not been properly understood and rather wrongly applied by various State Governments. We have called for the data in the instant case to ensure as to how many employees were working on contract basis or ad-hoc basis or daily-wage basis in different State departments. We can take judicial notice that widely aforesaid practice is being

continued. Though this Court has emphasised that incumbents should be appointed on regular basis as per rules but new devise of making appointment on contract basis has been adopted, employment is offered on daily wage basis etc. in exploitative forms. This situation was not envisaged by Uma Devi (supra). The prime intendment of the decision was that the employment process should be by fair means and not by back door entry and in the available pay scale. That spirit of the Uma Devi (supra) has been ignored and conveniently over looked by various State Governments/ authorities. We regretfully make the observation that Uma Devi (supra) has not be implemented in its true spirit and has not been followed in its pith and substance. It is being used only as a tool for not regularizing the services of incumbents. They are being continued in service without payment of due salary for which they are entitled on the basis of Article 14, 16 read with Article 34 (1) (d) of the Constitution of India as if they have no constitutional protection as envisaged in D.S. Akara vs. Union of India, AIR 1983 SC 130 from cradle to grave. In heydays of life they are serving on exploitative terms with no guarantee of livelihood to be continued and in old age they are going to be destituted, there being no provision for pension, retiral benefits etc. There is clear contravention of constitutional provisions and aspiration of down trodden class. They do have equal rights and to make them equals they require protection and cannot be dealt with arbitrarily. The kind of treatment meted out is not only bad but equally unconstitutional and is denial of rights. We have to strike a balance to really implement the ideology of Uma Devi (supra). Thus, the time has come to stop the situation where Uma Devi (supra) can be permitted to be flouted, whereas, this Court has interdicted such employment way back in the year 2006. The employment cannot be on exploitative terms, whereas Uma Devi (supra) laid down that there should not be back door entry and every post should be filled by regular employment, but a new device has been adopted for making appointment on payment of paltry system on contract/adhoc basis or otherwise. This kind of action is not permissible, when we consider the pith and substance of true spirit in Uma Devi (supra).

9. Coming to the facts of the instant case, there was a direction issued way back in the year 1999, to consider the regularization of the appellants. However, regularization was not done. The respondents chose to give minimum of the pay scale, which was available to the regular employees, way back in the year 2000 and by passing an order, the appellants were also conferred temporary status in the year 2006, with retrospective effect on 2.10.2002. As the respondents have themselves chosen to confer a temporary status to the employees, as such there was requirement at work and posts were also available at the particular point of time when order was passed. Thus, the submission raised by learned counsel for the respondent that posts were not available, is belied by their own action. Obviously, the order was passed considering the long period of services rendered by the appellants, which were taken on exploitative terms.

10. The High Court dismissed the writ application relying on the decision in Uma Devi (supra). But the appellants were employed basically in the year 1993; they had rendered service for three years, when they were offered the service on contract basis; it was not the case of back door entry; and there were no Rules in place for offering such kind of appointment. Thus,

the appointment could not be said to be illegal and in contravention of Rules, as there were no such Rules available at the relevant point of time, when their temporary status was conferred w.e.f. 2.10.2002. The appellants were required to be appointed on regular basis as a one-time measure, as laid down in paragraph 53 of Uma Devi (supra). Since the appellants had completed 10 years of service and temporary status had been given by the respondents with retrospective effect in the 2.10.2002, we direct that the services of the appellants be regularized from the said date i.e. 2.10.2002, consequential benefits and the arrears of pay also to be paid to the appellants within a period of three months from today."

16. In **Yashwant Hari Katakkar v. Union of India and others, 1996 (7) SCC 113**, it was held that an employee who has served more than 20 years is entitled to pension and denial of retiring pension to the petitioner on the ground of not being permanent on any post clearly is violation of Clause (e) of Fundamental Rules, 56. The department cannot keep a person temporary or on daily wages indefinitely.

17. In **A.P. Srivastava v. Union of India and others, (1995) 3 UPLBEC 1842 (supplement)**, the Supreme Court has clearly taken a view that in case of a temporary employee who has rendered 20 years of service is entitled to pension. In the expression 'substantive capacity' the emphasis imparted by the adjective 'substantive' is that a thing is substantive if it is essential part of the constituent or relating to what is essential. Therefore, when a post is vacant, however, designated in officilase, the capacity in which the person holds the post has to be ascertained by the State. The substantive capacity refers to capacity in which person holds the post and not necessarily to the nature and character of the post. Thus, a person is said to hold a post in a substantive capacity when he holds it for an indefinite period especially for a long duration in contradistinction to a person who holds it for a definite or a temporary period or holds it on probation subject to confirmation. (Refer:**Ram Pratap V. State of U.P., 2006 (4) ADJ 709, Babu Singh V. State of U.P., 2006 (8) ADJ 371, Kedar Ram-I v. State of U.P., 2008 ILR (All) 659, Ram Sajiwan Maurya v. State of U.P. and others passed in W.P. No.30301 (S/S) of 2004 decided on 12.08.2009, Kanti Devi v. State of U.P., 2009 (10) ADJ 18, Kishan Singh v. State of U.P., 2009 (9) ADJ 516, Awadh Bihari Shukla v. State of U.P., 2015 (6) ADJ 186).**

18. The Division Bench of this Court in State of U.P. and others v. Mahendra Chaubey, 2018 (9) ADJ 829, allowed the claim of pension of a seasonal collection amin, whose temporary service was followed by substantive appointment despite the petitioner therein having not rendered 10 years substantive service after regularization.

19. The principle, that emerges from the spectrum of the decisions, is that a temporary employee appointed on the regular establishment of the Government is entitled to pension under Fundamental Rule 56.

20. A three Judge Bench of the Supreme Court in **Prem Singh vs. State of Uttar Pradesh, 2019 LawSuit (SC) 1557**, was considering the question, as to whether, Rule 3(8) of the U.P. Retirement Benefits Rules, 1961 and Regulation 370 of the Civil Services Regulation of Uttar

Pradesh should be struck down having regard to the fact that the Supreme Court had upheld the pari materia provision enacted in the State of Punjab, which excluded computation of the period of work-charged services from qualifying service for pension.

21. The appellant before the Supreme Court was a work-charged employee having put in more than three decades of service, pension was declined as the appellant had not put in 10 years of regular service after regularization. The question posed was whether after regularization employees are entitled to count their past service. The Court made the following observations:

"29. We are not impressed by the aforesaid submissions. The appointment of the work-charged employee in question had been made on monthly salary and they were required to cross the efficiency bar also. How their services are qualitatively different from regular employees? No material indicating qualitative difference has been pointed out except making bald statement. The appointment was not made for a particular project which is the basic concept of the work charged employees. Rather, the very concept of work-charged employment has been misused by offering the employment on exploitative terms for the work which is regular and perennial in nature. Payment used to be made monthly but the appointment was made in the pay scale of Rs.200-320. Initially, he was appointed in the year 1978 on a fixed monthly salary of Rs.205 per month. They were allowed to cross efficiency bar also as the benefit of pay scale was granted to them during the period they served as work-charged employees they served for three to four decades and later on services have been regularized time to time by different orders. However, the services of some of the appellants in few petitions/ appeals have not been regularized even though they had served for several decades and ultimately reached the age of superannuation.

30. In the aforesaid facts and circumstances, it was unfair on the part of the State Government and its officials to take work from the employees on the work-charged basis. They ought to have resorted to an appointment on regular basis. The taking of work on the work- charged basis for long amounts to adopting the exploitative device. Later on, though their services have been regularized. However, the period spent by them in the work-charged establishment has not been counted towards the qualifying service. Thus, they have not only been deprived of their due emoluments during the period they served on less salary in work charged establishment but have also been deprived of counting of the period for pensionary benefits as if no services had been rendered by them. The State has been benefitted by the services rendered by them in the heydays of their life on less salary in work-charged establishment.

31. In view of the note appended to Rule 3(8) of the 1961 Rules, there is a provision to count service spent on work charged, contingencies or non pensionable service, in case, a person has rendered such service in a given between period of two temporary appointments in the pensionable establishment or has rendered such service in the interregnum two periods of temporary and permanent employment. The work-charged service can be counted as qualifying service for pension in the aforesaid exigencies.

32. The question arises whether the imposition of rider that such service to be

counted has to be rendered in-between two spells of temporary or temporary and permanent service is legal and proper. We find that once regularization had been made on vacant posts, though the employee had not served prior to that on temporary basis, considering the nature of appointment, though it was not a regular appointment it was made on monthly salary and thereafter in the pay scale of work-charged establishment the efficiency bar was permitted to be crossed. It would be highly discriminatory and irrational because of the rider contained in Note to Rule 3 (8) of 1961 Rules, not to count such service particularly, when it can be counted, in case such service is sandwiched between two temporary or in-between temporary and permanent services. There is no rhyme or reason not to count the service of work-charged period in case it has been rendered before regularisation. In our opinion, an impermissible classification has been made under Rule 3(8). It would be highly unjust, impermissible and irrational to deprive such employees benefit of the qualifying service. Service of work-charged period remains the same for all the employees, once it is to be counted for one class, it has to be counted for all to prevent discrimination. The classification cannot be done on the irrational basis and when respondents are themselves counting period spent in such service, it would be highly discriminatory not to count the service on the basis of flimsy classification. The rider put on that work-charged service should have preceded by temporary capacity is discriminatory and irrational and creates an impermissible classification.

33. As it would be unjust, illegal and impermissible to make aforesaid classification to make the Rule 3(8) valid and non discriminatory, we have to read down the provisions of Rule 3(8) and hold that services rendered even prior to regularisation in the capacity of work-charged employees, contingency paid fund employees or non- pensionable establishment shall also be counted towards the qualifying service even if such service is not preceded by temporary or regular appointment in a pensionable establishment.

34. In view of the note appended to Rule 3(8), which we have read down, the provision contained in Regulation 370 of the Civil Services Regulations has to be struck down as also the instructions contained in Para 669 of the Financial Handbook.

35. There are some of the employees who have not been regularized in spite of having rendered the services for 30-40 or more years whereas they have been superannuated. As they have worked in the work-charged establishment, not against any particular project, their services ought to have been regularized under the Government instructions and even as per the decision of this Court in Secretary, State of Karnataka and others vs. Uma Devi, 2006 (4) SCC 1. This Court in the said decision has laid down that in case services have been rendered for more than ten years without the cover of the Court's order, as one time measure, the services be regularized of such employees. In the facts of the case, those employees who have worked for ten years or more should have been regularized. It would not be proper to relegate them for consideration of regularisation as others have been regularised, we direct that their services be treated as a regular one. However, it is made clear that they shall not be entitled to claiming any dues of difference in wages had they been continued in service regularly before attaining the age of

superannuation. They shall be entitled to receive the pension as if they have retired from the regular establishment and the services rendered by them right from the day they entered the work-charged establishment shall be counted as qualifying service for purpose of pension.

36. In view of reading down Rule 3(8) of the U.P. Retirement Benefits Rules, 1961, we hold that services rendered in the work-charged establishment shall be treated as qualifying service under the aforesaid rule for grant of pension. The arrears of pension shall be confined to three years only before the date of the order. Let the admissible benefits be paid accordingly within three months. Resultantly, the appeals filed by the employees are allowed and filed by the State are dismissed."

22. In view of the aforesaid discussions, in my opinion, the G.O. dated 13.08.2015 as well as decisions of the Apex Court, the petitioner is entitled to get regularization of his service from the date of issuance of G.O. dated 13.08.2015 wherein the cut-off-date for regularization is mentioned as 31.01.1996.

23. In view thereof, the writ petition succeeds and the same is allowed. Since the petitioner has completed 20 years of his service and comes under the G.O. dated 13.08.2015, this Court directed that the service of the petitioner be regularized from the date i.e. 13.08.2015 and the consequential benefits as well as arrears of pay also to be paid to the petitioner within a period of two months from today. The petitioner is also entitled to get seniority and pension, if he has been retired from his service.

24. It is made clear that petitioner shall not be entitled to differences of arrears prior to the period of his regularization. The petitioner's services would be counted as qualified service for grant of retiral benefits including pension.

25. No order as to cost.

(2020)12ILR A671
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.11.2020

BEFORE

THE HON'BLE PANKAJ MITHAL, J.

Writ -A No. 8797 of 2020

Mohd. Haidar ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Surendra Prasad Mishra

Counsel for the Respondents:
C.S.C., Sri Daya Ram Yadav

A. Service Law – Compassionate Appointment - Uttar Pradesh Recruitment of Dependants of Government Servant Dying in Harness Rules, 1974: Rule 5 - There is no statutory requirement under law for seeking permission of Basic Shiksha Adhikari for the purpose of re-marriage by an employee, who has been appointed on compassionate basis. The petitioner has unnecessarily invoked the writ jurisdiction of this Court. (Para 6, 7)

Right to marry with person of choice is an integral part of Article 21 of the Constitution of India - Rule 5 only provides that the person employed on compassionate basis shall maintain other members of the family of the deceased government servant and in case he neglects or refuses to maintain them, his services may be terminated. Merely because petitioner has been appointed on compassionate basis, he cannot be forced to sacrifice his/her fundamental right of remarriage, after the death

of the earlier spouse. A person would not earn any disqualification on this score and warrant any disciplinary proceedings. (Para 5)

Writ Petition dismissed. (E-4)

Precedent followed:

1. Smt. Santoshi Vs St. of U.P. & 2 ors., Writ-A No. 834 OF 2020, decided on 21.01.2020 (Para 5)

(Delivered by Hon'ble Pankaj Mithal, J.)

1. Heard Sri Surendra Prasad Mishra, learned Counsel for the petitioner and learned Standing Counsel for State-respondent No.1.

2. Briefly stated facts of the present case are that the petitioner was appointed on compassionate basis on the death of his wife. The petitioner now intends to marry the younger sister of his wife. Therefore, he seeks permission from Basic Shiksha Adhikari where he is employed to re-marry.

3. Learned Standing Counsel submits that there is no requirement under law for getting any permission for re-marriage by an employee. The petitioner appears to have applied for permission to re-marry in view of Rule 5 of the 1974 Rules.

4. Rule 5 of the Uttar Pradesh Recruitment of Dependants of Government Servant Dying in Harness Rules, 1974 (hereinafter referred to as 'the Rules, 1974') provides as under:-

"5. Recruitment of a member of the family of the deceased - (1) In case a Government servant dies in harness after the commencement of these rules, and the spouse of the deceased Government servant is not already employed under the Central government or a State Government or a Corporation owned or controlled by the Central Government or a State Government, one member of his family who is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government shall, on making an application for the purpose, be given a suitable employment in Government Service on a post except the post which is within the purview of the Uttar Pradesh Public Service Commission, in relaxation of the normal recruitment rules if such person -

(i) fulfils the educational qualifications prescribed for the post:

Provided that in case appointment is to be made on a post for which typewriting has been prescribed as an essential qualification and the dependent of the deceased Government servant does not possess the required proficiency in typewriting, he shall be appointed subject to the condition that he would acquire the requisite speed of 25 words per minute in typewriting well within one year and if he fails to do so, his general annual increment shall be withheld and a further period of one year shall be granted to him to acquire the requisite speed in typewriting and if in the extended period also he again fails to acquire the requisite speed in typewriting, his services shall be dispensed with.

Provided further that in case appointment is to be made on a post for which the knowledge of computer operation and typewriting has been prescribed as an essential qualification and the dependent of the deceased Government servant does not possess the required proficiency in computer operation and typewriting, he shall be appointed subject to the condition that he would acquire the 'CCC' certificate in computer operation awarded by the DOEACC Society or a certificate equivalent thereto from an Institution

recognized by the Government together with the required speed of 25 words per minute in typewriting well within one year and, if he fails to do so, his general annual increment shall be withheld and a further period of one year shall be granted to him to acquire the required certificate in computer operation and the required speed in typewriting and if in the extended period also he again fails to acquire the required certificate in computer operation and the required speed in typewriting, his services shall be dispensed with."

(ii) is otherwise qualified for Government service; and

(iii) makes the application for employment within five years from the date of the death of the Government servant:

Provided that where the State Government is satisfied that the time limit fixed for making the application for employment causes undue hardship in any particular case, if may dispense with or relax the requirement as it may consider necessary for dealing with the case in a just and equitable manner:

Provided further that for the purpose of the aforesaid proviso, the person concerned shall explain the reasons and give proper justification in writing regarding the delay caused in making the application for employment after the expiry of the time limit fixed for making the application for employment along with the necessary documents/proof in support of such delay and the Government shall, after taking into consideration all the facts leading to such delay, take the appropriate decision."

(2) As far as possible, such an employment should be given in the same department in which the deceased Government servant was employed prior to his death.

(3) Every appointment made under sub-rule (1) shall be subject to the condition that the person appointed under sub-rule (1) shall maintain other members of the family of deceased Government servant, who were dependent on the deceased Government servant immediately before his death and are unable to maintain themselves.

(4) Where the person appointed under sub-rule (1) neglects or refuses to maintain a person to whom he is liable to maintain under sub-rule (3), his services may be terminated in accordance with the Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999, as amended from time to time."

5. The aforesaid Rule nowhere stipulates that any permission is required by a person employed on compassionate basis for re-marriage. It only provides that the person employed on compassionate basis shall maintain other members of the family of the deceased government servant. It also provides that in case he neglects or refuses to maintain them, his services services may be terminated. This does not mean that there is any rider on the right of the employee to re-marry. This is what has also been laid down by this Court in the case of Smt. Santoshi v. State of U.P. and 2 others, Writ-A No. 834 of 2020, decided on 21.1.2020. It has been observed that right to marry with person of choice is an integral part of Article 21 of the Constitution of India. Merely because petitioner has been appointed on compassionate basis, he cannot be forced to sacrifice his/her fundamental right of re-marriage, after the death of the earlier spouse. A person would not earn any disqualification on this score and warrant any disciplinary proceedings.

6. Thus, there is no provision under law which requires any person to seek permission from the employer for re-marriage.

7. In view of the aforesaid facts and circumstances, as there is no statutory

requirement under law for seeking permission of Basic Shiksha Adhikari for the purpose of re-marriage by an employee, who has been appointed on compassionate basis, I am of the opinion that the petitioner has unnecessarily invoked the writ jurisdiction of this Court.

8. The petition as such is misconceived and is dismissed.

(2020)12ILR A674
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.11.2020

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Writ-A No. 9511 of 2020

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

Counsel for the Petitioner:
Sri M.D. Singh Shekhar, Sri Ram Dayal Tiwari, Sri Vaibhav Goswami

Counsel for the Respondents:
C.S.C.

A. Service Law – U.P. Government Servant (Discipline and Appeal) Rules, 1999 - Rule 11, 12, 13-Disciplinary Enquiry – Alternative remedy - Alternative remedy is not a bar to entertain a writ petition where there has been violation of principles of natural justice. (Para 25)

An appeal, generally speaking, is a rehearing by a superior authority/Court on both law and fact. In the instant case, the petitioner has not challenged the enquiry report in his objection against the second show-cause notice on the ground of violation of the principle of natural justice. Since petitioner is raising the plea of violation of principles of natural justice for the first time in the writ petition, and the question whether the Enquiry Officer had fixed any date, time and place for conducting the enquiry is essentially a question of fact, this issue can very well be raised by the petitioner in appeal, which can be considered by the appellate authority under Rule 12 of Rules, 1999 as it is empowered to consider all factual aspect of the matter. (Para 26, 27)

It is apparent from the reading of Rules 11, 12 and 13 of Rules, 1999 that it provides a complete mechanism to disseminate justice if any injustice has been caused by the disciplinary authority. (Para 28)

Writ Petition dismissed. (E-4)

Precedent followed:

1. Nivedita Sharma Vs Cellular Operators Assc. of India & ors., (2011) 14 SCC 337 (Para 20)

2. Thansingh Nathmal & ors. Vs Superintendent of Taxes, Dhubri & ors. s, AIR 1964 SC 1419 (Para 21)

(Delivered by Hon'ble Saral Srivastava, J.)

1. Heard Sri M.D. Singh Shekhar, learned Senior Counsel assisted by Sri Ram Dayal Tiwari, learned counsel for the petitioner and learned Standing Counsel for respondent nos.1 to 4.

2. The brief facts of the case are that petitioner while working as Lekhpal was suspended by Up-Ziladhikari, Bansgaon, Gorakhpur by order dated 06.10.2018 in contemplation of enquiry. The charge sheet was issued on 24.01.2019 against the petitioner. In the charge sheet, four charges were levelled against the petitioner.

3. The main charge against the petitioner was that he made wrongful entries in respect of certain gatas in fasli year 1424-1429F. Besides this, the other charge against the petitioner was for

causing loss to the State Government to the tune of Rs.5 crores.

4. The Tehsildar, Sadar, Gorakhpur was appointed as Enquiry Officer, who conducted the enquiry and found all the charges against the petitioner proved. Thereafter, the Enquiry Officer submitted its enquiry report to the Disciplinary Authority on 12.07.2020.

5. The Disciplinary Authority/S.D.M., Bansgaon, Gorakhpur on 16.07.2020 issued second show-cause notice alongwith enquiry report to the petitioner and granted him one week time to submit an objection against the enquiry report.

6. The petitioner on 22.07.2020 submitted objection against the enquiry report to the Disciplinary Authority/S.D.M., Bansgaon, Gorakhpur. The Disciplinary Authority/S.D.M. Bansgaon, Gorakhpur found the charges against the petitioner proved, and consequently, he passed an order on 27.07.2020 dismissing the petitioner from service, which is impugned in the present petition.

7. Learned Standing Counsel has raised a preliminary objection against the maintainability of the writ petition as the petitioner has the statutory remedy of appeal under Rule 11 of U.P. Government Servant (Discipline and Appeal) Rules, 1999 (hereinafter referred to as 'Rules, 1999') which provides that an appeal shall lie to the next higher authority from an order passed by the Disciplinary Authority.

8. To the preliminary objection of the learned Standing Counsel, Sri M.D. Singh Shekhar learned Senior Counsel for the petitioner submits that present is a case where impugned order has been passed in violation of principles of natural justice since the Enquiry Officer did not fix any date, time and place for conducting the enquiry, and further the Enquiry Officer did not summon anyone to prove the reports against the petitioner and opportunity of cross-examination was not given to the petitioner. In support of his contention, he has placed reliance upon paragraph 21 of the writ petition which is being extracted hereinbelow:-

"That the Enquiry Officer submitted the report dated 12.7.2020 without any oral hearing and without fixing the date, time and place to the petitioner for his defence. The Enquiry Officer has not summoned anyone to verify the report, as such opportunity of cross examination has never been given to the petitioner. True copy of the enquiry report dated 12.7.2020, is being filed herewith and marked as Annexure-15 to the present writ petition."

9. Thus, he submits that alternative remedy is not an absolute bar to entertain a writ petition where impugned order has been passed in violation of principles of natural justice, and thus, the writ petition against the impugned order is maintainable and this Court may entertain the same.

10. I have considered the rival submissions of the parties and perused the record.

11. Before adverting to the merits of the case, it would be relevant to refer Rules, 11, 12 & 13 of Rules, 1999 which are being extracted herein below:-

"11. Appeal. - (1) Except the orders passed under these rules by the Governor, the Government servant shall be entitled to

appeal to the next higher authority from an order passed by the disciplinary authority.

(2) The appeal shall be addressed and submitted to the appellate authority. A Government servant preferring an appeal shall do so in his own name. The appeal shall contain all material statements and arguments relied upon by the appellant.

(3) The appeal shall not contain any intemperate language. Any appeal, which contains such language may be liable to be summarily dismissed.

(4) The appeal shall be preferred within 90 days from the date of communication of impugned order. An appeal preferred after the said period shall be dismissed summarily.

12. Consideration of Appeals. - The appellate authority shall pass such order as mentioned in clauses (a) to (d) of Rule 13 of these rules, in the appeal as he thinks proper after considering.

(a) Whether the facts on which the order was based have been established;

(b) Whether the facts established afford sufficient ground for taking action; and

(c) Whether the penalty is excessive, adequate or inadequate;

13. Revision. - Notwithstanding anything contained in these rules, the Government may of its own motion or on the representation of concerned Government servant call for the record of any case decided by an authority subordinate to it in the exercise of any power conferred on such authority by these rules; and

(a) confirm, modify or reverse the order passed by such authority; or

(b) direct that a further inquiry be held in the case, or

(c) reduce or enhance the penalty imposed by the order; or

(d) make such other order in the case as it may deem fit;"

12. Rule 11(1) of Rules, 1999 provides that except the orders passed by the Governor, under these rules, an employee can file an appeal to the next higher authority from an order passed by the disciplinary authority.

13. Rule 11 (2) of Rules, 1999 provides that appeal shall contain all material statements and arguments.

14. Rule 11 (3) of Rules, 1999 provides that appeal may not contain any intemperate language and if it contains such language, the appeal may be liable to be dismissed summarily.

15. Rule 11 (4) of Rules, 1999 provides limitation for filing the appeal is 90 days from the date of communication of the order.

16. Rule 12 of Rules, 1999 provides that the appellate authority is empowered to pass such order as mentioned in clauses (a) to (d) of Rule 13 of Rules, 1999. It also provides elaborately how the appeal is to be considered by the appellate authority.

17. Rule 13 of Rules, 1999 provides the power of revision and also orders which could be passed by the appellate authority under Rule 12 as well as revisional authority.

18. Reading of Rule 11,12 & 13 of Rules 1999 makes it amply clear that Rules,1999 provides the manner in which the appeal is to be considered by the appellate authority and what order can be passed by the appellate authority.

19. At this stage, it would be apt to refer judgements of Apex Court wherein Apex Court has held that when a statutory forum is created by law for redressal of grievance, a writ petition should not be entertained ignoring the statutory provision.

20. In the case of Nivedita Sharma Vs. Cellular Operators Association of India and Others 2011 (14) SCC 337, against an order passed by the State Commission under the Consumer Protection Act, 1986, the respondent-Cellular Operators Association approached the High Court. The High Court entertained the writ petition and allowed it. Against the order of High Court, an appeal was preferred by the appellant- Nivedita Sharma before the Apex Court. The Apex Court held that there are certain exceptions where the High Court can entertain a writ petition even if an alternative remedy is provided, but it should not be done as a matter of course particularly when an effective alternative remedy is provided. Paragraphs 15 & 16 of the said judgement are being extracted herein below:-

"15. In the judgments relied upon by Shri Vaidyanathan, which, by and large, reiterate the proposition laid down in Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad AIR 1969 SC 556, it has been held that an alternative remedy is not a bar to the entertaining of writ petition filed for the enforcement of any of the fundamental rights or where there has been a violation of the principles of natural justice or where the order under challenge is wholly without jurisdiction or the vires of the statute is under challenge.

16. It can, thus, be said that this Court has recognized some exceptions to the rule of alternative remedy. However, the proposition laid down in Thansingh Nathmal v. Superintendent of Taxes AIR 1964 SC 1419 and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for rederssal of grievance still hold field."

21. In the case of Thansingh Nathmal and Others Vs. Superintendent of Taxes, Dhubri and Others AIR 1964 SC 1419 the Apex Court has held that ordinarily, the High Court should not entertain a petition for a writ under Article 226 where the petitioner has an equally efficacious remedy. Paragraph 7 of the said judgement is being extracted hereinbelow:-

"7. Against the order of the Commissioner an order for reference could have been claimed if the appellants satisfied the Commissioner or the High Court that a question of law arose out of the order. But the procedure provided by the Act to invoke the jurisdiction of the High Court was bypassed. The appellants moved the High Court challenging the competence of the Provincial Legislature to extend the concept of sale, and invoked the extra-ordinary jurisdiction of the High Court under Art. 226 and sought to re-open the decision of the taxing authorities on questions of fact. The jurisdiction of the High Court under Art. 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restrictions except the territorial restrictions which are expressly provided in the Articles. But the exercise of the jurisdiction is discretionary: it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction

demands that it will ordinarily be exercised subject to certain self-imposed limitations. Resort to that jurisdiction is not intended as an alternative remedy for relief which may be obtained in a suit or other mode prescribed by statute. Ordinarily the Court will not entertain a petition for a writ under Art. 226, where the petitioner has an alternative remedy, which without being unduly onerous, provides an equally efficacious remedy. Again the High Court does not generally enter upon a determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed. The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Art. 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Art. 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up."

22. Now, in the case in hand, the argument of learned Counsel for the petitioner that if there is breach of principles of natural justice, the alternative remedy is not an absolute bar to the maintainability of the writ petition is being tested on the anvil of the principles laid down by the Apex Court in the aforesaid cases.

23. In the instant case, the petitioner has stated in paragraph 21 of the writ petition that the Enquiry Officer conducted the enquiry without fixing any date, time and place for conducting the enquiry. A bald assertion has been made in paragraph 21 of the petition regarding violation of principles of natural justice. At this point, it would be pertinent to refer to the objection of the petitioner against the enquiry report before the Disciplinary Authority, which is appended as Annexure 17 to the writ petition.

24. A perusal of the objection filed by the petitioner to the second show-cause notice dated 16.07.2020 reveals that challenge to enquiry report was not laid by the petitioner on the ground that Enquiry Officer did not fix any date, time and place for conducting the enquiry and Enquiry Officer did not summon any witness to verify the reports, and opportunity of cross-examination was not given to the petitioner. This plea has been set up for the first time in the writ petition. Further, no assertion has been made in the writ petition as to what prejudice was suffered by the petitioner by the aforesaid act of enquiry officer.

25. There is no quarrel to the proposition of law that alternative remedy is not a bar to entertain a writ petition where there has been violation of principles of natural justice.

26. However, it is also settled in law that an appeal, generally speaking, is a rehearing by a superior authority/court on both law and fact. In the instant case, the petitioner has not challenged the enquiry report in his objection against the second show-cause notice on the ground of violation of the principle of natural justice. Since petitioner is raising the plea of violation of principles of natural justice for

the first time in the writ petition, and the question whether the Enquiry Officer had fixed any date, time and place for conducting the enquiry is essentially a question of fact, this issue can very well be raised by the petitioner in appeal, which can be considered by the appellate authority under Rule12 of Rules, 1999 as it is empowered to consider all factual aspect of the matter.

27. It is further relevant to mention that Appellate Authority is vested with the powers to confirm, modify or reverse the order passed by the disciplinary authority; or it may direct that further inquiry be held in the case; or it may reduce or enhance the penalty imposed by the order; or it may make such other order in the case as it may deem fit.

28. Thus, it is apparent from the reading of Rules 11, 12 & 13 of Rules, 1999 that it provides a complete mechanism to disseminate justice if any injustice has been caused by the disciplinary authority, therefore, this Court finds it appropriate to relegate the petitioner to the remedy of appeal under the Rules, 1999. Hence, the writ petition is not maintainable and accordingly, dismissed on the ground of alternative remedy.

29. However, in the interest of justice, it is provided that if petitioner prefers any appeal within a period of eight weeks from today, the appellate authority shall consider it on merits without entering into the question of limitation.

(2020)12ILR A679
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.12.2020

BEFORE
THE HON'BLE CHANDRA DHARI SINGH, J.

Service Single No. 14731 of 2020
connected with S.S. No. 14024 of 2020 and S.S. No. 13197 of 2020

Dr. Narendra Singh Sengar & Ors. **...Petitioners**

Versus

State of U.P. & Ors. **...Respondents**

Counsel for the Petitioners:
Laltaprasad Misra, Prafulla Tiwari.

Counsel for the Respondents:
C.S.C.

A. Service Law – Cancellation of contractual appointment - Inquiry – The State cannot take away employment of the petitioners who are not responsible for any irregularities in the appointment without proper inquiry of each appointment individually or appraisal of performance of every employee individually. Not approval of any Government Order by Cabinet, cannot said to be a wrong committed by the employee and therefore, the petitioners cannot suffer for any irregularities committed by Government authorities. (Para 27, 29, 30)

In the present case, services of all the petitioners have been cancelled and a decision for no further renewal of any contractual employee in Homeopathic Colleges has been taken. It is clear law that eligibility of any candidate is to be reckoned not from his or her selection but in terms of rules or advertisement for the respective post. It is also settled law that authority publishing the advertisement/notification or any GO represents to the members of the public that it is bound by such representation. Any complaint regarding an appointment should be examined and the decision be taken individually and not by a general order. The appointment of the petitioners was made after adopting the procedure prescribed in the statute as well as the advertisement dated 15.12.2017 and if the appointment is cancelled by a general order, without appointing teachers on regular basis by UPPSC, then the students who are studying in the said Homeopathic Colleges may also suffer irreparably. (Para 29)

B. The contractual employees can only be replaced by regularly selected persons - It

is settled law that one set of contractual employee should not be replaced by another set of contractual employees unless it is found by the authorities that the persons working on contractual basis are not working satisfactory. (Para 28)

C. Legitimate Expectation - One amongst several tools incorporated by the Court to review administrative action. A person may have a reasonable or legitimate expectation of being treated in a certain way by the administrative authorities owing to some consistent practice in the past or an express promise made by the concerned authority.

There is also a legitimate expectation of the petitioners who have been appointed on contractual basis in different colleges on their respective posts after following due process. (Para 30, 31)

Writ Petitions allowed. (E-4)

Precedent followed:

1. Navjyoti Coop. Group Housing Society Vs U.O.I., (1992) 4 SCC 477 (Para 32)

Present petition assails orders dated 14.08.2020, passed by the State Government.

(Delivered by Hon'ble Chandra Dhari Singh, J.)

1. Since common questions are involved in all the above-mentioned three writ petitions, they are being decided together.

2. Brief facts of the case are as follows:

(i) In the State of U.P. in various Government Homeopathic Medical Colleges, the number of qualified teachers selected through Uttar Pradesh Public Service Commission (hereinafter be referred as 'UPPSC') were not available and, therefore, the State Government issued Government Order dated 28.05.2015 giving out that teachers of various categories be appointed on contract basis through a selection based on interview from amongst the teachers having retired from various Government Homeopathic Medical Colleges situated in the State of U.P. or outside the State of U.P.

(ii) A selection for appointment on contract basis in accordance with the provisions contained under Government Order dated 28.05.2015 took place but the requisite hands for teaching in various Government Homeopathic Medical Colleges including the newly created Government Homeopathic Medical Colleges in various districts could not be made available. Therefore, in order to meet the requirement of teachers of various categories, such as, Lecturers or Readers or Professors, the State Government issued Government order dated 27.10.2017 modifying the earlier Government order dated 28.05.2015. The difference between the two government orders are that as per Government Order dated 28.05.2015 only teachers having retired from State Government Homeopathic Medical Colleges could be appointed whereas as per Government Order dated 27.10.2017 it was inter-alia provided that the teachers either serving or having retired from Government Homeopathic Medical Colleges located inside the State of U.P. or outside or retired or serving teachers of Private Homeopathic Medical Colleges located inside the State of U.P. or outside having requisite experience could also be appointed.

(iii) In the Government Order dated 28.05.2015, it was provided that the appointment of the teachers retired from Government Homeopathic Medical Colleges could be made for a period of one year or till the availability of the candidates

selected by the UPPSC whereas in the Government order dated 27.10.2017 it was provided that the teachers to be appointed, who could be either retired or serving teachers of Government Homeopathic Medical Colleges or from Private recognized Government Homeopathic Medical Colleges, could continue till the availability of the regularly selected candidate from UPPSC or till attaining the age of 65 years.

(iv) In furtherance of the Government order dated 27.10.2017, an advertisement was issued on 15.12.2017 mentioning that contractual appointment was to be made for the period till the availability of regularly selected candidate or till attaining the age of 65 years. It was further mentioned in the advertisement that the appointment was to be made for a period of one year or till the availability of the regularly selected candidate from the UPPSC or till attaining the age of 65 years, whichever is earlier.

(v) The petitioners submitted their candidature and they were subjected to selection process as prescribed under Government order dated 27.10.2017, and selected and appointed on their respective posts.

(vi) On 26.03.2019 some deliberations through Video Conferencing took place under Chairmanship of Secretary, Department of AYUSH, U.P. with participation of Regional Ayurvedic and Unani Officers, District Homeopathic Officers and Principals of Ayurvedic and Unani and Homeopathic Medical Colleges. The said video conferencing deliberations provided that contractual appointment of employees be made only for a period of 11 months and in no circumstance the employees shall be paid salary for twelve months. On the basis of the drawn up proceedings of the deliberations through video conferencing as held on 26.03.2019, the Director, Homeopathy, U.P., Lucknow issued a letter dated 29.03.2019 addressed to all Principals of Government Homeopathic Medical Colleges and Hospitals, U.P. and to all District Homeopathic Officers of the State of U.P. directing that the action be taken on the basis of the decision taken through the video conferencing dated 26.03.2019.

(vii) The Director, Homeopathic, U.P./respondent no.2 issued a letter dated 20.06.2019 instructing all the Principals of Government Homeopathic Medical Colleges and Hospitals of U.P. to discharge the petitioners till execution of any fresh contract and in furtherance of the same the petitioners were discharged on different dates after completing one year of service.

(viii) Thereafter, the Director issued letter dated 06.07.2019 providing that in the public interest/governmental functioning interest, it was necessary and compulsive to continue to engage teachers on contract basis and the teachers already appointed be engaged on contract basis for a period of 11 months after creating a break of seven days. The names of all the petitioners find mention in the list attached to the letter dated 06.07.2019.

(ix) Respondent No.1 i.e. State Government issued two orders on 14.08.2020, in which, it has been stated that there are many complaints regarding renewal of tenureship on contractual basis pending before the Uttar Pradesh Lokayukt, Lucknow and, therefore, renewal of the tenure of the petitioners on contractual basis on various posts is not liable to be done. It is also contained in the said order that new process for selection on contractual basis for various specified posts may be initiated. Vide another order of the same day i.e. 14.08.2020, Government Order dated 11.04.2018 was cancelled.

Hence, the instant writ petition has been filed challenging aforesaid orders dated 14.08.2020.

3. Dr. L.P. Mishra, learned counsel appearing for the petitioner has submitted that bare perusal of the impugned orders dated 14.08.2020 reveals that the foundation for passing the impugned orders is an inquiry report, which was submitted by Ms. V. Hekali Jhemomi, Secretary, Medical Department, U.P. Government. It is submitted that on the same matter earlier an inquiry was conducted by Shri R.N. Bajpai, Special Secretary, AYUSH Department, Government of U.P., who submitted his inquiry report before the Government but it appears from the perusal of the impugned orders that the inquiry report of Shri R.N. Bajpai has not been considered by respondent no.1 while passing the impugned orders.

4. It has further been submitted that findings given in the impugned orders dated 14.08.2020 are contrary to the documents on record because while issuing Government Order dated 11.04.2018, earlier Government Orders dated 28.05.2015 and 27.10.2017 were not superseded. Therefore, the impugned orders dated 14.08.2020, which has been passed on the inquiry report of Ms. V. Hekali Jhemomi, are perverse in nature and cannot be relied upon.

5. Dr. Mishra has submitted that in all the nine Homeopathic Medical Colleges where the appointments were done on contractual basis, posts were vacant since no regular incumbents were available due to non-selection by UPPSC. It has been submitted that the matter was referred to the State Government by referring the provisions of Government Orders dated 28.05.2015 and 27.10.2017. Thereafter, State Government directed respondent no.2 to hold selection by adopting the procedure as prescribed in the aforesaid Government Orders.

6. Dr. Mishra has submitted that the aforesaid decision for appointment of teachers on contractual basis in Homeopathic Medical Colleges were taken by State Government in peculiar and special circumstances since the working in almost all Homeopathic Medical Colleges in the State of U.P. were paralysed due to absence of regular teachers and, therefore, there is no fault on the part of the petitioners. Apart from this, before issuing Government Order dated 11.04.2018, all the Government Orders, issued earlier, were considered and only thereafter, a conscious decision was taken and Government Order dated 11.04.2018 was issued.

7. Dr. Mishra has submitted that the respondents are trying to appoint other contractual employees of their own choice on different posts in place of the petitioners by ousting them. It is settled law that one set of contractual employees cannot be replaced by another set of contractual employees and, therefore, the action of the respondents to appoint other contractual employees in place of the petitioners is against the settled law.

8. It has been submitted that action of the respondents in extending/renewing the tenure of contractual employees in the Nine State run Homeopathic Colleges in Uttar Pradesh on the basis of pick and choose, and denying the same benefit to the petitioners despite their eligibility and entitlement as per provisions of Government Orders dated 28.05.2015 & 27.10.2017 as well as the terms and conditions of their respective appointment orders, is not only illegal, arbitrary and malafide but discriminatory as well as contrary to Articles 14 & 16 of Constitution of India.

9. Dr. Mishra has submitted that term of contractual appointments of all the petitioners are required to be renewed/extended for further twelve months because till date, regularly selected candidates from UPPSC are not available. It has been submitted that no irregularity has been found against the contractual appointments of the petitioners and thus, refusal of renewal/extension of their contractual period is illegal and not sustainable in the eyes of law. It has been submitted that there is also a legitimate expectation of the petitioners that their tenure for contractual employment may be renewed/extended from time to time and they may be allowed to perform their duties till regularly selected candidates are available from UPPSC or till they attain the age of 65 years. Dr. Mishra has vehemently submitted that due to illegal and arbitrary action of the respondents, Fundamental Right of the petitioners as enshrined under Article 21 of the Constitution of India has been curtailed.

10. It has been submitted that instead of allowing the petitioners to continue to work and function as Lecturers or Readers or Professors in Government Homeopathic Medical Colleges in the State of U.P. till they attain the age of 65 years or till a regularly selected candidate is made available by the UPPSC, the State Government has issued the impugned Order dated 14.08.2020 and has written a letter dated 14.08.2020 addressed to the Director, Homeopathic, U.P., Lucknow.

11. It has been submitted that the impugned letter/order dated 14.08.2020 is not referable to Article 162 and 166 of the Constitution of India and therefore, the same apart from being illegal and arbitrary is also without jurisdiction and has also been passed prior to passing of the Government Order dated 14.08.2020 by means of which Government Order dated 11.04.2018 has been cancelled. It has been submitted that the impugned Government Order dated 14.08.2020 by means of which Government Order dated 11.04.2018 has been cancelled cannot at all be given retrospective effect so as to disturb the already concluded selection process followed by issuance of appointment letters, and the same is to be followed prospectively.

12. Dr. Mishra, learned counsel, has submitted that the ground while passing impugned order/letter dated 14.08.2020 to the effect that still the State Government is receiving many complaints in regard to selection and appointment of teachers on contract basis in Government Homeopathic Medical Colleges in the State of U.P., is illegal and arbitrary and could not have been a ground, inasmuch as, in every selection several complaints are made by un-selected candidates and merely because complaints are made or received cannot mean that the selection and appointment was not valid or was illegal. The impugned exercise has been undertaken without issuing any notice to the petitioners and without affording any opportunity of hearing to them. The petitioners cannot at all be made to suffer on the ground as to whether a policy decision has been taken by the Cabinet or not or a particular Government Order has been issued after taking approval from the Cabinet or not. The petitioners being bonafinde candidates and being fully eligible submitted their candidature pursuant to the advertisement and were selected and appointed either as Lecturers or Readers or Professors in Government Homeopathic Medical Colleges in the State of U.P. on the basis of their merits.

13. It is submitted that the service record of the petitioners are unblemished. All the petitioners have rendered satisfactory service and there has been no dissatisfaction on the part of their superiors nor is there any complaint against their functioning. On a general complaint, the inquiry was initiated but the petitioners have not been made party by way of issuing show cause or inviting any explanation on the complaint and also it is not disclosed by the respondent vide the impugned order that the complaint received against which petitioner and whether service of any petitioner was unsatisfactory or appointment of any petitioner is contrary to any Government Order. It has been submitted that if any complaint is received regarding illegal appointment then the department/respondent might examine each case individually and pass appropriate order against each petitioner separately but discontinuing the service of the petitioners by passing a general impugned order is contrary to the earlier Government Order dated 28.05.2015 and 27.10.2017 and the advertisement dated 15.12.2017.

14. It is submitted that the petitioners have got a legal right to continue till the availability of the regularly selected candidates through UPPSC or till attaining the age of 65 years and the respondents have corresponding legal obligation to allow the petitioners to continue till availability of the regularly selected candidates from UPPSC or till attaining the age of 65 years by the petitioners by adhering to the terms of Government Order dated 27.10.2017.

15. Per Contra, Shri Ranvijay Singh, learned counsel for the State has vehemently opposed the submissions of petitioner's counsel and submitted that the advertisement was issued as per the provisions/conditions contained in Government Order dated 27.10.2017 for filling up the posts of teachers in 09 Government Homeopathic Colleges on contractual basis. In the year 2018, the vacant posts of teachers were filled up through departmental selection committee on the basis of interview on contractual basis, whose term had already completed in the year 2019 and thereafter, their contracts were renewed for 11 months.

16. It has been submitted that on the aforesaid contractual appointments, a complaint was filed before Hon'ble Lokayukt, U.P., who vide letter dated 02.09.2019, directed the State Government to conduct an inquiry in respect of irregularities committed in the contractual appointments of teachers in Government Homeopathic Medical College. In pursuance of the direction, Ms. V. Hekali Jhemomi, Secretary, Department of Medical and Health, Government of U.P. was appointed as inquiry officer who conducted inquiry and submitted a report stating therein that the appointments were made on contractual basis in the Homeopathy Medical Colleges vide Government Order dated 11.04.2018. It was further mentioned in the inquiry report that Government Order dated 11.04.2018 was not approved by Hon'ble Council of Ministers, whereas earlier Government Orders dated 28.05.2015 and 27.10.2017 were issued with the approval of Hon'ble Council of Ministers, Government of U.P., as such contractual appointments made on the basis of Government Order dated 11.04.2018 are not legally sustainable. It has been submitted that the inquiry officer made recommendation for termination of the contractual appointment of the teachers and therefore, the contractual term of the petitioners have not been renewed further.

17. It is further submitted that several complaints were received in respect of the aforementioned appointments and the matter is still being before the Hon'ble Lokayukt. The State Government vide order/letter dated 14.08.2020 cancelled the appointment of contractual teachers and vide office memorandum dated 14.08.2020, the decision for not renewing the term of aforementioned contractual appointments was taken. It was also decided that fresh selection process for contractual appointments in terms of Government Order dated 28.05.2015 be carried out.

18. It is submitted that the petitioners have twisted the facts mentioned in the Government Order dated 27.10.2017 just to mislead this Hon'ble Court, whereas the correct facts are mentioned in the Para-4 (Aa) (2) of the afore-mentioned Government Order which reads as under:-

"प्रदेश एंव प्रदेश के बाहर मान्यता प्राप्त निजी होम्योपैथिक मेडिकल कालेजों एंव चिकित्सालयों के सेवारत या सेवानिवृत्त ऐसे शिक्षकों जिनके द्वारा सेवाकाल में कम से कम 10वर्ष का शिक्षण कार्य अनिवार्य रूप से सम्पादित किया गया हो, को राजकीय होम्योपैथिक मेडिकल कालेजों में प्रोफेसर/रीडर/प्रवक्ताओं के रिक्त पदो के सापेक्ष संविदा के आधार पर रखा जाये। ऐसे शिक्षकों को उनकी 65 वर्ष की आयु तक अथवा लोक सेवा आयोग से अभ्यर्थी उपलब्ध होने तक ही रखे जाने का प्राविधान किया जाये"

19. Learned counsel has submitted that in view of the above it is crystal clear that the appointments were to be made on contractual basis and the term of contract of employee is only up to 65 years of age or till availability of selected candidates from Public Service Commission. It is submitted that these contractual appointments do not fall within the regular appointments, therefore, these appointments were made on the basis of contract only for 11 months and after completion of afore-mentioned term, as per the decision taken by the Government, the contract of the petitioners were not renewed.

20. It is further submitted that Ms. V. Hekali Jhemomi, Secretary, Department of Medical Health, Government of U.P. conducted an inquiry and submitted report wherein it has been mentioned that Government Order dated 11.04.2018 pursuant to which appointment of contractual teacher were made in the year 2018, was not issued after approval of Hon'ble Council of Ministers whereas the earlier Government Orders dated 28.05.2015 and 27.10.2017 were issued after approval of Hon'ble Council of Ministers. Therefore, it is evident that the appointment of contractual teachers made pursuant to Government Order dated 11.04.2018 are not in accordance with law as such recommendation has been made for cancellation of the aforesaid appointments.

21. Learned counsel for the State has submitted that the petitioners were engaged on contractual basis and they were not appointed through UPPSC. Several complaints were received in respect of selection process of the aforementioned appointments and the same was inquired into as per the orders of Hon'ble Lokayukt and it was found that the aforesaid appointments were not in accordance with law, therefore, the appointments were cancelled and fresh selection process has been initiated. Therefore, there is no illegality in the impugned orders. The instant writ petition is devoid of merit and be dismissed as such.

22. Counter and rejoinder affidavits have been exchanged.

23. I have heard learned counsel for the parties and perused the record. I have also perused Government Orders dated 28.05.2015, 27.10.2017 & 11.04.2018 and

appointment letters of the petitioners as also Advertisement No.2/2020-21 dated 24.11.2020.

24. Vide order dated 04.09.2020 passed by co-ordinate Bench of this Court, Additional Chief Secretary, AYUSH was directed to file his personal affidavit. In pursuance to the said order, an affidavit has been filed on 29.09.2020. In Paras - 12 & 13 of the said affidavit it is contended that State Government vide Government Order dated 14.08.2020 has decided to make fresh contractual appointments of teachers as per provisions of Government Orders dated 28.05.2015 and 27.10.2015 and if the petitioners are eligible for the concerned post, they may also submit their application form as per law and may participate in the fresh selection process.

25. Bare perusal of Advertisement No.2/2020-21 dated 24.11.2020 (Annexure RA-1 with Rejoinder Affidavit) reveals that reservation has been applied by clubbing all the vacant posts of Lecturers (subject-wise) available in all the Government Homeopathic Medical Colleges so that adequate reservation is provided and the same procedure was also followed in the case in hand in terms of Government Order dated 11.04.2018. Since the procedure prescribed in Government Order dated 11.04.2018 is to be followed in the latest selection process, as per the advertisement dated 24.11.2020, therefore, it cannot be said that selection and appointment of the petitioners either as Professors or Readers or Lecturers in terms of Government Order dated 11.04.2018 was bad in the eyes of law.

26. It is not the case of the State that the petitioners are not having requisite qualifications for their respective posts. It is also not the case of the State that the appointments of the petitioners were contrary to the provisions of any statute as well as advertisement dated 15.12.2017. It is also not the case of the State that there is any complaint regarding performance of the petitioners as Lecturers, Readers or Professors in their respective colleges. It is only argued by the State that some complaints were received by the Department regarding irregularities in appointment of the few of the candidates who have been appointed in pursuance of the aforesaid advertisement in the year 2017 and it is also the case of the State that the appointments of the petitioners were made on contractual basis in the Homeopathic Medical Colleges vide Government Order dated 11.04.2018 which is not approved by Hon'ble Council of Ministers whereas earlier Government Orders dated 28.05.2015 and 27.10.2017 were issued with the approval of Hon'ble Council of Ministers of Government of U.P. Therefore, contract appointments made on the basis of Government Order dated 11.04.2018 are not legally sustainable.

27. From perusal of the record, it is evident that the authorities concerned have taken a decision for cancelling contractual appointment of the petitioners without initiating a proper individual inquiry against each candidate and also not given them opportunity to represent their case on the said complaint. If any irregularity has been committed in the selection and appointment of the petitioners on contractual basis, then the law is already settled that the illegality may be examined by the process of due legal inquiry and the persons concerned may be denied renewal of further term of the contractual employment, if the allegation of

irregularity in selection process is found proved. However, in the present case, no inquiry has been initiated to find out irregularity and arbitrariness in appointment of individual contractual employees.

28. In the case in hand, individual cases were not examined by the authorities concerned but in one stroke, by a general order, all contractual appointments have been cancelled. The department has initiated process for filling the said vacancy vide advertisement dated 24.11.2020 on contractual basis. It is settled law that one set of contractual employee should not be replaced by another set of contractual employees unless it is found by the authorities that the persons working on contractual basis are not working satisfactory. The contractual employees can only be replaced by regularly selected persons. The petitioners herein were appointed for a specified period as Lecturers, Readers and Professors in their respective Homeopathic Colleges as per terms of Advertisement dated 15.12.2017 as also Government Orders dated 28.05.2015 and 27.10.2017.

29. The services of all the petitioners have been cancelled and a decision for no further renewal of any contractual employee in Homeopathic Colleges has been taken. It is clear law that eligibility of any candidate is to be reckoned not from his or her selection but in terms of rules or advertisement for the respective post. It is also settled law that authority publishing the advertisement/notification or any Government Order represents to the members of the public that it is bound by such representation. Therefore, the State cannot take away employment of the petitioners who are not responsible for any irregularities in the appointment without proper inquiry of each appointment individually or appraisal of performance of every employee individually. Any complaint regarding an appointment should be examined and the decision be taken individually and not by a general order. Not approval of any Government Order by Cabinet, cannot said to be a wrong committed by the employee and therefore, the petitioners cannot suffer for any irregularities which have been committed by government authorities. The appointment of the petitioners was made after adopting the procedure prescribed in the statute as well as the advertisement dated 15.12.2017 and if the appointment is cancelled by a general order, without appointing teachers on regular basis by UPPSC, then the students who are studying in the said Homeopathic Colleges may also suffer irreparably.

30. In the instant case, the petitioners have been appointed on contractual basis on their respective posts after completion of due process. If any irregularity has been committed in the selection and appointment of the petitioners, then the said irregularity may be detected by the process of due legal inquiry. There is also a legitimate expectation of the petitioners who have been appointed on contractual basis in different colleges on their respective posts after following due process.

31. Legitimate Expectation: one amongst several tools incorporated by the Court to review administrative action. A person may have a reasonable or legitimate expectation of being treated in a certain way by the administrative authorities owing to some consistent practice in the past or an express promise made by the concerned authority.

32. In, **Navjyoti Coop. Group Housing Society v. Union of India - (1992) 4 SCC 477**, the new criteria for allotment of land was challenged. In the original policy, the seniority with regards to allotment was decided on the basis of date of registration. Subsequently, a change in policy was made in 1990, changing the criteria for deciding seniority based on the date of approval of the final list.

The Hon'ble Supreme Court in **Navjyoti Coop. Group Housing Society's** case (supra) held that the Housing Societies were entitled to "legitimate expectation' owing to the continuous and consistent practice in the past in matters of allotment. The Court further elucidated on the principle stating that presence of "legitimate expectations' can have different outcomes and one such outcome is that the authority should not fail "legitimate expectation' unless there is some justifiable public policy reason for the same.

It is further emphasized that availability of reasonable opportunity to those likely being affected by the change in a policy which was consistent in nature is well within the ambit of acting fairly. The Hon'ble Court held that such an opportunity should have been given to the Housing Societies by way of a public notice.

33. In view of the foregoing discussion, all the above-mentioned three petitions are allowed.

Impugned Order No.2188/96-AYUSH-2-2020-10/2015 T.C.-I dated 14.08.2020 and Order/Letter No.1561/96-AYUSH-2-2020-10/2015 T.C.-I dated 14.08.2020 are hereby quashed.

The petitioners are allowed to work on their respective posts in their respective colleges as per Government Orders dated 28.05.2015 & 27.10.2017.

However, in case, any complaint is made/receipt, the State shall be at liberty to examine/inquire the said complaint in respect of each candidate as per law and pass order on each case separately.

The State or the respondent/authorities shall also be at liberty to examine performance of each petitioner on their respective posts before renewing their services after expiry of their contract period and pass appropriate order in accordance with law.

(2020)12ILR A688
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.12.2020

BEFORE

THE HON'BLE SHEKHAR KUMAR YADAV, J.

Writ A No. 17061 of 2010

Ram Bahore & Anr. ...Petitioners
Versus
The State of U.P. & Ors. ...Respondents

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

Counsel for the Respondents:
C.S.C.

A. Service Law – U.P. Retirement Benefits Rules, 1961 - Rule 3(8) – Regularisation and Payment of Salary After regularization the entire period of service shall be counted for purpose of fixation of pensionary benefits. Services rendered in the work-charged establishment shall be treated as qualifying service for grant of pension. (Para 9, 10, 11, 12)

In the present case, services of the petitioners have already been regularised and they were

getting their salary of regular employee from the date of their regularisation w.e.f. 2.9.2003 and prior to their regularisation they were getting payment as admissible to the daily wager employees.

It was held that the petitioners are entitled to get all the pensionary benefits after taking into the consideration the services rendered by them as daily wagers, prior to their regularisation, as also the seniority from the date of engagements as daily wagers; but they shall not be entitled for the arrears of balance from the date of their appointments on daily wage posts since they have already been paid wages of such period. (Para 15, 16, 17)

Writ Petition disposed off. (E-4)

Precedent followed: -

1. Dr. Ramkant Tiwari Vs St. of U.P. & ors., W.P. No. 11630 of 2018, decided on 14.05.2018 (Para 3)

2. Muneshwear Dutt Mishra Vs St. of U.P. & 4 ors., Writ-A No. 18117 of 2018, decided on 06.09.2018 (Para 3)

3. Gulaichi Devi Vs St. of U.P. & ors., 2019 (12) ADJ 547 (Para 3)

4. Habib Khan Vs St.of U.P. & ors., Civil Appeal No. (5) 10806 of 2017, decided on 23.08.2017 (Para 3)

5. Secretary, Minor Irrigation Deptt & RES Vs Narendra Kumar Tripathi, Civil Appeal No. 3348 of 2015, decided on 07.04.2015 (Para 3, 13)

6. Naval Kishore Rai Vs St. of U.P. & 3 ors., Writ-A No. 25623 of 2018, decided on 30.09.2020 (Para 7)

7. Netram Sahu Vs St.of Chhatt., 2018 (2) PLJR 284 SC (Para 9)

8. Prem Singh Vs St. of U.P. & ors., Civil Appeal No. 6798 of 2019, passed on 02.09.2019 (Para 10, 17)

9. Punjab State Electricity Board & anr. Vs Narata Singh & anr., (2010) (Para 11)

10. Secretary, Minor Irrigation Deptt. and RES Vs Narendra Kumar Tripathi, Civil Appeal No. 3348 of 2015, decided on 07.04.2015 (Para 13)

(Delivered by Hon'ble Shekhar Kumar Yadav, J.)

1. The present writ petition has been filed seeking following reliefs:-

i) Issue a writ, order or direction in the nature of mandamus commanding the respondents to pay to the petitioners the arrears of salary treating their appointment in the year 1981 and 1990 respectively which was approved by the then Chief Development Officer after re-fixing their salary on the basis of 6th Pay Commission and also to pay the arrears of salary for the period from 1995 till the year 2003 after re-fixing their salary on the basis of 6th Pay Commission;

(ii) Issue any other and further writ, order or direction as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

2. Briefly stated facts of the case are that petitioners were appointed as Chowkidar on daily wages (Class IV post) in the year 1981 and 1990 respectively. Their services were orally terminated in the year 1995. Against the said order of termination, petitioners preferred Civil Misc Writ Petition No. 22522 of 1995, which was finally disposed off vide order dated 29.4.1999 with the direction to the respondents to regularise the services of the petitioners on Class IV post. Petitioners accordingly, made their representation for their regularisation and also for payment of balance salary. It is further alleged that the respondents against the order dated 29.4.1999 preferred Special Leave to Appeal (civil) No. 336 of 2000, which was dismissed as withdrawn vide order dated

31.1.2000. Thereafter, respondents is said to have preferred Special Appeal against the judgement and order dated 29.4.1999, which was also dismissed vide order dated 2.4.2003. Thereafter, an order for regularisation of the services of the petitioners was passed by the respondents on 2.9.2003. After regularisation of their services, petitioners demanded salary as well as seniority since 1981 to 1990 respectively. It is further submitted that the petitioner no. 1 has been superannuated from service on 30.4.2017 and petitioner no. 2 has died during pendency of the writ petition. Hence this writ petition.

3. Submission of learned counsel for the petitioners is that at the time of regularisation i.e. 2.9.2003, they have completed 22 and 13 years of their services respectively and as such their seniority may be counted from the date of their initial appointment i.e. 1981 and 1990 respectively. They also demanded the arrears of salary of balance from the above respective dates of their appointments. Further submission is that due to the non actions of respondents, the petitioners are made to suffer recurring financial loss for no fault on the part of the petitioners. In support of his arguments, petitioners relied upon the various judgements of this Court as well as of Apex Court, viz. **Writ Petition No. 11630 of 2018, (Dr Ramakant Tiwari Vs State of UP and others) decided on 14.05.2018; Writ A No. 18117 of 2018, (Muneshwer Dutt Mishra Vs State of UP and 4 others) decided on 6.9.2018; 2019(12) ADJ, 547 (Gulaichi Devi Vs State of UP and others); Civil Appeal No. (5) 10806 of 2017 (Habib Khan Vs State of UP and others) decided on 23.08.2017; and Civil Appeal No. 3348 of 2015, Secretary, Minor Irrigation Deptt and RES Vs Narendra Kumar Tripathi decided on 7.4.2015.**

4. Learned Standing Counsel for the State on the other hand submitted that in pursuance of the order passed by this Court, services of the petitioners were regularised w.e.f. 2.9.2003 on the class IV posts and they were made payment admissible to the regular employees and thereafter they were also made payment of revised pay scales and also the payment of arrears of Rs. 48650/- and Rs. 49033/- respectively, vide Annexure CA-6 & 7 filed by the State in regard to the payment of arrears made vide letter dated 13.01.2009 passed by Chief Development Officer, Basti.

5. The petitioners have submitted that they are entitled for payment from their initial appointments as daily wagers i.e. from 1981 and 1990 respectively, thereafter they are entitled for regular pay scales since 1981 and 1990.

6. Heard learned counsel for the parties and perused the material on record.

7. It is admitted fact that the petitioners were appointed as daily wagers and their services were regularised on 2.9.2003 and since then they were getting regular pay-scales as admissible to a regular employee and also they have received their arrears of the balance from the date of their regularisation. In support of their claim, petitioners have relied on various judgements as noted above in preceding paragraphs and also contended that their case is squarely covered with the judgement of this Court passed in **Writ A No. no. 25623 of 2018 Naval Kishore Rai Vs State of UP and 3 others, decided on 30.9.2020**, in which this Court having

relied upon the decision of Prem Sing Vs State of UP and others decided on 2.9.2019 allowed the writ petition in the following terms:-

"Heard learned counsel for the petitioner and learned Standing Counsel for the respondents.

The petitioner by means of the present writ petition has prayed for the following main relief:-

"(i) Issue a writ, order or direction in the nature of mandamus commanding the respondents to consider and decide the petitioner's representation dated 06.02.2018 (Annexure-1 to the writ petition) and pay entire retiral dues including his pension and other consequential benefits after calculating his services rendered by him on work charge basis i.e. 01.04.1978, in the light of the judgment of Hon'ble Supreme Court in the case of Habib Khan Vs. State of Uttaranchal"

As per the pleadings in the petition, the petitioner was initially appointed as Helper on 01.04.1978 on work charge basis in the Irrigation Department, Varanasi and his services was regularized with effect from 01.05.2006. The petitioner has retired on 01.06.2018. The petitioner is not being paid retiral dues and in the aforesaid backdrop, the petitioner has prayed for the relief inserted above.

A counter affidavit has been filed by respondent nos. 2 to 4, wherein, it is stated that the petitioner had worked since 01.04.1978 to 30.04.2006 in work charge establishment and thereafter since 01.05.2006 to 31.01.2018 in regular department. The petitioner has retired on 31.01.2018, but in view of the letter dated 01.08.2005 which provides that the services rendered in work charge establishment shall not be included for the purposes of pension and gratuity as has been provided in Civil Services Regulation 370.

Learned counsel for the petitioner has contended that the Apex Court in the case of Prem Singh vs. State of U.P. & Ors. decided on 02.09.2019 has held that the work charge period rendered by an employee shall be included for the purposes of pension and, therefore, the ground on which the pension of the petitioner has been denied is not sustainable.

Learned Standing Counsel submits that the letter dated 01.08.2005 provides that the period rendered as work charge employee shall not be counted for the purposes of service, therefore, the petitioner is not entitled for the same.

I have heard the rival submissions of the parties and perused the record.

It is admitted by the respondents the the petitioner was initially appointed as Helper employee on 01.04.1978 and had continued to work as work charge employee till 03.04.2006. The services of the petitioner was regularized on 01.05.2006 and he retired on 01.06.2018.

In view of the aforesaid fact that the petitioner has worked as work charge employee since 01.04.1978, the judgment of the Apex Court in the case of Prem Sing (supra) is applicable and the controversy as in the present case is concluded by the judgment of Apex Court in the case of Prem Singh (supra). Consequently, the services rendered by the petitioner in work charge employee are liable to be counted for the purposes of pension.

Considering the facts and circumstances of the case, the writ petition is allowed and a mandamus is issued to the respondent no.4-The Executive Engineer, Tube-well Construction Division, Irrigation Department Varanasi to add the service rendered as work charge employee in the services rendered by the petitioner as regular employee and pay the pension and other retiral dues to the petitioner which the petitioner is entitled as per law.

For the reasons given above, the writ petition is allowed. No order as to costs.".

8. The issue as to whether the petitioners are entitled to any benefits of the period rendered by them as a daily wagers till his regularisation has been set at rest by the Supreme Court.

9. Hon'ble the Apex Court in the case of Netram Sahu Versus State of Chhattisgarh reported in 2018 (2) PLJR 284 SC has already decided that after regularisation the entire period of service shall be counted for purpose of fixation of pensionary benefits.

10. Hon'ble the Apex Court in the case of Prem Singh Versus State of Uttar Pradesh & Ors. passed on 2 September, 2019 in Civil Appeal No. 6798 of 2019 and other analogous appeals has also reiterated the same principle as laid down in the case of Netram Sahu (supra). The Apex Court in paragraph 36 has held as under:-

"In view of reading down Rule 3(8) of the U.P. Retirement Benefits Rules, 1961, we hold that services rendered in the work-charged establishment shall be treated as qualifying service under the aforesaid rule for grant of pension. The arrears of pension shall be confined to three years only before the date of the order. Let the admissible benefits be paid accordingly within three months. Resultantly, the appeals filed by the employees are allowed and filed by the State are dismissed."

11. In Punjab State Electricity Board & Anr. v. Narata Singh and Anr., (2010), the apex court had held that the period of work-charged service should be counted for computation of qualifying service for grant of pension.

12. Thus, it is obvious from the decisions cited on behalf of the petitioners that the Hon'ble Apex court has already set at rest the above stated dispute holding that the services rendered in work charged establishment shall be counted for purpose of pension and gratuity after regularisation of the service.

13. Further, Hon'ble Apex Court in the case of Civil Appeal No. 3348 of 2015, Secretary, Minor Irrigation Deptt. and RES Vs Narendra Kumar Tripathi, decided on 07.04.2015, has allowed all the benefits of ad-hoc services rendered for the purposes of reckoning his seniority and other consequential benefits.

14. In the aforesaid facts and circumstances of the case, admittedly, services of the petitioners have already been regularised on 2.9.2003 and they were getting their salary of regular employee from the date of their regularisation w.e.f. 2.9.2003 and prior to their regularisation they were getting payment as admissible to the daily wager employees.

15. Claim of the petitioners for arrears of balance as regular employees from the date of their initial appointments could not be accepted because they have already been made payment as daily wagers and now they have been regularised and after that they were getting regular pay scales, therefore, services of the petitioners as daily wagers could only be counted as qualified service only for the benefit of pension because prior to their regularisations they were working in the capacity of work-charge employees.

16. Having considered the facts and circumstances of the case, and also keeping in view the mandate of the judgements in

preceding paragraphs, I am of the considered opinion that the petitioners are entitled to get all the pensionary benefits after taking into the consideration the services rendered by them as daily wagers, prior to their regularisation, as also the seniority from the date of engagements as daily wagers; but they shall not be entitled for the arrears of balance from the date of their appointments on daily wage posts since they have already been paid wages of such period.

17. In the circumstances, the writ petition is finally disposed off with the direction to the respondents to make pensionary benefits to the petitioners after taking into the consideration the services rendered by the petitioners as daily wagers, prior to regularisation, in the light of the judgements of Prem Singh (Supra) and and shall also count the services rendered by the petitioners as daily wagers for the purpose of seniority. Respondents are further directed to ensure the payments of arrears of pension, if any, within three months from the date of receipt/production of a copy of this judgment.

(2020)12ILR A693
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.11.2020

BEFORE

THE HON'BLE CHANDRA DHARI SINGH, J.

Service Single No. 18508 of 2020

Dr. Syed Akhtar Mehdi Rizvi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sanjay Kumar Srivastava, Akshat Kumar.

Counsel for the Respondents:
C.S.C.

A. Practice & Procedure - Maintainability - U.P. Fundamental Second Amendment Rules, 2010: Rule 56 (a-1) read with Rule 56 (a-2) -The issuance of writ of quo warrant is upon discretion of the Court. In the instant case the Court did not find any substantial reason against the opposite part no. 3 to grant the writ of quo-warranto. (Para 26, 27)

Writ Petition rejected. (E-10)

List of Cases cited:-

1. Nand Lal Jaiswal Vs The Secretary, Government of U.P. & ors. Writ Petition No. 1428 (MB) of 2011

2. Gadde Venkateshwara Rao Vs Govt. of Andhra Pradesh AIR 1966 SCC 828

3. Hamid Hasan Nomani Vs Banwarilal Roy & ors. AIR (34) 1947 Privy Council 90

4. The University of Mysore Vs C.D. Govinda Rao & anr. AIR 1965 Sc 491

5. J.A. Samaj Vs D. Ram AIR 1954 Pat 297

6. Mohammad Tafiuddin & ors. Vs St. of W.B. & ors. 1979 (2) CLJ 494

7. Arun Kumar Vs U.O.I. AIR 1982 Raj 67

8. Dr. S. Mahadevan Vs Dr. S. Balasundaram & ors. (1986) 1 Mad LJ 31

9. Devi Prasad Shukla & anr. St. of U.P. & anr. 1989 Lab IC 1086

10. R. Vs Speyer (1916)1 K.B. 595

11. Rex Vs Stacey 99 English Reports 938 (2)

12. Fredric Guilder Julius Vs The Right Rev. The Lord Bishop of Oxford: The Rev. Thomas Thellusson Carter 5 Appeal Cases 214 (3)

13. The King exrel Boudret Vs Johnston (1923) 2 Deminion Law Reports 278 (4)

(Delivered by Hon'ble Chandra Dhari Singh, J.)

1. Initially, the instant writ petition was filed by the petitioner challenging Clause 4 of the impugned order dated 31.08.2020 to the extent of posting and taking over charge on the post of Director/ Principal Medical Superintendent, Balrampur Hospital, Lucknow by Dr. Rajeev Lochan (opposite party no.3). The petitioner, inter alia, had further prayed for a direction to the opposite party no.3 not to function and work on the said post and also direct the opposite parties no.1 and 2 to appoint/ post a regular promoted Director, Medical and Health Services on the abovesaid post.

2. The instant writ petition was entertained by this Court on 02.11.2020 and during the course of argument, on the objection raised by learned Counsel appearing on behalf of the State, the petitioner had sought for some time to file an affidavit stating therein that as to how, the petitioner is affected by the impugned order.

3. In pursuance to the order dated 02.11.2020, the petitioner filed an application bearing No.66564 of 2020 supported by an affidavit, whereby, the petitioner had sought for certain amendments in the pleadings of the writ petition and also the prayer clause.

4. Considering the submissions of learned Counsel for the parties and also the no objection of the State, the application is allowed.

5. With the consent of the parties, this Court proceeds to hear the matter finally at the admission stage.

6. By means of amendment application, the petitioner has sought for quo-warranto restraining the opposite party no.3 to continue on the post of Director/ Principal Medical Superintendent of Balrampur Hospital, Lucknow and remove him forthwith from the said post while declaring his appointment as illegal and void. He also prayed for a direction to the opposite parties no.1 and 2 to hold regular selection on the said post in accordance with Rules.

7. Submission of learned Counsel for the petitioner is that initially the petitioner was appointed on the post of Medical Officer vide order dated 18.05.1990 in the Provincial Medical and Health Service Cadre, Uttar Pradesh. Later on, the petitioner was promoted on the post of Senior Consultant (Neuro Physician) (Level-IV). At present, the petitioner is posted as Senior Neuro Physician at Balrampur Hospital, Lucknow [(Senior Consultant) (Level-IV)].

8. Learned Counsel for the petitioner has further submitted that the opposite party no.3 was initially appointed on the post of Medical Officer in Provincial Medical and Health Services Cadre, Uttar Pradesh. Subsequently, he was promoted on the next promotional post in the cadre and lastly, he was promoted to the post of Additional Director, Medical Health.

9. Learned Counsel for the petitioner has again submitted that the opposite party no.3 was never promoted to the post of Director, Medical and Health Services rather he was retired on 31.08.2019 from the post of Additional Director Medical Health after attaining the age of superannuation. The State Government while creating an Ex-cadre post of Additional Director in the department of Medical and Health Services, Uttar Pradesh

had re-appointed/ re-employed the opposite party no.3 on the said Ex-cadre post for one year vide order dated 31.08.2019 and directed him to hold the post of Officiating/ In-charge, Director/ Principal Medical Superintendent, Balrampur Hospital, Lucknow during re-appointment/ re-employment. Vide order dated 31.08.2020, the re-appointment/ re-employment of the opposite party no.3 was extended for a period of three years.

10. It has also been submitted by learned Counsel for the petitioner that considering the increase of outdoor and indoor patient of specialist doctors and in order to provide medical facilities to poor people, the State Government vide Government Order dated 13.01.2014 had decide to re-appoint/ re-employed the retired specialist doctor of Provincial Medical and Health Cadre upto the age of 65 years. Thereafter, vide Government Order dated 19.07.2017, the State Government after considering the abovesaid increase of outdoor and indoor patient had decided to give re-appointment/ re-employment to the retired MBBS Medical Officers upto the age of 65 years or regularly selected candidate from Commission whichever is earlier on the post of "Consultant". While issuing the Government Orders dated 13.01.2014 and 19.07.2017, it was clarified that the abovesaid re-appointment/ re-employment shall be given only to Specialist Doctors/ Consultants but they have not discharged any administrative post and during the said period they will not be given any cadre post. From the abovesaid Government Orders, it is clear that firstly the opposite party no.3 is not doing any work of Specialist Doctor and secondly, in view of the provisions of said Government Orders, posting of opposite party no.3 on the administrative post of In-charge Director/ Principal Medical Superintendent, Balrampur Hospital, Lucknow is totally illegal and arbitrary and without any authority.

11. It has been contended by learned Counsel for the petitioner that instead of giving posting to any regular selected and promoted Director, Medical and Health Services like the petitioner on the post of Director/ Principal Medical Superintendent, Balrampur Hospital, Lucknow, the opposite party no.1 is continuously give posting to opposite party no.3 on the said post, which is against the provisions of Government Orders dated 13.01.2014 and 19.07.2017 and the Fundamental Rules. As per the provisions of Service Rules, 2004 and amendment Rules, 2011, the post of Director/ Principal Medical Superintendent, Balrampur Hospital, Lucknow is a promotional post and because of illegal appointment of opposite party no.3, who has no requisite qualification for the said post, the petitioner as well as other doctors could not be considered for promotion, which is totally illegal, arbitrary and not only in violation of statutory provisions of Service Rules but also in violation of the provisions of Articles 14 and 16 of the Constitution of India. From the perusal of the Service Rules, 2004, amended Rules 2011 as well as in view of the provisions of Rule 56 (a-1)(a-2) of Financial Hand Book Vol-II Part 2 to 4, the opposite party no.3 cannot be appointed on the post in question.

12. Learned Counsel for the petitioner has again contended that on similar facts, a Writ Petition No.190 (SB) of 2014 [Provincial Medical Services Welfare Association through General Secretary Vs. State of U.P. and others] was filed before

this Court and the Division Bench vide order dated 30.05.2014 had held that the extension in service given to Dr. Baljit Singh Arora on the post of Director General, Medical and Health Services was not in accordance with law rather the same was not only in violation of provisions of Articles 14 and 16 of the Constitution of India but also in violation of the Service Rules because of under favour given by the Minister concerned out of way and forfeiting the valuable legal rights of other eligible officers those who are waiting in queue for promotion and posting on the said post in question.

13. So far as the locus standi to challenge the appointment of opposite party no.3 is concerned, it has been submitted by learned Counsel for the petitioner that admittedly the office of Director/ Principal Medical Superintendent, Balrampur Hospital, Lucknow is a public office and the abovesaid question has already been decided by this Court vide judgment and order dated 10.01.2012 passed in Writ Petition No.1428 (MB) of 2011 (Nand Lal Jaiswal Vs. The Secretary, Government of U.P. and others). Vide judgment and order dated 10.01.2012, the Division Bench while relying upon the law laid down by Hon'ble Apex Court in the case of Gadde Venkateswara Rao Vs. Government of Andhra Pradesh; AIR 1966 SCC 828 has held that the petitioner being General Secretary of the Employees' Union seems to possess locus standi to prefer the writ petition. It has also been held that a writ in the nature of quo warranto, as held by the Supreme Court, may be filed by any person challenging the right of authority to hold public office.

14. Per contra, learned Counsel appearing on behalf of the State has vehemently opposed the submissions of learned Counsel for the parties and submitted that the instant writ petition is nothing but only an arm-twisting and misconceived. The petitioner is habitual to file such frivolous petitions against the department before this Court. There is no illegality in the impugned order. The State Government has rightly extended the service of opposite party no.3.

15. Learned Counsel appearing on behalf of the State has further submitted that the extension has been given to the opposite party no.3 in public interest. The State Government has power to grant extension under Clause 56(a-2) of U.P. Fundamental (Second Amendment) Rules, 2010. Learned Counsel appearing on behalf of the State has again submitted that the petitioner has no locus standi to prefer such writ petition and, therefore, the instant writ petition is liable to be dismissed.

16. I have considered the submissions of learned Counsel for the parties and perused the material available on record.

17. Before entering into the merits of the case, it would be appropriate to reproduce the impugned order dated 31.08.2020 for ready reference:

"प्रादेशिक चिकित्सा एवं स्वास्थ्य सेवा संवर्ग के अपर निदेशक ग्रेड के चिकित्साधिकारी डा0 राजीव लोचन प्रभारी निदोक/प्रमुख चिकित्सा अधीक्षक, बलरामपुर, चिकित्सालय लखनऊ जो अपनी अधिवर्षता आयु पूर्ण कर दिनाँक 31.08.2019 को सेवा निवृत्ति हुए को शासन के कार्यालय ज्ञाप संख्या–2976/रोक–2–पाँच–2019 दिनाँक 31.08.2019 के द्वारा कार्यभार ग्रहण करने की तिथि से 01 वर्ष तक के लिए अपर निदेशक के एक निसवर्गीय पद सृजित करते हुए उक्त निसवर्गीय पद पर निम्नलिखित शर्तों के अधीन पुनर्नियोजन किये जाने के आदेश निर्गत किये गये हैं:–

(1)– पुर्नयोजन की अवधि में डा0 राजीव लोचन को वित (सामान्य अनुभाग–3 के शासनादेश दिनाँक 15.

12.1983 के अनुसार यह नियत वेतन अनुमन्य होगा जो पुर्नयोजित कार्मिक द्वारा सेवानिवृत्ति के समय प्राप्त अन्तिम वेतन में से शुद्ध पेंशन (राशिकरण के पूर्व) को घटा कर प्राप्त हो अथवा पुर्नयोजन पद पर वेतनमान का अधिकतमए दोनों में से जो कम हो।

(2)– पुनर्योजन की अवधि में डा0 राजीव लोचन अपने चिकित्सकीय कार्यों का निर्वहन पूर्ववत करते रहेंगे।

(3)– पुनर्योजन की अवधि में डा0 राजीव लोचन को अस्थायी सरकारी सेवक मानते हुए वित्तीय नियम संग्रह के खण्ड–2 भाग–2 से 4 के सहायक नियम–157ए तथा राज्य सरकार द्वारा समय≤ पर पारित आदेशों के अनुसार अस्थायी कर्मचारी की भाँति आकस्मिक अवकाश अनुमन्य होगा, किन्तु अर्जित अवकाश को नगदीकरण अनुमन्य नहीं होगा।

(4)– पुनर्योजन अवधि की गणना पेंशन हेतु नहीं की जायेगी।

(5)– पुनर्योजन की अवधि में डा0 राजीव लोचन को यात्रा भत्ता तथा दैनिक भत्ते उनके वेतन एवं पेंशन के योग के अनुसार अनुमन्य दरों पर, यात्रा भत्ता नियम–16–ए– के अनुसार देय होंगे।

6– डा0 राजीव लोचन का पुर्नयोजन किसी भी समय समाप्त करने का अधिकार शासन में निहित होगा।

2– चूँकि उक्त पद के भविष्य में चलते रहने के संभावना है और जिन उद्देश्यों की पूर्ति के लिए उक्त पद सुजित किया गया था, उसकी आवश्यकता अभी भी विद्यमान होने के दृष्टिगत श्री राज्यपाल अपर निदेशक के उक्त निःसंवर्गीय पद की निरन्तरता दिनाँक 28.02.2021 तक बढ़ाये जाने तथा उक्त पद पर डा0 राजीव लोचन की, की गयी पुनर्योजन की अवधि को एक वर्ष के लिए विस्तार दिये जाने की सहर्ष स्वीकृति प्रदान करते हैं।

3– उपर्युक्त के सम्बंध में होने वाला व्यय चालू वित्तीय व्यय के आय–व्ययक के अनुदान संख्या–32 के अन्तर्गत लेखाशीर्षक–2210–चिकित्सा तथा लोक स्वास्थ्य (एलोपैथी विभाग) (अयोजनेत्तर पक्ष) –01 शहरी स्वास्थ्य सेवाएं–110– अस्पताल तथा औषधालय–04 एलोपैथी एकीकृत चिकित्सालय और औषधालय के नामे डाला जायेगा।

4– डा0 राजीव लोचन नियमित व्यवस्था होने/अग्रेतर आदेशों तक प्रभारी निदेशक/प्रमुख चिकित्सा अधीक्षक, बलरामपुर चिकित्सालय, लखनऊ के पद का कार्य देखते रहेंगे।

5– उक्त आदेश वित विभाग के अशासकीय पत्र संख्या–ई–3–805/दस–2020 दिनाँक 31.08.2020 में प्राप्त उनकी सहमती से जारी किये जा रहे हैं।"

18. Vide order dated 31.08.2020, the services of the opposite party no.3 have been extended for three years on the post of Director/ Principal Medical Superintendent, Balrampur Hospital, Lucknow. As per Rule 56 (a-1) read with Rule 56(a-2) of the U.P. Fundamental Second Amendment Rules, 2010, the State Government may extend the services of a Government Servant after the age of superannuation. The services of the Government Servant may be extended in public interest with the prior approval of the Cabinet. The petitioner has failed to make out any case or produce any document to show that the extension of the petitioner is against the provisions of Fundamental Rules as well as the Government Orders dated 13.01.2014 and 19.07.2020. The petitioner also failed to show that the opposite party no.3 is not a qualified person for the post in question. There is no averment that the opposite party no.3 does not possess the required qualification.

19. The Privy Council in a case reported in AIR (34) 1947 Privy Council 90 Hamid Hasan Nomani vs. Banwarilal Roy and others, while considering the nature of quo warranto observed that an information in the nature of quo warranto is the modern procedure replacing the obsolete High Prerogative Writ of quo warranto. It is used to try the civil right to a public office.

20. The Hon'ble Supreme Court in a case reported in AIR 1965 SC 491, The University of Mysore vs. C.D.Govinda Rao and another had relied upon the definition given in Halsbury's Law of England, to quote relevant portion:-

"An information in the nature of quo warranto took the place of the obsolete writ of quo warranto which lay against a person who claimed or usurped an office, franchise, or liberty, to enquire by what

authority he supported his claim, in order that the right to the office or franchise might be determined." Broadly stated, the quo warranto proceeding affords a judicial enquiry in which any person holding an independent substantive public office, or franchise, or liberty, is called upon to show by what right he holds the said office, franchise or liberty; if the inquiry leads to the finding that the holder of the office has no valid title to it, the issue of the writ of quo warranto ousts him from that office. In other words, the procedure of quo warranto confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions; it also protects a citizen from being deprived of public office to which he may have a right. It would thus be seen that if these proceedings are adopted subject to the conditions recognised in that behalf, they tend to protect the public from usurpers of public office; in some cases, persons not entitled to public office may be allowed to occupy them and to continue to hold them as a result of the connivance of the executive or with its active held, and in such cases, if the jurisdiction of the Courts to issue writ of quo warrnto is properly invoked, the usurper can be ousted and the person entitled to the post allowed to occupy it. It is thus clear that before a citizen can claim a writ of quo warranto, he must satisfy the court, inter alia, that the office in question is public office and is held by usurper without legal authority, and that necessarily leads to the enquiry as to whether the appointment of the said alleged usurper has been made in accordance with law or not."

21. In the case of J.A. Samaj vs. D. Ram; AIR 1954 Pat 297, election to the Working Committee of the Bihar Rajya Arya Pratinidhi Sabha, was challenged by a Writ of Quo Warranto, the Hon'ble High Court of Patna, held thus:-

"The remedy which Article 226 contemplates is a, public law remedy for the protection and vindication, of a public right. It is essential in this connection to remember that there is a distinction between jus privatum and jus publicum which is the most fundamental distinction of corpus juris. This Roman distinction has been carried into modern law and the scope of public law in this context embraces all the rights, and duties, of which the State or some individual holding in W.P.No.24464 of 2019 delegated authority under it, is one part and the subject is the other part. The language of the Article 226 supports the inference that the remedy is provided only for the assertion of a public law right. Article 226 states that the High Court shall have power to issue to any person or authority, including it appropriate cases any Government, directions, orders or writs, including writs in the nature of habeas corpus, man damns, prohibition, quo warranto and certiorari. All these writs are known in English law as prerogative writs, the reason being that they are specially associated with the King's name. These writs were always granted for the protection of public interest and primarily by the Court of the King's Bench. As a matter of history the Court of the King's Bench, was held to be coram rege ipso and was required to perform quasi-governmental functions. The theory of, the English law is that the King himself superintends the due course of justice through his own Court--preventing cases of usurpation of jurisdiction and insisting on vindication of public rights and personal freedom of his subjects. That is the theory

of the English law and our Constitution makers have borrowed the conception of prerogative writs from the English law. The interpretation of Article 226 must therefore be considered in the background of English law and so interpreted, it is obvious that the remedy provided under Article 226 is a remedy for the vindication of a public right."

22. In the case of Mohammad Tafiuddin and others Vs. State of West Bengal and others; 1979 (2) CLJ 494, at paragraph Nos.13 to 16, the Hon'ble High Court of Calcutta, held thus:-

"13. In terms of the determinations in the case of Hamid Hasan Vs. Banwarilal Roy and others; AIR 1947 P. C. 90 an information in the nature of quo warranto is the modern from of the obsolete writ of quo warranto, which lay against a peon, who claimed or usurped in office franchise or liberty, to enquire by what authority he supported his claim, in order that the right to the office or franchise might be determined. It has also been observed to be a remedy to try the Civil right to a public office. In view of the determinations in the case of University of Mysore Vs. Govinda Rao; MANU/SC/0268/1963 : AIR 1965 SC 491 the procedure of quo warranto confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against statutory, provisions or statutes, it also protects a subject from being deprived or public office, to which he may have a right. As observed in the case of Statesman (P) Ltd. Vs. H.R. Deb; MANU/SC/0123/1968 : AIR 1968 SC 1495 the High Court in a proceeding for quo warranto should be also in its pronouncement unless there is a case of infringement of law.

14. A Writ of quo warranto is not the same as a Writ of Certiorari, or Prohibition or Mandamus and in a such a proceeding for quo warranto, it is not necessary for the applicant to establish that he has been prejudicially affected by any wrongful act of public nature or that his fundamental right is infringed or that he is denied any legal right or that any legal duty is owed to him. The scope of a proceeding for quo warranto is very limited and it is only for the determination, whether the appointment of the Respondent is by a proper authority and in accordance with law, if there is some express statutory provision. The High Court's power of interference in a proceeding for quo warranto is also limited and it cannot act as an appellate authority. Quo warranto, in terms of the determination in the case of Bhaimlal Chunilal Vs. State of Bombay; MANU/MH/0030/1954 : AIR 1954 Bom. 116 is a remedy given in law at the discretion of the Court and is not a proceeding or a writ of course. The High Court can in a proceeding for quo warranto, as observed in the case of Lalit Mohan Das Vs. Biswanath Ghosh; MANU/WB/0250/1951 : AIR 1952 Cal. 868, issue an order not only prohibiting an officer from acting in an office to which he is not entitled, but can also declare the Office to be vacant. As observed in Hamid Hasans case (Supra) information in the nature of quo warranto is in nature of a Civil proceedings and such writ can be issued when a post created under or by a statute or a public office, is usurped wrongly, illegally or without any authority. The tests of public office, as observed in the case of Sashi Bhusan Ray v. Pramatha Nath Bandopadhaya MANU/WB/0366/1966 : 70 CWN 892, are whether to the duties of office are of public nature and whether it is a substantive office

under a statute. It has been held and observed in the case of Amarendra Chandra Aich Vs. Narendra Kumar Basu; MANU/WB/0036/1953 : 56 CWN 449, that a writ of quo warranto will not be available in respect of an office of private nature.

15. Thus, in terms of the determinations an the case of University of Mysore v. Govinda (Supra) the first and foremost criteria for the issue of a writ of quo warranto should be that the office must be public and pursuant to the determinations in the case of Shyabudinsab Mohidinsate Akki v. Gadaj Belgeri Municipal Borough AIR 1975 SC 314, a proceeding for quo war- ranto will not be in respect of office ox a private charitable institution or of a private association and the test of a public office is whether the duties of the office are public nature. On the basis of the determinations as mentioned above, it can also be deduced that the office moist be substantive in character and must be, as mentioned hereinbefore created by statute or by Constitution itself. So neither the statutory nor constitutional character being satisfied in the instant case is so far the offices of Respondent Nos. 4 or 7 of 18 (a), I am of the view that even inspite of the determinations on merit, the petitioners would not be entitled to the issue of a writ of quo warranto.

16. In order to succeed in obtaining a writ or an order in the nature of Mandamus, which is the second prayer the petitioners must "establish that he has a legal right to the performance by the opposite party of legal duty imposed by a statute and such right must exist at the date of the petition. A mandamus will not issue if the duty required to be performed is discretionary. A mandamus will also not issue to compel the performance of anything which an authority has the power to do unless the power becomes coupled with a duty. " it is not all wrong which can be cured by a writ of Mandamus. Mandamus literally means a command. It is a demand for some activity on the part of the body or persons to whom it is addressed. In view of the character of entitlement and more particularly when the petitioners have a legal right to the performance of duty or obligation by the authority concerned in terms of Article 154, which in my view has not been duly discharged in the formation of the said Board or delegation of powers to the same, the same being neither a statutory body nor a body or authority under the Constitution of India, the petitioners can claim the issue of a Mandamus, requiring the notifications as impeached not to be given effect to. Thus, the second prayer of the petitioners should succeed."

23. In Arun Kumar Vs. Union of India; AIR 1982 Raj 67, in para 4 to 6, the Rajasthan High Court has held as under:

"4. Article 226 of the Constitution empowers the High Court to issue to any person or authority including the Government within its territorial jurisdiction, directions, orders or writs in the nature of mandamus, certiorari prohibition or quo-warranto for the enforcement of fundamental rights or for the enforcement of the legal rights and for any other purpose.

5. The founding fathers of the Constitution have couched the Article in comprehensive phraseology to enable the High Court to remedy injustice wherever it is found, but it is equally true that a person invoking the extraordinary jurisdiction of this Court should be an aggrieved person. If he does not fulfil the character of an aggrieved person and is a 'stranger' the

Court will, in its discretion, deny him this extraordinary remedy save in very special and exceptional circumstances. The petitioner challenging the order must have some specialised interest of his own to vindicate, apart from a political concern, which belongs to all. Legal wrong requires a judicial and enforceable right and the touchstone to the justiciability is injury to legally protected right. A nominal, imaginary, a highly speculative adverse effect to a person cannot be said to be sufficient to bring him within the expression of "aggrieved person". The words "aggrieved person" cannot be confined within the bounds of a rigid formula. Its scope and meaning depends on diverse facts and circumstances of each case, nature and extent of the petitioner's interest and the nature and extent of the prejudice or injury suffered by him.

6. Any information in the nature of quo warranto would not be issued, and an injunction in lieu thereof would not be granted as a matter of course. It is in the discretion of the Court to refuse or grant it according to the facts and circumstances of each case. The Court would inquire into the conduct and motive of the applicant and where there are grounds for supposing that the relator was not the real prosecutor but was the instrument of other persons and was applying in collusion with stranger, the Court may refuse to grant a writ of quo warranto."

24. The **Madras High Court in the case of Dr. S. Mahadevan Vs. Dr. S. Balasundaram and others; (1986)1 Mad LJ 31** held as under:

"For the issuance of a writ of quo warranto, the court asks the question -- Where is your warrant of appointment? It enjoins an enquiry into the legality of the claim which the party asserts to an office and if the appointment and holding on to the office are illegal and violative of any binding rule of law, then the court shall oust him from his enjoying thereof. This Court, within the scope of the enquiry for the issuance of a writ of quo warranto, is not concerned with any other factor except the well laid down factors: which require advertence to and adjudication. The existence of the following factors have come to be recognised as conditions precedent for the issuance of a writ of quo warranto: (1) the office must be public; (2) the office must be substantive in character, that is, an office independent of in title; (3) the office must have been created by statute or by the Constitution itself; (4) the holder of the office must have asserted his claim to the office; and (5) the impugned appointment must be in clear infringement of a provision having the force of law or in contravention of any binding rule of law. This Court shall not frown upon an appointment to the office on the ground of irregularity, arbitrariness or caprice or mala fides and these features, even if they are present, could not clothe this court with the power for the issuance of a writ of quo warranto. The scope of the enquiry is riveted to only the aforesaid factors. Prerogative writs, like the one for quo warranto, could be and should be issued only within the limits, which circumscribe their issuance. It is not possible to widen their limits. A writ of quo warranto is of a technical nature. It is a question to an alleged usurper of an office to show the legal authority for his appointment and holding on to it. If he shows his legal authority, he cannot be ousted from the office. The invalidity of the appointment may arise either for want of qualifications prescribed by law or want of authority on the part of the person who made the

appointment, or wants of satisfaction of the statutory provisions or conditions or procedure governing the appointment and which are mandatory. This Court, under Article 226 of the Constitution, can issue a writ of quo warranto only if the salient conditions delineated above stand satisfied and not otherwise."

25. In **Devi Prasad Shukla and another Vs. State of Uttar Pradesh and another; 1989 Lab IC 1086**, at paragraph No.34, the Hon'ble Allahabad High Court, held thus:-

"34. To illustrate the point, we may mention that in a writ petition even the person called upon to show whether he possesses the necessary qualifications prescribed for that office can also be asked whether the authority which he produces is by the person who is authorised to make appointment to the Office which he holds. By showing that he possesses the necessary qualifications by demonstrating that there is no legal impediment in the way of his appointment to the office and by showing that the person who issued the appointment or warrant of his appointment is authorised by law to do so, no writ of quo warran-to will be issued against him. If all these things are demonstrated by him in his favour, he cannot be said to be a usurper."

26. A writ of quo warranto poses a question to the holder of a public office. In plain English language, the question is "where is your warrant of appointment by which you are holding this office ?" In its inception in England such a writ was a writ of right issued on behalf of the Crown requiring a person to show by what authority he exercised his office, franchise, or liberty. Webster's Third New International Dictionary, Volume II, describes it as "a legal proceeding that is brought by the state, sovereign, or public officer, has a purpose similar to that of the ancient writ of quo warranto, is usually criminal in form and sometimes authorizes the imposition of a fine but is essentially civil in nature and seeks to correct often at the relation or on the complaint of a private person a usurpation, misuser, or nonuser of a public office or corporate or public franchise, and may result in judgements of ouster against individuals and of ouster and seizure against corporations." Halsbury's Laws of England, Third Edition, Volume 11, Para 281(1) contains a summary of the decisions of English Courts with regard to the discretion of the Court in issuing a writ of quo warranto. It is said that "An information in the nature of a quo warranto was not issued, and an injunction in lieu thereof will not be granted, as a matter of course. It is in the discretion of the Court to refuse or grant it according to the facts and circumstances of the case . . . . the Court might in its discretion decline to grant a quo warranto information where it would be vaxatious to do so, or where an information would be futile in its results, or where there was an alternative remedy which was equally appropriate and effective." The leading case on the subject of quo warranto from which many of the statements are derived is R. v. Speyer, (1916) 1 K.B. 595. Lord Reading, Chief Justice has observed: "If the irregularity in the appointment of an office held at pleasure could be cured by immediate reappointment, the Court in the exercise of its discretion would doubtless refuse the information." Lush, J. expressed the view that the Court would not make an order ousting the holders of public offices from their office if the existing defect, if there is one, could be cured, and they could be reappointed. Rex v. Stacey, 99 English

Reports 938 (2) holds that writ of quo warrant, is not a motion of course and it is in the discretion of the Court to issue it considering the circumstances of the case. Frederic Guilder Julius v. The Right Rev. The Lord Bishop of Oxford: The Rev. Thomas Thellusson Carter, 5 Appeal Cases 214 (3) also states that the issue of writ of quo warranto is in the discretion of a Court. The Canadian view as stated in The King exrel Boudret v. Johnston, (1923) 2 Deminion Law Reports 278 (4) is that the Court has to take into consideration public interest, the consequences to follow the issue of a writ of quo warranto and all the circumstances of the case. These general propositions have been accepted in America as appears from the statements contained in sections 5, 9, 10 and 18 in American Jurisprudence, Second Edition, Volume 65.

27. In the instant case, the allegations are made against the opposite party no.2 and even taking it for granted that there is any misuse of power, and consequentially the contention that the said extension has been made without approval without any supporting material, argument of non-approval of the cabinet as required under the provisions of Fundamental Rules, I do not find anything against the opposite party no.3 and, therefore, mere submission of illegality in the appointment of opposite party no.3 would not attract a writ of quo-warranto.

28. In the light of the above discussion and decisions, prayer sought for quo-waranto is not maintainable. Accordingly, writ petition is dismissed. No costs.

(2020)12ILR A703
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.11.2020
BEFORE

THE HON'BLE MANISH MATHUR, J.

Service Single No. 21802 of 2020

Sulochana Devi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Rajesh Kumar Verma.

Counsel for the Respondents:
C.S.C., Rajiv Singh Chuahan

A. Service Law–Compassionate Appointment –U.P. Recruitment of Dependents of Government Servant Dying in Harness Rules, 1974: Rules 2(c), 2(c)(iii) - Exclusion of married daughters from the ambit of the expression 'family' has been held to be illegal and unconstitutional, being violative of Articles 14 and 15 of the Constitution of India. (Para 10)

B. A statute or a provision of statute which is struck down as being ultra vires to Constitution of India or any of the fundamental rights applies retrospectively since it goes against the very basic tenets of the Constitution of India – The striking down of exclusion of married daughter from the ambit of family being held to be violative of fundamental rights, operates retrospectively. (Para 11)

In the present case, the rejection order has been passed in the year 2019 while the judgment rendering the abovementioned provision unconstitutional has been given in the year 2015. Petitioner's candidature was kept alive by opposite parties themselves till the year 2019. Therefore, by prospective application of the aforesaid judgment, petitioner's candidature could not been rejected on the ground of being a married daughter. (Para 13)

Writ Petition allowed. (E-4)

Precedent followed:

1. Smt. Vimla Srivastava Vs St. of U.P. & anr., [Writ-C No. 60881 of 2015] (Para 4)

2. Assistant Commissioner, Income Tax, Rajkot Vs Saurashtra Kutch Stock Exchange Ltd., (2008) 14 SCC 171 (Para 12)

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

1. Heard Sri Rajesh Kumar Verma, learned counsel for petitioner, learned State Counsel appearing on behalf of opposite parties 1 and 3 and Mr. Rajiv Singh Chauhan, learned counsel for opposite party no.2.

2. Petition has been filed against order dated 04.04.2019 whereby petitioner's candidature for compassionate appointment in terms of U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 has been rejected on the ground that petitioner has been indicated in the records as a married lady, which does not come within the definition of family in the aforesaid rules.

3. Learned counsel for petitioner submits that aforesaid ground for rejection is totally untenable in view of a Division Bench decision of this Court rendered in Smt. Vimla Srivastava v. State of U.P. and another [Writ - C No.60881 of 2015] in which it has been categorically held that the exclusion of married daughters from the ambit of the expression 'family' is unconstitutional. As such it is submitted that petitioner is entitled to be considered for compassionate appointment in terms of aforesaid Rules of 1974.

4. Learned counsel appearing for opposite party no.2 has opposed the petition with submission that petitioner's father passed away in the year 1985 and therefore her candidature cannot be considered after such a long lapse of time since it would render fruitless the very purpose of compassionate appointment with regard to providing succour to a dependent family instantly.

5. It has also been submitted that judgment rendered in **Smt. Vimla Srivastava(supra)** would be applicable only prospectively and not retrospectively since petitioner's rights stand crystallized as in year 1985 and not in the year 2019.

6. Upon consideration of material on record and submissions advanced by learned counsel for the parties, it is apparent that by means of impugned order, candidature of petitioner has been rejected only on the ground that she is a married lady and, therefore, would not come within the meaning of 'family' in terms of Rules of 1974.

7. This Court in **Smt. Vimla Srivastava(supra)** has clearly held that the exclusion of married daughters from the ambit of the expression 'family' in Rules 2(c) of Rules of 1974 is illegal and unconstitutional. The word 'unmarried' in rule 2(c) (iii) of the said Rules was struck down.

8. It is quite clear that impugned order has rejected petitioner's candidature only on that single ground of petitioner being married and neither eligibility nor any other factor has been considered by the authorities.

9. So far as submission of learned counsel for opposite parties with regard to prospective application of judgment in Smt. Vimla Srivastava(supra) is concerned, it is clear from a reading of aforesaid judgment that the exclusion of married daughters from the ambit of the expression 'family' has been held to be illegal and unconstitutional, being violative of Articles 14 and 15 of the Constitution of India.

10. A statute or a provision of statute which is struck down as being ultra vires to Constitution of India or any of the fundamental rights applies retrospectively since it goes against the very basic tenets of the Constitution of India. As such, the striking down of exclusion of married daughter from the ambit of family being held to be violative of fundamental rights, operates retrospectively.

11. It has been held by Hon'ble the Supreme Court of India in Assistant

Commissioner, Income Tax, Rajkot v. Saurashtra Kutch Stock Exchange Ltd. reported in (2008) 14 SCC 171 as under:-

"35. In our judgment, it is also well settled that a judicial decision acts retrospectively. According to Blackstonian theory, it is not the function of the court to pronounce a ?new rule? but to maintain and expound the ?old one?. In other words, Judges do not make law, they only discover or find the correct law. The law has always been the same. If a subsequent decision alters the earlier one, it (the later decision) does not make new law. It only discovers the correct principle of law which has to be applied retrospectively. To put it differently, even where an earlier decision of the court operated for quite some time, the decision rendered later on would have retrospective effect clarifying the legal position which was earlier not correctly understood."

"36. Salmond in his well known work states:

The theory of case law is that a judge does not make law; he merely declares it; and the overruling of a previous decision is a declaration that the supposed rule never was law. Hence any intermediate transactions made on the strength of the supposed rule are governed by the law established in the overruling decision. The overruling is retrospective, except as regards matters that are res judicatae or accounts that have been settled in the meantime. (emphasis supplied)"

"37. It is no doubt true that after a historic decision in Golak Nath v. State of Punjab [AIR 1967 SC 1643: (1967) 2 SCR 762] this Court has accepted the doctrine of? prospective overruling?. It is based on the philosophy:

The past cannot always be erased by a new judicial declaration.

It may, however, be stated that this is an exception to the general rule of the doctrine of precedent."

13. Even otherwise the rejection order has been passed in the year 2019 while the judgment has been rendered in Smt. Vimla Srivastava(supra) in the year 2015. Even by that consideration, petitioner's candidature was kept alive by opposite parties themselves till the year 2019 and even by prospective application of aforesaid judgment, petitioner's candidature could not have been rejected on that ground.

14. In view of aforesaid facts, impugned order dated 04.04.2019 is clearly unsustainable and is quashed by issuance of a writ in the nature of Certiorari. Opposite party no.2, District Basic Education Officer, Unnao is directed to consider the claim of petitioner for compassionate appointment afresh considering her eligibility for the same in terms of aforesaid Rules of 1974 and her candidature shall not be rejected or excluded from consideration only on the ground of her marital status. Aforesaid consideration shall be done by said opposite party by a reasoned and speaking order within a period of six weeks from the date a copy of this order is produced before said authority.

15. Consequently, the writ petition stands allowed at the admission stage with consent of the parties.

16. The petitioner shall be at liberty to approach the said authority with regard to any pending pensionary dues of her late father. The same shall also be considered within aforesaid time period.

(2020)12ILR A705
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.11.2020

BEFORE

THE HON'BLE MANISH KUMAR, J.

Service Single No. 22483 of 2020

Devi Saran Yadav ...Petitioner
Versus
Khadi & Vill. Indus. Commission & Ors. ...Respondents

Counsel for the Petitioner:
Akash Dikshit

Counsel for the Respondents:
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A. Service Law - Suspension - It is necessary to attach a suspended delinquent outside the district of his current posting. It would be better to keep in mind that the attachment is not made at a place which itself may appear to be kind of punishment and oppressive. And it may also generally be bore in mind that the delinquent may be able to conveniently attend the place where enquiry is to be held and not at a place where it may become difficult for delinquent to properly participate and defend himself in the enquiry proceedings. (Para 9)

In the instant case, the petitioner was being attached at Mumbai from Gorakhpur and the enquiry was being conducted at Gorakhpur. (Para 8)

Writ Petition allowed. (E-10)

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

1. Heard learned counsel for the petitioner and Sri Anil Kumar for the respondents.

2. The present writ petition has been preferred for quashing the impugned order dated 06.03.2020, passed by the Opposite party No.1, by which the petitioner has been placed under suspension and attached at Mumbai Office during suspension period.

3. Learned counsel for the petitioner has submitted that the petitioner has challenged the impugned order dated 06.03.2020 to the limited extant of attachment of the petitioner at Mumbai and the same has been averred in Para 2 of the writ petition, but by mistake it has been left to be mentioned in the prayer clause, so the prayer has been confined only to the extent to consider the case of the petitioner as far as it relates to the attachment of the petitioner from Gorakhpur to Mumbai.

4. It is further submitted that the petitioner is a Class IV employee and very recently got operated for Gall Bladder Stone and is not keeping good health. Attaching the petitioner at Mumbai is very harsh action on the part of the opposite parties.

5. On the other hand, learned counsel for the respondents has submitted that the petitioner bullies and misbehaves with the Superior Officer and the Offices in U.P. are not ready to take the petitioner in their office.

6. After hearing learned counsel for the parties, it is found that the petitioner is a Class IV employee. The inquiry is still pending and the charges are not proved. Attaching a Class IV employees during the disciplinary inquiry from Gorakhpur to Mumbail is undoubtedly a harsh decision on the part of the opposite parties, specially when the petitioner could be accommodate within the state of U.P. The order has been passed without application of mind that how a Class IV employee could manage two establishments in his meager salary, one at the place where his family resides and second where the petitioner has been attached i.e. at a place like Mumbai. The inquiry will conducted at Gorakhpur.

7. In view of the uncontroverted situation with regard to the status of the petitioner being a Class IV employee, the present writ petition is being decided at the admission stage itself.

8. The decision of the Opposite Party No.1 by passing the impugned order dated

6.3.2020 attaching the petitioner from Gorakhpur to Mumbai is very harsh and not sustainable. It is not necessary that in every case of suspension, the delinquent employee is to be attached to a place other than the place of his current posting and if there is any such necessity to replace the delinquent employee from the place of posting of which the enquiry has been initiated, then the attachment should be at nearest place from where the delinquent employee could participate in the inquiry proceedings. Attaching the petitioner at Mumbai from Gorakhpur and the inquiry is to be conducted at Gorakhpur is an arbitrary exercise of power by Opposite party No.1.

9. It may be observed where the authorities find it necessary to attach a suspended delinquent outside the district of his current posting it would be better to kept in mind that the attachment is not made at a place which itself may appear to be kind of punishment and oppressive. And it may also generally be bore in mind that the delinquent may be able to conveniently attend the place where enquiry is to be held and not at a place where it may become difficult for delinquent to properly participate and defend himself in the enquiry proceedings.

10. Under these circumstances, the impugned order dated 6.3.2020 is hereby quashed to the limited extent of attachment of the petitioner at Mumbai. It will be open to Opposite Party No.1 to pass an order of attachment of the petitioner at near Gorakhpur district keeping in view the observation made above.

11. With the observation made hereinabove, the Writ Petition is Allowed.

(2020)12ILR A707
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.11.2020

BEFORE

THE HON'BLE J.J. MUNIR, J.

Writ A No. 23008 of 2015

Devendra Singh ...Petitioner
Versus
Chairman State Cane Service Auth. Lko/Cane Comm. U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rishi Kant Singh

Counsel for the Respondents:
Sri Ravindra Singh

A. Service Law – Payment of Salary – The issue involved in this petition is about payment of salary to the petitioner, a part-time clerk with the Sahkari Ganna Vikas Samiti Ltd., Dhaulana, District - Hapur, in accordance with the recommendations of the 6th Pay Commission. (Para 4)

The validity of an order under challenge before the Court can be judged by the reasons that it carries. Nothing can be added to the reasons, on which the impugned order is founded by way of affidavits, much less submissions made during the hearing. (Para 11)

Court observed that the sole reason assigned by the Cane Commissioner, U.P., Lucknow to pass the order impugned, declining the petitioner's claim is the non-submission of a proposal to implement the 6th Pay Commission recommendation by the Sahkari Ganna Vikas Samiti Ltd., Dhaulana, Hapur. The claim has been declined with a remark that as and when the said proposal is received, a decision to implement it would be taken. It was found that a proposal (dated 10.02.2011) by the Cooperative Societies, Dhaulana has already been made, which ought not only be available with the Cane Commissioner, U.P., Lucknow,

but also with the Managing Director, U.P. Cooperative Cane Union Federation Ltd., Lucknow. The impugned order was passed, ignoring the proposal dated 10.2.2011. (Para 8)

The petitioner in the present case has reportedly retired. Therefore, it was held that in case a decision to implement the 6th Pay Commission were to be taken and the petitioner's claim considered, he would be entitled to revised pay-scale from an appropriate date and also revision of his post-retiral benefits. (Para 13)

Writ Petition allowed in part. Matter remitted. (E-2)

Precedent distinguished:

1. Jay Narayan Tiwari Vs St. of U.P. & ors., Writ-A No. 22820 of 2011, decided on 26.02.2020 (Para 7, 9, 11, 12)

Present petition assails order dated 09.03.2015, passed by the Cane Commissioner, U.P., Lucknow.

(Delivered by Hon'ble J.J.Munir, J.)

1. Counter and rejoinder affidavits have been exchanged in this case.

2. Admit.

3. Heard Mr. Rishi Kant Singh, learned Counsel for the petitioner and Mr. Ravindra Singh, learned Counsel appearing on behalf of the respondents.

4. The issue involved in this petition is about payment of salary to the petitioner, a part-time clerk with the Sahkari Ganna Vikas Samiti Ltd., Dhaulana, District - Hapur, in accordance with the recommendations of the 6th Pay Commission. It appears that the other Cane Cooperative Societies like the Sahkari Ganna Vikas Samiti Ltd. Syana, Bulandshahar and the Sahkari Ganna Vikas Samiti Ltd., Modinagar have been granted benefit of the 6th Pay Commission, where two of their employees are receiving salaries in accordance with pay-scales prescribed under the 6th Pay Commission. The two employees, that is to say, Sunil Kumar, Peon, Sahkari Ganna Vikas Samiti Ltd. Syana, Bulandshahar and Rahul, Peon, Sahkari Ganna Vikas Samiti Ltd., Modinagar were transferred, on their request, to the Sahkari Ganna Vikas Samiti Ltd., Dhaulana, Hapur. These two employees were receiving emoluments at the Cane Cooperative Societies, wherefrom they were transferred according to the 6th Pay Commission pay-scale. After transfer to the Sahkari Ganna Vikas Samiti Ltd. Dhaulana, Hapur the two employees continued to receive emoluments in the pay-scale governed by the 6th Pay Commission. It was on this account that the petitioner claimed emoluments also in accordance with the 6th Pay Commission. This was so because the Sahkari Ganna Vikas Samiti Ltd., Dhaulana, Hapur was paying its native employees salaries in accordance with the 5th Pay Commission, and the petitioner alleged discrimination. The petitioner approached this Court earlier through Writ-A No. 62640 of 2014, decided on 04.12.2014, asking for revision of his emoluments in terms of the 6th Pay Commission. That writ petition was disposed of with a direction that the petitioner ought, in the first instance, make a representation within two weeks to the competent authority, along with a certified copy of the order made in that case. Upon that application being moved by the petitioner, respondent no. 5 to the last mentioned writ petition was ordered to consider the petitioner's claim after calling for comments in the matter from respondent nos. 6 and 7 also to that writ

petition, in accordance with law, within a specified period of time. The petitioner represented, in compliance with the order of this Court dated 04.12.2014, on 16.12.2014, to the Cane Commissioner, U.P., Lucknow. The Cane Commissioner, U.P., Lucknow, respondent no. 1, vide his order dated 09.03.2015, has proceeded virtually to decline the petitioner's representation. It is this order which is under challenge here. The reason assigned in the order impugned appears to be that no proposal has been received for implementation of the 6th Pay Commission from the Sahkari Ganna Vikas Samiti Ltd., Dhaulana, Hapur, whereas the other Cane Cooperative Societies, wherefrom the two employees above mentioned came on transfers have the 6th Pay Commission regime already implemented. The Cane Commissioner, U.P., Lucknow has, therefore, proceeded to cancel the transfer orders relating to the two employees from the other Cooperative Societies.

5. So far as the petitioner's claim is concerned, it has been disposed of in terms that as and when a recommendation is received for implementation of the 6th Pay Commission, appropriate decision will be taken thereon and the petitioner's claim for grant of salary in terms of the 6th Pay Commission shall be considered, once that proposal is accepted by the Cane Commissioner for the Sahkari Ganna Vikas Samiti Ltd., Dhaulana, Hapur.

6. Learned counsel for the petitioner points out that a proposal has already been made for implementation of the 6th Pay Commission, by Sahkari Ganna Vikas Samiti Ltd., Dhaulana, Hapur on 10.02.2011 in the prescribed proforma to the Managing Director, U.P. Sahkari Ganna Samiti Sangh Ltd., Lucknow which has been recommended by the District Cane Officer and the Deputy Cane Commissioner, Meerut. The resolution of the Committee is also enclosed. It is pointed out that the impugned order has been passed, ignoring and disowning these recommendations made by the Sahkari Ganna Vikas Samiti Ltd., Dhaulana, Hapur. The attention of the Court is also drawn towards the memo dated 20.01.2015 from the Secretary, Sahkari Ganna Vikas Samiti Ltd., Dhaulana, Hapur, addressed to the Adhyaksh, Zila Ganna Sewa Pradhikaran, Ghaziabad with copies endorsed inter alia to the Deputy Cane Commissioner, Meerut and the Joint Cane Commissioner/Secretary, Rajya Ganna Sewa Pradhikaran, Lucknow. It is further pointed out that the memo dated 20.01.2015 shows that the Secretary of the Sahkari Ganna Vikas Samiti Ltd. has clearly informed through the aforesaid memo that complete papers in the prescribed format, recommending implementation of the 6th Pay Commission, have been sent to the Managing Director, U.P. Cane Cooperative Union Federation Ltd., Lucknow through a memo dated 13.01.2015, by registered post and also by e-mail. Learned counsel for the petitioner emphasizes that the impugned order dated 09.03.2015 is certainly one made after the memo dated 20.01.2015 was issued by Secretary, Sahkari Ganna Vikas Samiti Ltd., Dhaulana, Hapur and also the proposal dated 10.02.2015, earlier submitted in the prescribed format. It is, therefore, submitted that impugned order is vitiated on account of ignorance of material on record.

7. Mr. Ravindra Singh, learned Counsel appearing on behalf of the respondents disputes the petitioner's claim. He submits that the Sahkari Ganna Vikas

Samiti Ltd., Dhaulana, Hapur is in dire financial straits and does not have the necessary wherewithal to shoulder the financial burden that would entail if the Sixth Pay Commission were implemented. He submits that the liability to implement a particular Pay Commission is subject to the concerned Sahkari Samiti's financial health. There is no scope for aid by the State Government. In order to buttress his submission, he has placed reliance on a decision of this Court, rendered in Jay Narayan Tiwari vs. State of U.P. and others, Writ - A No.22820 of 2011, decided on 26.02.2020. In that case, the employee's claim was for payment of post retiral benefits based on the recommendations made by the Fifth Pay Commission. In the context of that claim, this Court held:

"From a perusal of material placed on the record, it appears that the Cane Commissioner on 30 June 2005 passed an order providing that although arrears for the period of 01 January 1996 to 31 March 2003 would not be payable pursuant to the recommendations made by the Fifth Pay Commission, in respect of those employees who had retired between 01 January 1996 to 31 March 2003, their pay scales as well as gratuity would be revised and reworked notionally and in light of the recommendations made by the Pay Commission. The petitioner here retired in 2000. It is based on this circular of the Cane Commissioner that the claim rests. The respondents however while considering that claim and passing the order impugned have referred to a subsequent circular of the Cane Commissioner of 30 September 2005 and have held thus:-

"गन्ना आयुक्त एंव निबन्धक, सहकारी गन्ना समितियां उ0प्र0 के परिपत्र संख्या 414/सी0/समिति दिनांक 30.9.2005 द्वारा पंचम वेतनमान की सुविधा अनुमन्य कराये जाने हेतु निम्नलिखित मापदण्ड निर्धारित किये गये है :–

1– 1.1.96 से 31.3.2003 की अवधि का कोई वेतन एरियर कर्मचारी को देय नहीं होगा।

2– नये संशोधित वेतनमान लागू करने पर जो अतिरिक्त व्यय भार पड़ेगा उसका वहन गन्ना समितियां अपने संसाधनों से करेगी।

3– गन्ना मूल्य व अन्य मदों का धन किसी भी दशा मं व्यावर्तित नहीं किया जायेगा।

4– गन्ना समितियों को नये वेतनमान लागू करने हेतु कोई राजकीय सहायता अनुमान्य नहीं होगी।

5– गन्ना समितियों को पंचम वेतनमान लागू करने हेतु अपने संचालक मण्डल के समक्ष वित्तीय स्थिति का उल्लेख करते हुए ध्यान में रखते हुए प्रस्ताव पारित करायेगी।

6– गन्ना मूल्य, मूल्य व्यावर्तन करने वाली समितियों को पंचम वेतन की सुविधा अनुमन्य नहीं होगी।

पंचम वेतनमान हेतु गन्ना आयुक्त एंव निबन्धक के परिपत्र संख्या 110/सी0/समिति दिनांक– 20.5.2003 एंव परिपत्र संख्या 414/सी0 दिनांक 30.9.2005 में निर्धारित उक्त शर्तो के वित्तीय स्थिति के अनुसार गन्ना समिति संतुलन पत्र वर्ष 1996–97 के अनुसार रूपया 2,57,2,355.50 की हानि है समिति के अन्य संस्थाओं की देनदारी 89,35,300.00 एंव कर्मचारियों की देनदारी रू0 1,22,10,04.00 है। समिति विगत दस वर्षो की सप्लाई 10.00 लाख कुन्तल से घटकर 3.82 लाख कुन्तल की हो गयी है। व्यावर्तित गन्ना मूल्य धनराशि समिति द्धारा कृषकों को शक्कर विशेष निधि से, 1.54 करोड़ का ऋण शासन द्वारा दिया गया है। शासन के निर्धारित शर्तो के अनुसार उक्त ऋण के विरूद्ध समिति की परिसम्पत्तियां राज्य सरकार के पक्ष में प्रबन्धक है।

पंचम वेतनमान स्वीकृत किये जाने हेतु समिति की प्रबन्ध कमेटी द्वारा कोई प्रस्ताव पारित नहीं किया गया है और निर्धारित मानकों की शर्ते पूर्ण न करने के कारण समिति में बढ़ते लगातार सकल घाटे को दृष्टिगत रखते हुए पंचम वेतनमान स्वीकृत किये जाने का कोई औचित्य नहीं बनता।"

As is evident from a reading of the extract of the communication of the Cane Commissioner of 30 September 2005, bearing in mind the precarious financial condition of Cane Cooperative Development Unions, it was left open for them to take a decision with respect to adoption of the recommendations made by the Fifth Pay Commission. This the State had clearly provided since it was clarified that any additional burden that may fall

upon the Cane Cooperative Development Union would be borne by them independently and without any financial aid or assistance of the State Government. The respondents have then alluded to the financial condition and the losses under which the particular respondent union was reeling. It has further been stated categorically that in light of the precarious financial position, the Board of the Cane Cooperative Development Union did not at any point of time either adopt or decide to implement the recommendations as made by the Fifth Pay Commission....."

8. This Court has perused the entire record. It does appear from a perusal of the record that the sole reason assigned by the Cane Commissioner, U.P., Lucknow to pass the order impugned, declining the petitioner's claim is the non-submission of a proposal to implement the 6th Pay Commission recommendation by the Sahkari Ganna Vikas Samiti Ltd., Dhaulana, Hapur. The claim has been declined with a remark that as and when the said proposal is received, a decision to implement it would be taken. This Court finds that a proposal by the Cooperative Societies, Dhaulana has already been made, which ought not only be available with the Cane Commissioner, U.P., Lucknow, but also with the Managing Director, U.P. Cooperative Cane Union Federation Ltd., Lucknow. Between them, respondent nos. 1 and 2 are the competent authorities to sanction the proposal. The impugned order has been passed, ignoring the proposal dated 10.02.2011, duly recommended to the Managing Director and also the memo dated 20.01.2015, which mentions some further proposal dated 13.01.2015 for the implementation of the 6th Pay Commission in the Establishment of the Sahkari Ganna Vikas Samiti Ltd., Dhaulana, Hapur. This being so, the impugned order passed by the Cane Commissioner, U.P., Lucknow suffers from the errors of ignorance of material evidence on record, besides being manifestly illegal.

9. The submission of Mr. Ravindra Singh, learned Counsel for the respondents, based on the decision of this Court in Jay Narayan Tiwari (supra), would not be attracted to the facts here for more than one reason. The said decision is based on the circular of the Cane Commissioner, dated September the 30th, 2005, which apparently relates to the implementation of the Fifth Pay Commission. It has not been asserted by Mr. Ravindra Singh that the said circular applies years later to the implementation of the Sixth Pay Commission as well.

10. Secondly, the decision would not come to the respondents' rescue because on the facts here, the Sahkari Ganna Vikas Samiti Ltd., Dhaulana, District Hapur have already submitted a proposal seeking implementation of the Sixth Pay Commission. Thus, if the Cane Commissioner's circular, dated 30th September, 2005, were to apply to the Sixth Pay Commission also, it would not avail the respondents, because the Samiti concerned would be conscious of its finances before making a recommendation for the implementation of the Sixth Pay Commission.

11. There is still another reason why the submission based on the decision in Jay Narayan Tiwari (supra) would not apply. The impugned order does not carry for a justification the fact that the Sahkari Samiti in question is reeling under a financial crisis or that the Cane Commissioner's circular dated 30th September, 2005 or a

similar circular, subsequently issued vis-a-vis the Sixth Pay Commission, stands to defeat the petitioner's claim. The law is well settled that the validity of an order under challenge before the Court can be judged by the reasons that it carries. Nothing can be added to the reasons, on which the impugned order is founded by way of affidavits, much less submissions made during the hearing.

12. In this view of the matter, the submissions advanced by Mr. Ravindra Singh, founded on the decision of this Court in Jay Narayan Tiwari cannot avail the respondents.

13. It must be remarked that the petitioner has reportedly retired. In case a decision to implement the 6th Pay Commission were to be taken and the petitioner's claim considered, he would be entitled to revised pay-scale from an appropriate date and also revision of his post-retiral benefits.

14. In the result, this writ petition is allowed in part. The impugned order dated 09.03.2015 is hereby quashed. The matter stands remitted to the Cane Commissioner, U.P. Lucknow and also to the Managing Director, U.P. Cooperative Cane Union Federation Ltd., Lucknow to take a decision between them, or whosoever is entitled under law, regarding implementation of the 6th Pay Commission for the Sahkari Ganna Vikas Samiti Ltd., Dhaulana, Hapur based on the pending recommendation dated 10.02.2011 and further recommendation made in the matter, within a period of one month of the date of receipt of a copy of this order. In case the 6th Pay Commission recommendations are implemented for the Sahkari Ganna Samiti concerned, the petitioner's emoluments and post retiral benefits would be revised and paid, within three months of the decision to implement the pay commission recommendations.

15. There shall, however, be no order as to costs.

16. Let this order be communicated to the Cane Commissioner, U.P. Lucknow and the Managing Director, U.P. Cooperative Cane Union Federation Ltd., Lucknow by the Joint Registrar (Compliance).

(2020)12ILR A712
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.12.2020

BEFORE

THE HON'BLE RAJAN ROY, J.

Service Single No. 23351 of 2020

Sunita Shukla & Ors. ...Petitioners
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioners:
Aditya Vikram Shahi, Prashant Vikram Singh, Shradha Singh.

Counsel for the Respondents:
C.S.C.

A. Service Law - Old Pension Scheme - The petitioners claimed to have appeared for a selection process which was advertised in the year 2011 which eventually got delayed. The appointment got concluded in the year 2006 by which the New Post Retirement Scheme had come into force and the Old Pension Scheme had seized to be effective from 01.04.2005. The Court rejected the claim of the petitioner seeking benefits of Old Pension Scheme on the ground that the petitioner neither approached this Court seeking any remedy for expeditious selection and appointment nor they raised any

dispute with regard to applicability of new post retirement scheme from the date of their appointment and readily accepted the conditions of service applicable including the new post retirement scheme. (Para 11)

The Court observed that the there is a distinction between the rules of recruitment and conditions of service. The principle that rules of recruitment cannot be changed can have no applicability in a scenario where conditions of service is changed on account of change in the service rules. Pension etc. would fall within the meaning of conditions of service and not conditions of recruitment, therefore, conditions of service can always be changed. (Para 9)

Writ Petition rejected. (E-10)

List of Cases cited: -

1. Mahesh Narayan & ors. Vs St. of U.P. & ors. Writ Petition No.. 55606 of 2008

2. Manoj Kumar Singh & 17 ors. Vs St. of U.P & ors. Writ A No. 5414 of 2020 *(Followed)*

3. Firangi Prasad Vs St. of U.P. & ors. 2011 (2) UPLBEC 987

4. Ashutosh Joshi & ors. Vs. St. of Uttarakhand & ors. Writ Petition (S/S) No. 1170 of 2010

5. Inspector Rajendra Singh Vs U.O.I. (2017) SCC Online Delhi 7879

6. Naveen Kumar Jha Vs U.O.I. & ors.

7. Shankarsan Das Vs U. O. I. & ors. (1991) 3 SCC 47

8. Balwant Singh & ors. Vs St. of Uttarakhand Writ Petition No. 16 and 944 of 2011

(Delivered by Hon'ble Rajan Roy, J.)

1. Heard learned counsel for petitioners and learned Additional Chief Standing Counsel for State.

2. This writ petition has been filed by petitioners seeking a writ of mandamus commanding respondents to provide them benefit under the Old Pension Scheme as existing prior to 01.04.2005.

3. The petitioners are still in service and have not retired. The petitioners claim to have appeared in a selection for appointment against post of Staff Nurse advertised in the year 2001. It is said that for some reason beyond their control the selection got delayed. They are not aware of the reason why this happened. Be that as it may, the petitioners were given appointment in 2006. They have referred to one writ petition bearing No. 3106 (M/S) of 2001 filed by some other persons but the counsel could not point out as to what was the issue involved therein. Nevertheless, the fact of the matter is that petitioners never approached the High Court prior to 2006 seeking expeditious selection or appointment, as the case may be. It is also not in dispute that the petitioners accepted appointment in 2006 by which the New Post Retirement Scheme had come into force and the Old Pension Scheme had seized to be effective from 01.04.2005. The fact of the matter is that the date of entry of petitioners in service is subsequent to 01.04.2005.

4. The basis of the claim of petitioners for benefit under the Old Pension Scheme, as and when the occasion arises, is a decision of this Court in the case of Mahesh Narayan and Ors. Vs. State of U.P. and Ors.; Writ Petition No. 55606 of 2008, however, this issue and the applicability of the decision in Mahesh Narayan's case (supra) came up for consideration before a co-ordinate Bench of this Court in Writ- A No. 5414 of 2020; Manoj Kumar Singh and 17 Ors. Vs. State of U.P. and Ors. wherein, the Co-ordinate Bench opined that recruitment in the said case commenced on

20.10.1999 in respect of a pensionable post. The recruitment got delayed on account of a dispute raised before this Court. Although by virtue of the order passed in Special Appeal No. 485 (S/B) of 2001, dated 29.12.2001, there was no impediment in completion of recruitment but the selection got completed only after dismissal of writ petition on 05.07.2005. In between, a subsequent advertisement was issued and the selected candidates were appointed prior to 01.04.2005 i.e. during the Old Pension Scheme. The Notification dated 28.03.2005, 07.04.2005 and the amended rules of 2005 were challenged as not being applicable upon the petitioner. The writ petition was partly allowed in Mahesh Narayan's case (supra). This Court in Manoj Kumar Singh's case (supra) opined that the judgment in the case of Mahesh Narayan's case (supra) is again on the facts of its own, inasmuch as, the recruitment process was delayed for no obvious reason and persons appointed pursuant to a subsequent notification were appointed earlier and were granted the benefit of old pension rules. Persons appointed against a previous advertisement could not be denied benefits which had already been extended to the appointees of a later recruitment exercise. The Court opined that the protection in the form of benefit under old pension rules in Mahesh Narayan's case (supra) had been extended only to protect against an arbitrary act. The Court further opined that this judgment did not lay down any proposition that delay in concluding selection would ipso facto result in applicability of old pension scheme.

5. In Manoj Kumar Singh's case (supra) various other decisions cited by the petitioners such as Firangi Prasad Vs. State of U.P. and others reported in 2011 (2) UPLBEC 987, Ashutosh Joshi and others vs. State of Uttarakhand and others; Writ Petition (S/S) No. 1170 of 2010 decided on 17.06.2013 and Special Appeal No. 330 of 2013 decided on 26.06.2014 arising therefrom as also a decision of Delhi High Court in Inspector Rajendra Singh Vs. Union of India reported in (2017) SCC Online Delhi 7879 were considered and distinguished.

6. In Inspector Rajendra Singh's case (supra) also, the petitioners were discriminated, inasmuch as, after being selected they were declared medically unfit. While their matter was pending before the Review Medical Board, the Commission declared results of all other selected candidates, except the petitioners. Others were appointed and were entitled to the benefit of Old Pension Scheme but on account of delay in appointment of the petitioners, who were subsequently declared medically fit, they were denied the benefit, therefore, that was also a case of discrimination. The co-ordinate Bench opined that Similar were the facts in the case of Naveen Kumar Jha Vs. Union of India and others, decided by Delhi High Court on 2.11.2012.

7. As regards the decision in Firangi Prasad's case (supra) the co-ordinate Bench in Manoj Kumar Singh's case (supra) opined that it was a case of arbitrariness and covered by the exception carved out in Shankarsan Das Vs. Union of India and others reported in (1991) 3 SCC 47 as appointment had been arbitrarily denied to the selected candidate within 10 days as was mandated, resulting in delay in regularization.

8. With regard to Ashutosh Joshi's case also (supra), although a passing observation was noticed by a co-ordinate

Bench that selection having commenced during old pension scheme it would be applicable upon male candidates appointed later, yet, as observed by it, this observation had to be read in the context of the fact that similarly placed women candidate were covered by the old pension rule. It opined that the Court in Ashutosh Joshi's case (supra) apparently was protecting the petitioners against an arbitrary scenario and thus this case also fell in the excepted category in Shankarsan Das (supra) of arbitrariness and discrimination.

9. Other decision of Uttrakhand High Court in Balwant Singh and Ors. Vs. State of Uttrakhand (Writ Petition No. 16 and 944 of 2011) was also dealt with and it was observed by the co-ordinate Bench that there is a distinction between rules of recruitment and conditions of service. The principle that rules of recruitment cannot be changed can have no applicability in a scenario where conditions of service is changed on account of change in the service rules. Pension etc. would fall within the meaning of conditions of service and not conditions of recruitment, therefore, conditions of service can always be changed. Ultimately, the co-ordinate Bench in Manoj Kumar Singh's case (supra) opined as under:-

"28. The petitioners have not been able to demonstrate that they have been arbitrarily discriminated or have been denied appointment prior to 31st March, 2005. For any delay in conclusion of selection the previous pension rules would not get attracted in view of the express stipulation in the statutory rule itself. Date of entry into service would otherwise determine the applicability of pension rules by virtue of the U.P. Retirement Benefits (Amendment) Rules, 2005, notified on 7.4.2005. Petitioners have otherwise accepted the terms of new pension scheme ever since their appointment in the year 2006. No protest of any kind was made during the last fourteen years. Petitioners therefore, have acquiesced to the new pension scheme and they cannot be permitted to resile from its applicability particularly when no challenge is laid to the statutory rule itself.

29. It is otherwise settled that no sympathy can be claimed to override express provisions contained in the applicable pension rules. In a matter arising out of claim of pension the Supreme Court in Sudhir Kumar Consul Vs. Allahabad Bank, (2011) 3 SCC 486, observed as under:-

"31. We have sympathies for the appellant but, in a society governed by Rule of law, sympathies cannot override the Rules and Regulations. We may recall the observations made by this Court while considering the issue of compassionate appointment in public service.

32. In Life Insurance Corporation of India v. Asha Ramachhandra Ambekar and Anr. (1994) 2 SCC 718, wherein the Court observed:

"The High Courts and the Administrative Tribunals cannot confer benediction impelled by sympathetic consideration.... Yielding to instinct will tend to ignore the cold logic of law. It should be remembered that "law is the embodiment of all wisdom". Justice according to law is a principle as old as the hills. The Courts are to administer law as they find it, however, inconvenient it may be."

30. In view of the discussions aforesaid, this Court is of the considered opinion that any delay in selection for appointment, ipso facto, cannot be a

ground to extend benefit of old pension scheme notwithstanding the clear stipulation in the pension rule specifying date of entry in service to be determinative of the pension scheme.

31. Writ petition lacks merit and is dismissed.

Order Date :- 13.10.2020

Ranjeet Sahu/Ani"

10. In the present case also no case of arbitrariness and discrimination had been made out on the lines noticed hereinabove in other cases. It is not a case of persons similarly situated in the same selection having been discriminated. It is not a case where selectees of a subsequent advertisement were appointed under the Old Pension Scheme while the selection of petitioners was kept pending nor is it a case where any discrimination had been made in this regard.

11. One of the glaring facts is that after issuance of advertisement the petitioner never approached this Court seeking any remedy for expeditious selection and appointment. Even after 2006 they readily accepted their appointment without demunr, meaning thereby, they also accepted the conditions of service applicable including the new post retirement scheme and the fact that the Old Pension Scheme became unavailable to them w.e.f. 01.04.2005 as their appointment was subsequent to it.

12. As observed by the co-ordinate Bench merely because a person has participated in a selection that by itself does not give any right to appointment nor to any benefits accruing therefrom. The fact is that petitioners were appointed in 2006 and not prior to 01.04.2005.

13. Now, after 14 years for the petitioners to come to this Court saying that they should be given the benefit of the Old Pension Scheme is rather belated apart from being impermssible.

14. The plea that the petitioners were absolutely unaware about the conditions of service is hardly acceptable in the facts and circumstances of the case. Ignorance is no excuse in law. Necessary deductions must have been made from their monthly salary under the New Pension Scheme which would make them fully aware as to what are the dues admissible and payable to them after retirement. Moreover, any conscious and prudent person would inquire about the service and post retirement benefits which they would be entitled to once they enter into service or within a reasonable period of such entrance.

15. Any plea based on Shankarsan Das (supra) had to be raised at the appropriate time which was never done.

16. In view of the above, the case at hand is squarely covered by the decision dated 13.10.2020 rendered in the case of Manoj Kumar Singh (supra) and there is no reason for this Court, in the facts of the present case, to take a view different from what has already taken by a co-ordinate Bench.

17. Accordingly, the writ petition lacks merit and is liable to be dismissed. It is, accordingly, dismissed.

(2020)12ILR A716
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.11.2020

BEFORE

THE HON'BLE J.J. MUNIR, J.

Writ A No. 27163 of 2016

Amarsen & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Rishu Mishra, Sri Deepak Kumar Tripathi, Sri Gopal Das Srivastava, Sri Uma Kant Mishra, Sri H.R. Mishra

Counsel for the Respondents:
C.S.C., Sri Rajesh Kumar

A. Service Law - The Uttar Pradesh Intermediate Education Act, 1921: Section 16-G - Regulations framed under the Act of 1921: Chapter III Regulation 101 - The Uttar Pradesh High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971 - Once a Government Order which serves as a basis to refuse financial approval is struck down by this Court as ultra vires, the position as it stood prior to those invalidated Government Orders/amendments, revives. (Para 24)

Writ Petition partly allowed. (E-10)

List of cases cited: -

1. Principal, Abhay Nandan Inter College, Vishnu Mandir & anr. Writ C No. 45060 of 2015

2. C/M Lala Babu Baija; Memorial Inter College & anr. Vs State of U.P. & ors. Writ C No. 11760 of 2011

(Delivered by Hon'ble J.J. Munir, J.)

1. Counter affidavits, one on behalf of respondent nos.1 and 2 and the other on behalf of respondent no.3 have been filed. There is no rejoinder affidavit to either of the two counter affidavits.

2. Admit.

3. Heard forthwith.

4. It seems that it is difficult for the District Inspector of Schools, Basti, if not altogether impossible, to understand that a Government Order, once struck down by this Court, is wiped out of existence. He seems to think that notwithstanding the Government Order dated 06.01.2011 being struck down by this Court, it still survives. It is this misconception of the District Inspector of Schools, that has led to this writ petition being instituted.

5. Heard Mr. H.R. Mishra, learned Senior Advocate assisted by Mr. Gopal Das Srivastava, learned Counsel for the petitioners and Mr. Sharad Chandra Upadhyay, learned State Law Officer appearing on behalf of respondent nos.1 and 2. No one appears on behalf of respondent no.3, though the name of Mr. Rajesh Kumar, learned Advocate appearing on behalf of the said respondent, is shown in the cause list.

6. Amarsen and Krishna Kumar Verma, who are the first and the second petitioners in that order, have been appointed as peons with Shri Deshraj Narang Dayanand Inter College, Govind Nagar, Walterganj, District Basti (for short, "the College'). Though appointed way back in the year 2014, their appointments have not received approval of the District Inspector of Schools. In consequence, both the petitioners are going without their salary. It is this deprivation of rights for the petitioners that has compelled them to move this Court.

7. The College is located at Govind Nagar in the district of Basti. It is a recognized and aided institution. The College is governed by the provisions of the Uttar Pradesh Intermediate Education Act, 1921 (for short, "the Act of 1921') and

the regulations framed thereunder. The salaries to teachers and other employees of the College are paid in accordance with The Uttar Pradesh High Schools And Intermediate Colleges (Payment Of Salaries Of Teachers And Other Employees) Act, 1971 (for short, "the Act of 1971').

8. Two substantive posts of peons fell vacant. According to the reservation profile of incumbents in the Class-IV cadre, these posts would go to the Other Backward Class (O.B.C.) quota. It seems that shortage of hands had adversely affected dispatch of work and, therefore, the College took a decision to fill up both these posts. The Principal of the College is the appointing authority of employees in the Class-IV cadre. He addressed memorandum dated 10.02.2014 with a follow up dated 19.03.2014 to the District Inspector of Schools, Basti, seeking the latter's permission to fill up the two vacant posts of peons with the College under the O.B.C. quota. It appears that no decision was taken on the Principal's request for a permission as aforesaid by the District Inspector of Schools. The Principal caused an advertisement to be published in two dailies, to wit, Swatantra Chetna and Dainik Prabhat issues, dated 20.06.2014, advertising the two posts of peons, available with the college.

9. In due course, applications were received and a Selection Committee was convened. The Selection Committee made recommendations to the Principal, favouring the petitioners' candidature. Accepting those recommendations, the Principal of the College appointed the petitioners, issuing both of them letters of appointment, both dated 10.07.2014. The petitioners, on receipt of letters of appointment, put in their respective joining reports in the office of the Principal on 11.07.2014. Ever since, the petitioners are discharging their duties as peons with the College.

10. The Principal for his part, after going through the entire selection process, forwarded papers pertaining to selection and appointment of the petitioners to the District Inspector of Schools, for his approval. These papers for approval were forwarded by the Principal to the District Inspector of Schools through a forwarding memo dated September the 2nd, 2014.

11. It is asserted on behalf of the petitioners that the District Inspector of Schools has received the entire papers relating to their selection and appointment, but he has not taken any decision for the approval of these appointments. He has neither approved or disapproved.

12. This writ petition, in substance, complains about this inaction by the District Inspector of Schools. The petitioners' cause of action, however, foretells the reason for the District Inspector of Schools' inaction. In paragraph nos.13 to 18 of the writ petition, reasons are indicated for the complained inaction by the District Inspector of Schools. It is said there that the State Government had issued a Government Order dated 06.01.2011, prohibiting appointment to Class-IV posts in aided educational/ technical institutions. It was also provided that in substitution of the existing mechanism of recruitment by the institution in accordance with Rules, services of Class-IV personnel required, would be secured through outsourcing. This stipulation was carried in paragraph no.2 of the Government Order dated 06.01.2011.

This Government Order was put to challenge in Writ - C No.11760 of 2011 and a host of other petitions. All the writ petitions were consolidated, heard together and decided by a common judgment and order dated 21.03.2012. Writ - C No.11760 of 2011 was decided as the leading petition.

13. This Court, by its judgment and order dated 21.03.2012 rendered in Writ - C No.11760 of 2011, allowed the writ petitions and struck down paragraph no.2 of the Government Order dated 06.01.2011. A special appeal, from the judgment and order dated 21.03.2012, was carried by the State, being Special Appeal No.1023 (D) of 2012, but no interim order was granted there. It is then pleaded that in order to override and undo the effect of the judgment and order dated 21.03.2012, the State Government issued a Government Order dated 04.09.2013. The said Government Order amends Regulation 101, occurring in Chapter III of the Regulations framed under the Act of 1921 to provide that the District Inspector of Schools would grant permission to the Management to fill up posts in the clerical cadre, after securing permission from the Director of Education (Secondary), but would leave out from this regime of permission, Class-IV posts. It is further provided by the amended Regulation that for the Class-IV vacancies with an intermediate institution, arrangement for hiring hands shall be made through outsourcing.

14. The petitioners plead that the Government Order dated 04.09.2013 has been challenged in Writ - A No.62544 of 2013, wherein an interim order dated 08.12.2013 has been passed. Details of this challenge in the order interim made by this Court are pleaded in paragraph no.17 of the writ petition. It is asserted that the Principals of the Intermediate Colleges and High Schools are still empowered to make selection and appointment of Class-IV Employees under the existing system.

15. It may be remarked that the interim order passed in Writ - A No.62544 of 2013 had stayed the operation of the order dated 04.09.2013, amending Regulation 101 and further ordered that no recruitment, by way of outsourcing, shall be made. It was also provided that further recruitment shall be made according to the process existing prior to the amendment, which shall remain in force. It is this part of the interim order passed by this Court on 18.12.2013 in Writ - A No.62544 of 2013 that has inspired the petitioners to plead the way they have done in paragraph no.18 of the writ petition.

16. During the course of hearing, Mr. H.R. Mishra, learned Senior Advocate appearing for the petitioners points out that the challenge to the Government Order dated 04.09.2013, amending Regulation 101, came up for hearing before a Division Bench of this Court along with a group of other writ petitions, involving the same question. The Division Bench proceeded to hear Writ - C No.45060 of 2015, Principal, Abhay Nandan Inter College, Vishnu Mandir & anr. as the leading case. Their Lordships, by the judgment and order dated 19.11.2018 rendered in Writ - A No.45060 of 2015 (supra) and connected matters, have held Regulation 101 of the Regulations framed under the Act of 1921, as amended vide Government Order dated 04.09.2013 ultra vires and struck down the same insofar it provided that vacancies of Class-IV in Intermediate Institutions, shall be filled up by an "outsourcing' arrangement. By the said judgment, the Educational Authorities have been ordered

to consider the matter of pending appointments and pass orders in accordance with law. A copy of the judgment of the Division Bench in Writ - C No.45060 of 2015 (supra) was placed before the Court by Mr. Mishra, during the course of the hearing. This Court has perused the same.

17. The stand of the State, represented by the Secretary, Secondary Education, Government of U.P. and the District Inspector of Schools, Basti, who have filed a joint counter affidavit, is encapsuled in paragraph no.3, which reads:

"B. That the Principal, Sri Deshraj Narang Dayanand Inter College Walterganj, Basti vide his letters dated 10.2.2014 and 19.3.2014 requested from the District Inspector of Schools, Basti to give permission for filling the two vacant posts of Peon under the OBC category. It is stated that in the institution in question, there are 15 posts of Class IV employees are sanctioned. Against which, 6 peons of General Category, 3 peons of OBC category and 4 peons of Scheduled Caste Category are working in the institution. Thereafter, the State Government vide government orders dated 6.1.2011 and 15.3.2012 imposed ban on appointment on the Class IV posts. Even the ban imposed by the State Government vide government orders dated 6.1.2011 and 15.3.2012, the Principal of the institution shown the appointment of Sri Amarsen and Sri Krishna Kumar Verma on the post of Peon. In view of the aforesaid government orders, the appointment made by the Principal of the institution is illegal and null and void and the petitioners are not entitled for any benefit. Aggrieved by the aforesaid, the petitioners have filed the present writ petition before this Hon'ble Court, which is liable to be dismissed with costs."

18. A counter affidavit has been filed on behalf of respondent no.3 as well, but there is no stand there, contesting the petitioners' claim.

19. Mr. Sharad Chandra Upadhyay, learned State Law Officer has argued in tandem with the State's stand that in view of the Government Order dated 06.01.2011 and the subsequent amendment to Regulation 101 of Chapter III of the Regulations framed under the Act of 1921, there is no scope left for a Class-IV employee to be appointed by any intermediate institution on the posts sanctioned in their establishment. He submits that under the new regime against the sanctioned posts of Class-IV employees, hands have to be hired through outsourcing. It is submitted by Mr. Upadhyay further that striking down of the Government Order dated 06.01.2011 and the subsequent Government Order dated 04.09.2013, effecting amendment to Regulation 101 (supra) cannot affect the State's right to stand by its policies, embodied in those amendments. He submits that since the State has to bear costs of employing personnel appointed to aided private educational institutions, the Authorities cannot be compelled to pay employees, recruited to posts, where the State have forbidden tenure appointment on the sanctioned posts.

20. This Court has keenly considered the submissions made and perused the record. Class-IV posts, in an intermediate institution, are governed by Section 16-G of the Act of 1921, like other posts in such an institution. Regulations providing for conditions of service are framed in exercise of delegated powers. Regulations, in fact, have been framed relating to service conditions, both of Class-III and Class-IV

employees, of which Regulation 101 is a part. Amendment made to Regulation 101, as regards condition of service, has been upheld by this Court as a valid exercise of legislative powers by the State Government, but the part of paragraph no.2 of the amendment, that provides for engagement of hands against existing Class-IV posts through outsourcing, has been held to be ultra vires the powers of the State Government. This is so because that part of the amendment is no part of conditions of service of a Class-IV employee. It is simply an impingement or restraint on the powers of the Management to appoint against a sanctioned post.

21. The amended part of the Regulation 101, forbidding appointment of regular staff against sanctioned posts of Class-IV alone, has also been held to be discriminatory by this Court. In Principal, Abhay Nandan Inter College, the amendment forbidding appointment by an intermediate institution to a sanctioned Class-IV post and instead introducing a regime, where hands have to be engaged through outsourcing, has been held ultra vires the powers of the State Government and the Government Order dated 04.09.2013 to that extent has been struck down. The relevant part of amended Regulation 101 has, a fortiori, also been struck down as ultra vires. Likewise, paragraph 2 of the earlier Government Order dated 06.01.2020, on the strength of which the respondents seek to resist the petitioners' claim for a financial approval to their appointment by the District Inspector of Schools, has also been struck down by this Court in Writ - C No.11760 of 2011, C/M Lala Babu Baijal Memorial Inter College and another vs. State of U.P. and others, decided on 21.03.212. In C/M Lala Babu Baijal Memorial Inter College, it has been held:

"64. In my view, therefore, though the concept of making available the staff to perform Class-IV job by outside agency though termed "Outsourcing" but it is nothing but a system of supply of work force through a contractor or a person who satisfy the term "contractor" for all purposes though termed as "outsourcing". Hence the system as contemplated in Para 2 of impugned G.O. is evidently exploitative, arbitrary, unreasonable, irrational, illogical, hence violative of Article 14 and 16 of the Constitution."

22. In C/M Lala Babu Baijal Memorial Inter College, the following order was passed:

"68. In the result, following writ petitions are decided in the following manner:

(A) The Writ Petitions No. 11670 of 2011, 27387 of 2011, 27388 of 2011, 45111 of 2011, 33140 of 2011, 64630 of 2011, 68199 of 2011, 68591 of 2011, 68592 of 2011, 62476 of 2011, 63197 of 2011 and 1432 of 2012 are allowed to the extent that Para 2 of G.O. dated 06.01.2011 is struck down in its application to Secondary Educational Institutions recognised by the Board and governed by provisions of Act, 1921 and the Regulations framed thereunder, being illegal, arbitrary, unconstitutional and ultra vires.

(B) Writ Petitions No. 62616 of 2011, 50905 of 2011, 8492 of 2012, 49269 of 2011, 63653 of 2011, 67140 of 2011, 61539 of 2011, 62465 of 2011, 631 of 2012 and 74197 of 2011 are allowed to the extent that orders impugned passed by State Government/educational authorities, pursuant to Para 2 of G.O. dated 06.01.2011, which has already been struck down, as above, are hereby set aside. They are directed to pass fresh order in

accordance with law and in the light of the observations made above.

(C) The Educational Authorities are also directed not to obstruct the process of selection and appointment on Class-IV posts in Secondary Educational Institutions only on the basis of Para 2 of G.O. dated 06.01.2011.

69. The Writ Petition No. 45708 of 2011 is disposed of directing the competent educational authorities to pass appropriate order on the matter of approval on selections made in educational institutions concerned for appointment on Class-IV posts expeditiously and in any case within a period of one month from the date of production of a certified copy of this order."

23. It has not been brought to this Court's notice that the decisions in Principal, Abhay Nandan Inter College and C/M Lala Babu Baijal Memorial Inter College have not been set aside or stayed by the Supreme Court. It is also not the respondents' case that some Government Order or amendment has been issued that may, in effect, reintroduce the regime envisaged under the Government Order dated 06.01.2011 or Regulation 101, as amended vide Government Order dated 04.09.2013, to the extent these Government Orders/ amended Regulations have been struck down by this Court in Principal, Abhay Nandan Inter College and C/M Lala Babu Baijal Memorial Inter College.

24. The contention put forth by Mr. Upadhyay that notwithstanding the Government Orders/ amendments being struck down, it is the State's policy to hire hands to Class-IV posts in private aided institutions, who cannot, therefore, appoint employees against sanctioned posts in their establishment, is hollow, if not preposterous. Once a Government Order or more so an amendment effected through a Government Order to statutory regulations, that serves as the basis to refuse financial approval, is struck down by this Court as ultra vires, the position as it stood prior to those invalidated Government Orders/ amendments, revives. Under Regulation 101, occurring in Chapter III of the Regulations framed under the Act of 1921, the position that obtains for the present is that a private and aided intermediate institution, governed by the Act of 1921 and Act of 1971, is entitled to appoint Class-IV employees against sanctioned post; and if such employees have been appointed in accordance with law, the competent Authority is bound to grant financial approval to their appointment.

25. Here, the petitioners' claim to grant a financial approval is substantially resisted by respondent nos.1 and 2 on ground that it is contrary to the Government Order dated 06.01.2011 and some other Order dated 15.03.2012. That Government Order and the subsequent Government Order dated 04.09.2013 effecting certain amendment to Regulation 101 (supra) being struck down, the District Inspector of Schools, Basti or any Authority of the State superior to him and competent, cannot refuse financial approval to the petitioners, on the strength of provisions and Government Orders, that stand effaced by judgments of this Court.

26. In the result, this writ petition succeeds and is allowed in part. A mandamus is issued to the District Inspector of Schools, Basti ordering him to consider and decide the petitioners' case for grant of financial approval to their respective appointment as Class-IV employees with the College, strictly in

accordance with law, after hearing the petitioners within a period of one month of date of receipt of copy of this order. Costs easy.

27. Let this order be communicated to the District Inspector of Schools, Basti by the Joint Registrar (Compliance) within a week.

(2020)12ILR A723
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.11.2020

BEFORE

THE HON'BLE J.J. MUNIR, J.

Writ A No. 31032 of 2015

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

Counsel for the Petitioner:
Sri Umesh Vats, Sri Bhupesh Kumar Singh, Sri Hare Ram Pandey

Counsel for the Respondents:
C.S.C., Sri Q.H. Siddiqui, Sri Rajesh Kumar Dubey, Saiful Islam Siddiqui, Sri Vimlesh Kumar Rai

A. Service Law-Compassionate Appointment - The U.P. Recruitment of Dependents of Government Servants Dying-in-Harness Rules, 1974 - In case there is a rival claim to compassionate appointment under the Rules, the Head of Office shall decide about the suitability of that person for employment. It also stipulates that the decision will be one that bears in mind the overall welfare of the entire family, particularly, the widow and the minor dependents. (Para 10)

The decision about the fact as to which dependent of the deceased would be best known to the widow's interest, can reasonably be expected to be best known to the widow herself. Apart from the widow, the other two dependents also expressed their choice in favour of the fifth respondent against the petitioner. Further, the widow sworn in an affidavit that the petitioner is a man with criminal antecedents which shows that she does not trust him to take care of the family therefore the Superintending Engineer rightly exercised his power under the Rules of 1974 to accept the fifth respondent's claim and reject that of the petitioner. (Paras 11, 12, 13)

Writ Petition rejected. (E-10)

(Delivered by Hon'ble J.J. Munir, J.)

1. This writ petition has emerged from a conflict of claims to compassionate appointment between the two sons of the late Mishri Lal, a Government servant, who died in harness. Late Mishri Lal was a chowkidar in the Establishment of the Construction Unit, Uttar Pradesh Jal Nigam, Power House Road, 102/1017, Kasturi Niwas, Mohammadipur, Gorakhpur. The deceased was a permanent employee. Mishri Lal died in harness on 03.05.2014, leaving behind him, his widow Smt. Vidya Devi and four sons, all adults, to wit, Ashok Kumar, Dhirendra Kumar, Brijesh Kumar and Vijay Kumar. The two sons of the late Mishri Lal, who have staked rival claims to compassionate appointment under The Uttar Pradesh Recruitment of Dependents of Government Servants Dying-in-Harness Rules, 19741 are the petitioner, Dhirendra Kumar, on the one hand, and the fifth respondent, Brijesh Kumar, on the other.

2. It is the petitioner's case that he is the eldest son of the deceased. He applied under the Rules of 1974 on 27.05.2014. It is the petitioner's case that his mother, Smt. Vidya Devi, tendered an affidavit dated 27.05.2014, indicating her willingness for a compassionate appointment in favour of the petitioner, in place of her deceased husband. A copy of the affidavit dated

27.05.2014, allegedly sworn by Smt. Vidya Devi in the petitioner's favour, is on record. The petitioner has also averred that while his father was alive, he had executed an unregistered will in the petitioner's favour, a copy whereof he has annexed as Annexure-4 to the writ petition. The will carries a nomination in favour of the petitioner by the testator, virtually bequeathing to the petitioner a right to compassionate appointment after his decease.

3. The Court has been taken through the contents of the will by the learned counsel for the petitioner. It is the petitioner's further case that he is a graduate. This Court must remark that in support of this assertion of his, the petitioner has annexed two certificates, which show that he has earned his matriculation and intermediate examination certificates from The U.P. Board of High School and Intermediate Education. There is no copy of a bachelor's degree of any kind to show that the petitioner is a graduate. The petitioner claims that no action was taken, on his request for compassionate appointment, for a considerable period of time. He, therefore, approached higher functionaries of the Uttar Pradesh Jal Nigam on 01.07.2014, complaining of inaction on the part the Jal Nigam authorities. It is asserted that all this inaction compelled the petitioner to institute Writ - A No. 45913 of 2014 before this Court, praying that his claim for compassionate appointment may be dealt with and decided. Writ - A No. 45913 of 2014 was disposed of by this Court, by an order dated 02.09.2014, requiring respondent no. 2 to the petition to decide the petitioner's claim for compassionate appointment, carried in his representation dated 27.05.2014, within a period of three months from the date of production of a certified copy of that order before the said respondent. It is the petitioner's case that by the impugned order dated 22.12.2014, his representation has been rejected, and instead, the fifth respondent's claim to compassionate appointment, on account of their father's death in harness, has been accepted. This order has been passed by the Superintending Engineer, Construction Unit, U.P. Jal Nigam, Lucknow.

4. Disillusioned by the impugned order dated 22.11.2014, this writ petition has been brought.

5. Notice, pending admission, was issued by this Court to the respondents, vide order dated 25.05.2015. This notice of motion has led to a combined counter affidavit being filed on behalf of respondent nos. 2, 3 and 4, and a separate return, on behalf of the rival and successful claimant for compassionate appointment, respondent no. 5. To both these returns, the petitioner has filed separate rejoinders.

6. Admit.

7. Heard forthwith.

8. Heard Mr. Hare Ram Pandey, learned counsel for the petitioner, Mr. Vimlesh Kumar Rai, learned Standing Counsel appearing on behalf of respondent nos. 2, 3 and 4, and Mr. Rajesh Kumar Dubey, learned counsel appearing for respondent no. 5.

9. This Court has carefully perused the record. The impugned order shows that the respondents had before them, two rival claimants to consider under the Rules. Admittedly, both the claimants, that is to say, the petitioner and the fifth respondent,

are sons of the late Mishri Lal. There is no quarrel that Mishri Lal was a permanent government servant and his dependents are eligible under the Rules of 1974 to compassionate appointment. The reason, apparently, to accept the fifth respondent's claim and reject that of the petitioner, is the fact that the deceased's widow has come out with a clear stand that she never gave a no objection on affidavit in favour of the petitioner's claim to compassionate appointment. She has dubbed the affidavit of no objection, produced by the petitioner, purporting to be sworn by her, as a forged document. To the contrary, she has furnished an affidavit in favour of the fifth respondent, saying that he may be considered for compassionate appointment under the Rules of 1974, availing the right as a dependent of her deceased husband. The respondents, faced with this kind of a claim, have placed reliance upon the provision to Rule 7 of the Rules of 1974, which is extracted infra :

"7. Procedure when more than one member of the family seeks employment.- If more than one member of the family of the deceased Government servant seeks employment under these rules, the Head of Office shall decide about the suitability of the person for giving employment. The decision will be taken keeping in view also the overall interest of the welfare of the entire family, particularly the widow and the minor members thereof."

10. Rule 7 of the Rules of 1974 provides that in case more than one members of the deceased's family stake claim for employment under the Rules, the Head of Office shall decide about suitability of the person for employment. It also stipulates that the decision will be one that bears in mind the overall welfare of the entire family, particularly, the widow and the minor dependents. It appears that in this case, not only the widow consented in favour of the fifth respondent's candidature, but the other two brothers, Ashok Kumar and Vijay Kumar also. The Superintending Engineer, who dealt with the claim, found the fifth respondent not just better qualified, with an M.A. degree, but also found that the petitioner's claim to being a graduate, unsubstantiated. He had placed on record a certificate of passing the intermediate examination, but nothing to show that he was a graduate. Before this Court also, the petitioner has claimed himself to be a graduate, but has not placed on record the bachelor's degree to prove the fact.

11. The primal consideration with the respondents, to accept the fifth respondent's claim, however, is the choice exercised in his favour by the deceased's widow. The choice of the deceased's widow is very relevant under Rule 7 of the Rules of 1974. There are, particularly, two classes of members of the deceased's family, whose welfare is more jealously guarded than the others. It is the deceased's widow and his minor children. There are no minor children here, and therefore, the widow's welfare assumes importance. Now, the decision about the fact as to which dependent of the deceased would best secure the widow's interest, can reasonably be expected to be best known to the widow herself. Also, the welfare of the other dependents, generally, is to be borne in mind. The two other dependents, besides the widow, have also exercised their choice in favour of the fifth respondent, and against the petitioner. The impugned order, therefore, appears to have proceeded on reasonable grounds and taking into account, considerations relevant under the

Rules of 1974, particularly, Rule 7, which applies to a case of rival claimants.

12. It must be placed on record that before this Court, a counter affidavit, filed on behalf of the fifth respondent, is an affidavit of the deceased's widow. She has said on oath that the petitioner is a man with criminal antecedents. She has annexed on record, a copy of an F.I.R. registered against the petitioner. She has also annexed on record, a copy of the ration card, from a time when the deceased was head of the family. That ration card does not show the petitioner's name, whereas, it clearly shows the fifth respondent's name. The widow appears to be disillusioned with the petitioner. She has called him a hardened criminal, in the counter affidavit filed on behalf of respondent no. 5.

13. This Court does not, at all, intend to say that the petitioner is, in fact, a hardened criminal. The petitioner may be a rascal, a saint, or a man in the mainstream of society. What is relevant is that the deceased's widow, the petitioner's mother, does not trust him to take care of the family. It is this fact that is relevant under Rule 7 of the Rules of 1974. The Superintending Engineer, who has passed the impugned order, has, in the opinion of this Court, rightly exercised his powers under the Rules of 1974 to accept the fifth respondent's claim and reject that of the petitioner.

14. In the result, this petition fails and is dismissed.

15. Costs easy.

(2020)12ILR A726
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.11.2020

BEFORE

THE HON'BLE MANISH KUMAR, J.

Service Single No. 31660 of 2019

Anurag Gupta ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ashwani Kumar

Counsel for the Respondents:
C.S.C., Rajendra Singh Kushwaha

A. Service Law - The petitioner had joined on the post of Assistant Teacher (Arts) on 11.10.1999 and worked untill 21.11.2000. He was then forced not to attend the institution for the period since 22.11.2000 to 20.11.2001. The decision for inclusion of institution in the Grant-in-Aid list is not in pursuance of the documents submitted in the year 2000-2001. After rectifying the shortcomings in the documents, the institution was included in the Grant-in-Aid list in the year 2004 and the name of the petitioner was there in the list. He was appointed against a sanctioned post which felt vacant one on the demise of the Principal and another on retirement of the incumbent teacher, which is the basis upon which the college has been included in the Grant-in-Aid list. In this background the reason assigned by DIOS for dropping the name of the petitioner is wholly untenable. (Para 9)

Writ Petition allowed. (E-10)

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

1. Heard learned counsel for the petitioner, learned State Counsel for Respondent Nos.1, 2 and 3 and Sri Rajendra Singh Kushwaha, learned counsel for Opposite Party No.4.

2. The present writ petition has been preferred for quashing of the impugned order dated 6.9.2019 passed by Opposite

Party No.3 i.e. District Inspector of Schools, Lakhimpur Kheri, by which rejected the claim of the petitioner for including in the list of teachers getting salary from the State exchequer after the institution being included in the list of Grant-in-Aid and further prayed for directing the Opposite Parties to consider, grant and pay to the petitioner all the benefits admissible to the post of Assistant Teacher (Arts) held by the petitioner w.e.f. 01.01.2004.

3. Learned counsel for the petitioner has submitted that Opposite party No.5 was an unaided and recognized institution at the time of appointment of the petitioner in the year 1999 on the post of Assistant Teacher (Arts). The petitioner in pursuance of the appointment letter dated 10.10.1999 had joined the institution on 11.10.1999 and worked up-till 21.11.2000.

4. The then Manager of the Institution was not happy with the petitioner and restrained him from coming to the institution and the matter was resolved only after intervention of the DIOS and whereafter, the petitioner was permitted to attend the institution from 14.07.2001 and since then the petitioner is regularly working in the institution till date.

5. It is further submitted that the claim of the petitioner for payment of salary from the state exchequer under the Payment of Salaries Act after the institution being included in the Grant-in-Aid list vide order dated 1st January, 2004 was rejected on the ground that when the list of teaching and non-teaching staff forwarded by the Committee of Management of the Institution in the year 2000-2001, the name of the petitioner was not there and, hence the petitioner is not entitled for the salary.

6. Learned counsel for the petitioner has further submitted that the list of teaching and non-teaching staff forwarded by the Committee of Management in the year 2000-2001 was not accepted by the authorities and returned the list to remove the shortcoming. In pursuance of the direction of the State Government, the Director wrote a letter dated 25.09.2004 addressed to the DIOS to complete the information. The Management of the institution, thereafter, submitted a list in which the name of the petitioner was mentioned removing the deficiencies as asked by the authorities. After the submission of the same, the institution has been included in the list of Grant-in-Aid w.e.f. 01.01.2004 but the petitioner was not included.

7. On the other hand, learned State Counsel has submitted that when the list of teaching and non-teaching staff was forwarded by the Committee of Management in the year 2000-2001, the name of the petitioner was not there as the petitioner was not working in the institution at that time, but failed to dispute this fact when the matter was remanded back by the State Government and the documents were again submitted by the Committee of Management including the list of teaching and non-teaching staff, the name of petitioner was there. It is further submitted that the petitioner mislead the authority by giving an undertaking on 14.07.2001 on an affidavit for not claiming any benefits for the period from 22.11.2000 to 14.07.2001 and joined the post on 21.07.2001. The Manager also specifically made a declaration that in case the petitioner is not included in the list of the staff of the institution then the Management shall bear his salary from its own resources.

8. After hearing learned counsel for the parties, it is found that the opposite

parties did not dispute the appointment of the petitioner since the year 1999.

9. Be that as it may, the decision for inclusion of institution in the Grant-in-Aid list is not in pursuance of the documents submitted in the year 2000-2001. The State Government after receiving the proposal from the Director had returned the documents pointing out the deficiency and the same had been rectified and fresh documents were submitted by the Committee of Management for the purposes of inclusion of the institution in the Grant-in-Aid list in the year 2004 and the name of the petitioner was also there. After the submission of the documents in the year 2004 the institution has been included in the list of Grant-in-Aid. The petitioner was forced not to attend the institution for the period since 22.11.2000 to 20.11.2001 and after intervention of the D.I.O.S. the petitioner was allowed to join the institution on 21.07.2001. This fact of the petitioner having worked or not during the period 02.11.2000 to 20.11.2001 has no bearing on the merit of the case in hand. There is no claim made in this writ petition for salary of the teacher for aforesaid period. Undisputedly, the name of the petitioner finds mentioned in the affidavit of the manager filed in the year 2004, having been appointed against a sanctioned posts which felt vacant one on the demise of the Principal and another on retirement of the incumbent teacher, which is the basis upon which the college has been included in the Grant-in-Aid-list. In this background the reason assigned by DIOS in excluding the name of the teacher are wholly untenable and extraneous for the purpose of dropping the name of the petitioner.

10. It may be observed that the DIOS could drop the name of the teacher only if had found that in the year 2004 the teacher was not duly and legally appointed teacher in the institution. The DIOS could perhaps rely on this ground of rejection in case the salary was being required to be paid since 2001, but the order is effective from 01.01.2004, therefore, the reason that the name of petitioner not in the list of 2000-2001, which was never acted upon cannot held to be a valid reason for passing the impugned order.

11. The only other reason that the Manager had given some undertaking to bear the burden of the salary of the teacher in case of non-inclusion the name of teacher in the approved list of 2004 is equally irrelevant and not legally acceptable. This condition volunteered by the Manager in respect of Salary will not deprive the teacher of his salary from the State exchequer. The dropping of the name of the teacher from the list of 2004 being illegal and without any valid ground. The liability of payment of salary of teacher is squarely lay on the State Government which could not be compromised or negotiated by any authority namely the Manager in this case depriving the teacher of his legal right under the law.

12. For the reasons indicated hereinabove, the impugned order dated 6.9.2019 is, hereby, quashed. The DIOS is directed to pass an appropriate order in accordance with law for payment of arrears of salary to the petitioner w.e.f. 01.01.2004 and regular salary every month for the post of Assistant Teacher (Arts) as it has been given to the other teachers whose names were forwarded by the Committee of Management alongwith name of the petitioner in the year 2004 adjusting the amount of any payment if made to the teacher by the Management and the said exercise shall be completed and payment

made within 3 months from the date of downloaded copy of the order from the official website is served.

13. The writ petition is allowed.

(2020)12ILR A729
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.11.2020

BEFORE

THE HON'BLE J.J. MUNIR, J.

Writ A No. 60602 of 2016

Shri Ram Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Awadh Behari Singh, Sri Manish Singh, Sri Rajesh Yadav

Counsel for the Respondents:
CS.C.

A. Service Law – The U.P. Collection Amin Service Rules, 1974 - U.P. Regularization of Ad-hoc (On posts outside the purview of Public Service Commission) Rules, 1979-Regularization and Appointment

The petitioner's claim to regularization was rejected under the Rules of 1974 as amended by the 7th Amendment of 2015, on the ground that 35% quota prescribed under the Rules for Seasonal Collection Amins was already full by 25.7.2016. So far as the regularization under the U.P. Regularization of Ad-hoc (On posts outside the purview of Public Service Commission) Rules, 1979 (for short "Rules of 1979"), as amended by the 3rd Amendment Rules, 2001, the petitioner was not eligible, because he was not an Ad-hoc Amin, but appointed in a Stop Gap arrangement, without being selected through any process prescribed by the Rules of 1974. (Para 7)

The Court, finds that the petitioner had been permitted to continue, at one point of time, under the umbrella of a judicial order, but not for the whole of his service. He was permitted by the respondents to continue in service, against a sanctioned post, drawing regular salary after 21.4.2004, without an interim order, protecting his interest by permitting him to continue in service. The petitioner retired on attaining the age of superannuation, and in the process, has rendered 28 years of service on the post of Collection Amin. (Para 11)

B. Difference between a Stop Gap arrangement and Ad-hoc arrangement - A Stop Gap arrangement, by its nature, is something pro tem. It is not an arrangement which can continue or ought to continue over a period as long as 14 years. It cannot, therefore, be gainsaid that the petitioner was not an ad-hoc employee, but a man, who filled in Stop Gap. Ad-hoc means a kind of arrangement that is not in accordance with the Rules, particularly in the context of service jurisprudence. No doubt, the petitioner was not selected in accordance with the Rules, but he was allowed to continue for a total period of 23 years, of which, 14 were without the protection of a judicial order, interim or final. This kind of arrangement certainly qualifies as an ad-hoc arrangement; an ad-hoc appointment. (Para 11)

C. U.P. Collection Amin (Service) 7th Amendment Rules, 2015 - The petitioner retired from service on 31.7.2018. The 7th Amendment Rules, which provided for a quota of 85% came into force on 1.10.2015, whereas the impugned order was passed on 8.10.2016. Thus, at the time when the District Magistrate made the impugned order, **the petitioner's claim as a Seasonal Collection Amin was to be reckoned on the basis of a quota of 85%, and not 35%.** The District Magistrate held that the available vacancy relative to the prescribed quota of 35% was full by 25.7.2016. The impugned order, therefore, proceeds on a reckoning of quota reserved for Seasonal Collection Amins far short of the prescribed 85%. (Para 14)

Writ Petition allowed. (E-4)

Precedent mentioned:

1.PoshakiLal & ors., Vs. St. of U.P. & ors., Civil Misc. W.P. No. 242 of 2001, decided on 16.04.2011 (Para 3)

2. Mata Deen & ors. Vs. St. of U.P. & ors., 1996 (3) UPLBEC-2227 (Para 3)

Precedent followed:

1. Division Bench Judgment of Allahabad High Court in Special Appeal (Defective) No. 483 of 2018 (Para 12, 13)

Present petition challenges order dated 08.10.2016, passed by District Magistrate, Deoria.

(Delivered by Hon'ble J.J. Munir, J.)

1. Heard Mr. Awadh Behari Singh, learned counsel for the petitioner and Mr. Manvendra Dixit, learned Standing Counsel appearing on behalf of the respondents.

2. The petitioner was a Collection Amin, when he instituted this writ petition on 19.12.2016. His appointment, however, was ad-hoc. Working against a sanctioned and vacant post of Amin, he was drawing a regular monthly salary, until he retired from service on 31.07.2018. The rights of the petitioner in this petition are traceable to and pegged at the time when the cause of action arose and he brought these proceedings. The petitioner calls in question an order of the District Magistrate, Deoria dated 08.10.2016, by which, his prayer, seeking regularization in service and appointment to the post of Collection Amin against which he was working, has been rejected.

3. The petitioner was initially appointed as a Seasonal Collection Amin on 09.01.1990. He filed a writ petition before the Lucknow Bench of this Court, being Writ Petition No. 430 of 1991 (SS), where an interim order was passed directing that till further orders, the respondents shall not terminate the petitioner's services, so as to create an artificial break, and further, that the petitioner be continued in service. On 30.11.1990, the petitioner was placed against the vacant post of Collection Amin, by an order made by the Joint Magistrate, Rudrapur, Deoria. This order was made by the Joint Magistrate in compliance with this Court's order dated 25.01.1991, and the petitioner was placed against the vacant post of one Ajay Kumar Singh, a Collection Amin, who had been transferred out. It is asserted by the petitioner that pending Writ Petition No. 430 of 1991 (SS), the Additional District Magistrate (Finance and Revenue) Deoria, cancelled the order dated 13.11.1995 passed by the Joint Magistrate. Thereupon, the petitioner made an amendment application in the pending writ petition before the Lucknow Bench of this Court, where a prayer was made to set aside the order dated 23.01.1996. By an interim order dated 11.04.1996 passed in Writ Petition No. 430 of 1996 (SS), this Court sitting at Lucknow, stayed the operation of the order dated 23.01.1996 passed by the Additional District Magistrate (Finance and Revenue) Deoria. Writ Petition No. 430 of 1991 (SS) came up for determination before this Court sitting at Lucknow on 21.04.2004 and by an order of that date, the writ petition was disposed of on the same terms and conditions as ordered in **Civil Misc. Writ Petition No. 242 of 2001, Poshaki Lal & Others v. State of U.P. and Others,** decided on 16.04.2001. A reference to the said decision shows that Poshaki Lal (Supra), in turn, gave effect to the decision in **Mata Deen and others v. State of U.P.** and others1 and ordered in the following terms :

However, in case junior to the petitioners have been regularized as alleged, then the case of the petitioners will be considered with effect from the date of regularization of that junior considering the law that the right of the senior for consideration of regularization is superior in comparison to similarly circumstanced junior. In case the petitioners are still continuing he shall be allowed to continue till the regularization/appointment on the post of Collection Amin is considered with the direction given above.

This writ petition is accordingly disposed of with the direction contained in the case of Mata Deen and others v. State of U.P. and others (Supra).

4. The result of the said orders were that the petitioner continued in service, drawing a monthly salary. It is asserted that he continued all this while on an ad-hoc basis. The final seniority list of Collection Amin was drawn by the Committee, on 09.04.2012. The U.P. Collection Amin Service Rules, 19742 were amended in 2015 by the U.P. Collection Amin (Service) 7th Amendment Rules, 20153. It is pointed out that this seniority list did not carry the petitioner's name in the main part of the list. Instead, it carried at the foot of the list, a separate list of six Collection Amins including one Narsingh Mall, who were continuing in service under orders of this Court. The name of the petitioner figures at Sr. No. 5 of this separate appendage to the seniority list. The list dated 09.04.2012 was forwarded by the District Magistrate to the Government, where age relaxation was granted on 13.06.2016. In consequence of this list being forwarded, juniors to the petitioner were appointed by the District Magistrate as regular Collection Amins on 25.07.2016 and were posted to different tehsils by the Additional District Magistrate (Finance and Revenue), Deoria vide order dated 30.07.2016. This order of the District Magistrate further excluded the petitioner. The petitioner made a representation in the matter on 05.01.2016 to the District Magistrate, requesting that his case for regularization be considered. This representation was not attended to. Accordingly, the petitioner filed Writ - A No. 32077 of 2016, claiming regularization in service as a Collection Amin. This Court disposed of Writ - A No. 32077 of 2016, vide order dated 18.07.2016 in terms of the following directions :

In this view of the matter, this writ petition is disposed of with the consent of the learned counsel for the parties with a direction to the respondent no.2, Collector/District Magistrate, District Deoria to examine the claim of the petitioner for regularization in the light of the observations made above and in accordance with law within a period of four months from the date a certified copy of this order is received in his office.

It is made clear that the Court has not adjudicated the claim of the petitioner on merit.

5. The District Magistrate, by the impugned order dated 08.10.2016, has rejected the petitioner's claim to regularize him as a Collection Amin.

6. Aggrieved, this writ petition has been filed.

7. A perusal of the impugned order shows that the petitioner's claim to regularization was rejected under the Rules of 1974 as amended by the 7th Amendment of 2015, on the ground that 35% quota prescribed under the Rules for Seasonal

Collection Amins was already full by 25.07.2016. So far as the regularization under the U.P. Regularization of Ad-hoc (On posts outside the purview of Public Service Commission) Rules, 19794, as amended by the 3rd Amendment Rules, 2001, the petitioner was not eligible, because he was not an Ad-hoc Amin, but appointed in a Stop Gap arrangement, without being selected through any process prescribed by the Rules of 1974.

8. Mr. Awadh Behari Singh, learned counsel for the petitioner, submits that so far as first premise on which the impugned order is founded, it is flawed, inasmuch as all the Seasonal Collection Amin, who had been selected until 25.07.2016 for regularization, were juniors to the petitioner as Seasonal Collection Amin. It has been specifically asserted in Paragraph 7, 9 and 20 that Seasonal Collection Amins appointed, subsequent to 1990, have been regularized on different dates. The candidates placed from Sr. No. 23 onwards, in the seniority list of 7th July, are juniors and their services have been regularized. He submits, therefore, that there is no ground to refuse that quota earmarked for Seasonal Collection Amins, which was full by 25.07.2016.

9. On the other limb of the submission, it is urged that declining the petitioner's claim, holding his appointment to be one by way of Stop Gap arrangement, and not ad-hoc, is also without basis. The petitioner has continued against a vacant post as long as 28 years and an engagement that long cannot be said to be by way of Stop Gap arrangement. Learned counsel also submits that it is not merely by dint of a judicial order that the petitioner has continued for all these 28 years. The protection of the judicial order vanished after 21.04.2004, once Writ Petition No. 430 of 1991(SS) was disposed of. The continuance of the petitioner against a vacant post until he retired on 31.07.2018 was not ordered by any judicial interdict. It was the respondents who permitted the petitioner to continue all this while.

10. Learned Standing Counsel has refuted the aforesaid submissions and pointed out that in Paragraph 11 of the counter affidavit, it is asserted that the petitioner continued in service under the umbrella of interim orders passed by this Court. There is no explanation as to how the petitioner continued after 21.04.2004, whereafter there is no interim order in operation, directing that the petitioner ought to continue in service. It is urged by learned Standing Counsel that the petitioner has not been selected in accordance with Rules, and thus, has no right to the post. His case does not fall under the purview of either the Rules of 1974 or the Rules of 1979.

11. This Court has considered the rival submissions advanced on both sides. The Court, on a perusal of the entire circumstances, finds that the petitioner had been permitted to continue, no doubt, at one point of time, under the umbrella of a judicial order, but not for the whole of his service. He was permitted by the respondents to continue in service, against a sanctioned post, drawing regular salary after 21.04.2004, without an interim order, protecting his interest by permitting him to continue in service. The petitioner retired on attaining the age of superannuation, and in the process, has rendered 28 years of service on the post of Collection Amin. To dub this kind of an appointment as ad-hoc and not Stop Gap, does not commend itself to this Court. A Stop Gap arrangement, by

its nature, is something pro tem. It is not an arrangement which can continue or ought to continue over a period as long as 14 years. These 14 years was a period of time when the petitioner was allowed to continue as a Collection Amin, without the protection of a judicial order, interim or otherwise. It cannot, therefore, be gainsaid that the petitioner was not an ad-hoc employee, but a man who filled in Stop Gap. The District Magistrate has committed a manifest error to hold the petitioner's services to be a Stop Gap arrangement instead of an ad-hoc one. Ad-hoc means a kind of arrangement that is not in accordance with the Rules, particularly in the context of service jurisprudence. No doubt, the petitioner was not selected in accordance with the Rules, but he was allowed to continue for a total period of 23 years, of which, 14 were without the protection of a judicial order, interim or final. This kind of arrangement certainly qualifies as an ad-hoc arrangement; an ad-hoc appointment.

12. Learned counsel for the petitioner has drawn attention of this Court towards the fact that Narsingh Mall, who is similarly circumstanced as the petitioner, was also declined regular selection by the Selection Committee constituted under the Rules of 1974 and it was held by the Collector that his appointment was not ad-hoc, but one by way of a Stop Gap arrangement. This Court, in Writ - A No. 31326 of 2016, filed by Narsingh Mall, who is similarly circumstanced as the petitioner, held that the petitioner, having continued against a clear vacancy until time that he retired, his appointment is to be regarded as ad-hoc and being one made prior to 30.06.1998, entitled him to regularisation under the 3rd Amendment Rules, 1998. In the present case too, the petitioner has continued on an ad-hoc basis since 1995 against a clear vacancy, until he superannuated on 31.07.2018.

13. In opinion of this Court, his case would clearly fall within the purview of the 3rd Amendment Rules, 2001. The decision of learned Single Judge in Writ - A No. 31326 of 2016, allowing the writ petition and directing Narsingh Mall's regularization on the post of Collection Amin under the Rules of 2001, has been affirmed by a Division Bench of this Court in Special Appeal (Defective) No. 483 of 2018. The decision of the Division Bench in the case last mentioned, would, on principle also, apply to the petitioner's case, as would the decision of learned Single Judge in Writ - A No. 31326 of 2016.

14. Insofar as the petitioner's claim to regulation under the 7th Amendment Rules is concerned, a perusal of the last mentioned proviso those Rules shows that on the commencement of these rules as a one-time measure, 85% of the existing vacancies have to be filled up by selection from amongst the Seasonal Collection Amins otherwise eligible. The petitioner retired from service on 31.07.2018. The 7th Amendment Rules came into force on 01.10.2015, whereas the impugned order was passed on 08.10.2016. Thus, at the time when the District Magistrate made the impugned order, the petitioner's claim as a Seasonal Collection Amin was to be reckoned on the basis of a quota of 85%, and not 35%. A perusal of the impugned order shows that the District Magistrate proceeded on the supposition that there was a quota of 35% for appointment of Seasonal Collection Amins against the available vacancy in the cadre. She held that the available vacancy relative to the prescribed quota of 35% was full by

25.07.2016. The impugned order, therefore, proceeds on a reckoning of quota reserved for Seasonal Collection Amins far short of the prescribed 85%. The impugned order, therefore, is seriously flawed on this score as well.

15. In this view of the matter, this Court is of opinion that the impugned order passed by the District Magistrate, Deoria dated 08.10.2016, cannot be sustained and is liable to be quashed.

16. In the result, this writ petition succeeds and is allowed. The impugned order dated 08.10.2016 passed by the District Magistrate, Deoria is hereby quashed. It is ordered that the petitioner shall be treated to be regularized on the post of Collection Amin, under the 3rd Amendment Rules, 2001, which shall be done notwithstanding his superannuation on 31.07.2018. Moreover, the petitioner will also be entitled to his post-retiral benefits in accordance with the Rules of 1974.

17. There shall be no order as to costs.

(2020)12ILR A734
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.12.2020

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Criminal Appeal No. 781 of 1983

Harish Chand & Ors. ...Appellants (In Jail)
Versus
State of U.P. ...Opp. Party

Counsel for the Appellants:
Sri Sanjiv Rohit, Sri Abhai Saxena, Sri Sandeep Kumar Srivastava, Sri D.P.S. Chauhan

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

(अ) फौजदारी कानून - दोष सिद्ध के खिलाफ - भारतीय दंड संहिता, 1860 - धारा 307 - हत्या करने का प्रयत्न, धारा 34 - सामान्य आशय को अग्रसर करने में कई व्यक्तियों द्वारा किए गए कार्य - आरोपी व्यक्तियों का अपराध करने का सामान्य आशय था या नहीं इसका निष्कर्ष , परिस्थितियों की समग्रता को ध्यान में रखकर ही किया जा सकता है - अपराध की गंभीरता को भी ही विभिन्न कारकों की कसौटी पर सुनिश्चित किया जाना चाहिए । (पैरा - 22,26)

वर्तमान आपराधिक अपील तीनों अपीलार्थी/अपराधी , अपीलार्थी सं० 1(मृत्यु) को धारा 307 भा० दं० सं० व अपीलार्थी सं० 2 (जीवंत) व अपीलार्थी सं० 3 (मृत्यु) को धारा 307/ 34 भा० दं० सं० के अंतर्गत दोष सिद्ध घोषित किया था - सभी अपीलार्थी को 4 वर्ष का सश्रम कारावास - व्यथित होकर आपराधिक अपील इस न्यायालय में दाखिल की ।

निर्णय : तीनों अभियुक्तों ने पीड़ित की हत्या का प्रयत्न कारित करने के सामान्य आशय के अग्रसर में कार्य किया, अतः धारा 307 अपठित धारा 34 भारतीय दंड संहिता के अंतर्गत दोष सिद्ध किए गए हैं , जिसमें कोई विधिक त्रुटि नहीं है । जीवंत अपीलार्थी पर प्रबोधित करने का आरोप है ।उसने कोई आपराधिक बल का प्रयोग नहीं किया और न ही उसका कोई घिनौना चरित्र प्रकट होता है । अन्य दो अपीलार्थी, जिसमें से एक पर गोली चलाने का आरोप सिद्ध हुआ था, कि मृत्यु हो चुकी है। अपीलार्थी का कोई और आपराधिक इतिहास नहीं बताया गया है । इसके अतिरिक्त कि अपराध 1981 में गठित हुआ था वर्तमान में अपीलार्थी की उम्र करीब 60 वर्ष को भी मद्देनजर रखना चाहिए । दंड की सजा की अवधि जो 4 वर्ष है उसको अब तक व्यतीत सजा की अवधि में परिवर्तित किया जाए वह प्रतिकर के रूप में एक लाख पीड़िता साक्षी को दिलवाया जाए तथा अपीलार्थी संख्या 2 की सजा जो अब तक करीब 36 दिन तक व्यतीत की है , की अवधि में परिवर्तित की जाती है । (पैरा - 22,26,27)

आपराधिक अपील आंशिक रूप से स्वीकार्य। (E-7)

<u>उद्धृत मामलों की सूची :-</u>

1. मनु दत्त एवं एक अन्य बनाम उत्तर प्रदेश शासन (2012)4 एस सी सी 79

2. वीरेंद्र बनाम हरियाणा राज्य, (2020) 2 एससीसी 700)

3. मध्यप्रदेश शासन बनाम ऊधम और अन्य : (2019) 10 एसईसी 300

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

आक्षेपित आदेश

1. वर्तमान आपराधिक अपील तीनो अपीलार्थी/अपराधी द्वारा अतिरिक्त सत्र न्यायालय (षष्टम), मुरादाबाद द्वारा सत्र परिक्षण संख्या 440 सन् 1981 में पारित आदेश दिनांक 24.03.1983 जिससे द्वारा अपीलार्थी सं0 1 (हरिशचन्द्र) को धारा 307 भा0दं0सं0 व अपीलार्थी सं0 2 (लाल सिंह) व अपीलार्थी सं0 3 (ताराचन्द्र) को धारा 307/34 भा0दं0सं0 के अन्तर्गत दोष सिद्ध घोषित किया था तथा सभी अपीलाार्थियों को 4 वर्ष का सश्रम कारावास की सजा सुनाई थी से व्यथित होकर इस न्यायालय में दाखिल की थी।

अपील की वर्तमान स्थिति

2. वर्तमान अपील के विचाराधीन होने के दौरान अपीलार्थी सं0 1, हरिशचन्द्र व अपीलार्थी सं0 2, तारा चन्द की मृत्यु हो गयी तथा इस न्यायालय के आदेश दिनांक 17.07.2020 के द्वारा वर्तमान अपील इन दोनों अपीलार्थी के सापेक्ष उपशमित की जा चुकी है तथा वर्तमान में यह अपील केवल अपीलार्थी सं0 2, लाल सिंह के सापेक्ष जीवंत रह जाती है।

तथ्यात्मक प्रारुप

3. अभियोजन साक्षी सं0 2 (जयराम) ने थाना हायत, सम्भल, मुरादाबाद में एक लिखित तहरीर दिनांक 28.02.1981, को 5:20 सुबह दी कि:

" हरिश्चनद पुत्र कन्हया जो मेरे ही ग्राम का बदमाश किशम का आदीमी है। और जो चोरी वगेरा करता है। जिसको मेरे ताउ श्री विहारी पुत्र रुपराम ने चोरी वेगरा को मने किया था। जिसके कारण हरिश्चनद व लाल सिंह व तारा चन्द्र पुत्र कन्हया ग्राम मूसापुर रनिजिस मानने लगे थे। इसी वजह से आज करिब दो बजे के हरिश्चनद तमंनचा हाथ में लिये व ताराचन्द लाल सिंह लाठीया लिये हुए मेरे ताउ को पुरानी रनजिस रखते हुए जान से मारने के लिये विहारी की झोपड़ी पर आये झोपड़ी पर रोजाना कि तरह लालटेन जल रही थी जिनको देखकर विहारी ने शोर मचाया जिसके शोर पर रामशह पुत्र रुपराम नन्हे पुत्र गुलजारी व मैं अपने अपने मकानों से लाठियां वेटरी जलाते शोर माचाते हुए और कि लाल सिंह ने कहा कि मार साले को फिर क्या करेंगे जिस पर हरिश्चन्द्र मेरे ताउ विहारी को जान से मारने की नियत से तमनचा से गोली मारी जो विहारी के बाये ओर कनपटी पर गोली लगी है गोली मार कर अपने घर को भागे तथा? हम लोगों ने पिछा किया तो हरिश्चनद ने तमन्चे में गोली भर कर कहा अगर कोई आगे बढ़ा तो गोली मार दूंगा हम डर की वजह से रुक गये विहारी की हालत खराब है। रपट लिखकर कानुनी कारवाई कि जावे।"

जिसको प्रथम सूचना रिपोर्ट (चिक संख्या 80) के रुप में अभियुक्त,हरिश्चन्द्र, लाल सिंह और तारा चन्द के विरुद्ध धारा 307 भा0दं0सं0 के अन्तर्गत अंकित की गई।

4. घायल बिहारी लाल को जिला अस्पताल, मुरादाबाद में भर्ती कराया गया जहाँ उसका मेडिकल परिक्षण डा0 आर0पी0 भारद्वाज द्वारा किया गया व उसके शरीर पर निम्न चोटे पायी गयी।

"1. Gun shot wound of entry 6 cm x 3.5 cm x depth not proved just on the left eye. Margins are inverted. Blackening and charing present around the wound in the area of face left side forehead around the wound. Gun powder is also present.

2. Wounds of existence four in number in the area of 8cm x 6cm on the left side of head close to the ear. 3 wounds are

anterior to the left ear and one at the lower end and ear. Margins are inverted. Fresh bleeding present.

--Injuries caused by some firearm.

--Fresh in duration.

--Kept under observation, Advised X-Ray."

एक दिन के उपरान्त घायल बिहारी लाल को सफदरगंज अस्पताल दिल्ली में ले जाया गया तथा 17.04.1981 को इलाज के बाद उसे छुट्टी दे दी गयी।

5. अन्वेषण अधिकारी ने प्रथम सूचना रिपोर्ट दर्ज होने के बाद अन्वेषण प्रारम्भ किया तथा घटना स्थल का निरिक्षण किया व वहाँ से खाट जिस पर घायल लेटा था, लालटेन, सादी मिट्टी बैटरी 2सेल जब्त करी व फर्द कब्जा बनाया। अन्वेषण अधिकारी ने घटना स्थल का नक्शा नजरी भी बनाया।

6. अन्वेषण अधिकारी ने विवेचना के उपरान्त तीनों अभियुक्तों के खिलाफ आरोप पत्र धारा 307 भा0दं0सं0 के अन्तर्गत दाखिल किया।

7. आरोप पत्र पर अपराध का संज्ञान लेने के बाद अतिरिक्त सत्र न्यायाधीश, मुरादाबाद ने अभियुक्त हरिश्चन्द्र के विरुद्ध धारा 307 भा0दं0सं0 व अभियुक्त लाल सिंह व ताराचन्द्र के विरुद्ध धारा 307/34 दं0प्र0सं0 के अन्तर्गत आरोप, दिनांक 25.10.1982को विचरित किये।

8. अभियोजन ने अभियुक्तों के विरुद्ध आरोप सिद्ध करने के लिये कुल 4 अभियोजन साक्षीयों को पेश किया जिसमें अभियोजन साक्षी सं0 1 बिहारी, अभियोजन साक्षी सं0 2 जयराम, अभियोजन साक्षी सं0 3 चन्द्र किरन तथा अभियोजन साक्षी सं0 4 नन्हे शामिल थे।

9. अभियोजन साक्षी 1, बिहारी, घटना में घायल हुआ था। उसने अपने साक्ष्य के मुख्य परीक्षा में कहा कि, "तीनों अभियुक्त सगे भाई हैं और उसकी बिरादरी से है। उम्र में बड़ा होने के कारण उसने अभियुक्तों से चोरी चकोरी का काम छोड़ने व मेहनत मजदूरी करके खाओ ऐसा कहा था। इस बात से अभियुक्त उससे रंजिश रखते थे व देख लेने की धमकी भी देते थे। साक्षी ने आगे कहा कि करीब 2 साल की बात है रात के करीब 2 बजे का वक्त था। मैं अपने घर में अपनी खाट पर बैठा हुआ था वहाँ पर लालटेन (प्रदर्श I) जल रही थी जिस की रोशनी में मैंने देखा कि मुल्जिमान हरिश्चनद, लाल सिंह व तारा चन्द वहाँ पर आये। इनमें से हरिश्चनद के पास तमन्चा था और बाकी दोनों के पास लाठियाँ थी। तो उस समय मुल्जिम लाल सिंह ने हरि चन्द से कहा और तारा चन्द ने भी कहा कि देखते क्या हो साले को गोली मार दो यह अपने को बहुत कुछ समझता है। इस पर हरिश्चनद ने मेरे गोली मार दी जो मेरी बाई कनपटी पर लगी और मेरे चोट आई। मैंने शोर मचाया था तो घटना के समय जयराम, राम सहाय व नन्हे लाठियां लेकर टार्च जलाते हुए वहाँ आये। इनके आने पर और उनके द्वारा ललकारने पर मुल्जिमान पहाड़ी की तरफ को भाग गये। मेरा डाक्टरी मुआयना अस्पताल में हुआ था और फिर यहाँ से मुझे देहली इलाज के लिये भेज दिया गया था। वहाँ मेरा इलाज हुआ था। मेरी बाई आंख बिल्कुल खत्म हो गई है और मुझे बाएं कान से भी बिल्कुल सुनाई नहीं देता। मेरा भतीजा जयराम मुझे थाने ले गया था जहाँ उसने मुकदमा कायम कराया था।"

10. अभियोजन साक्षी सं0- 2 ने मुख्य परीक्षा में कहा "करीब 2 साल की बात है। मैं अपने गाँव में बिहारी के घेर के पहाड़ में मन्दिर के पास आलुओं के ढेर के पास आलूओं की रखवाली के लिये सो रहा था। रात को करीब 2 बजे मैंने अपने ताऊ बिहारी का शोर सुना तो मैं भाग कर उनकी झोपड़ी के पास गया। वहाँ पर उस समय नन्हे व राम सहाय भी पहुँच गये थे।

हम लोग लाठियाँ लेकर बैटरी जलाते हुए वहाँ पहुँचे थे। वहाँ पर छप्पर में लालटेन जल रही थी उसकी काफी रोशनी थी। जब हम वहाँ पहुँचे तो हमने देखा कि मुल्जिमान हरिश्चनद, लाल सिंह व तारा चन्द वहाँ खड़े थे। उस समय हरिश्चनद के पास तमन्चा था और बाकी दोनों मुल्जिमान के पास लाठियाँ थी। यह तीनों मुल्जिमान आज अदालत में हाजिर है। उस समय मुल्जिम लाल सिंह ने हरिश्चनद से कहा कि मार दे गोली देखता क्या है। इस पर हरिश्चनद ने बिहारी की चारपाई के पास जा कर गोली मार दी जो बिहारी की बाई कनपटी पर लगी है। हमने मुल्जिमान को ललकारा तो यह पहाड़ी की तरफ को भागे। हम लोगों ने इनका पीछा करके इन्हे पकड़ने की कोशिश की तो हरिश्चनद ने तमन्चे में दोबारा गोली भर कर कहा कि अगर आगे बढ़ोगे तो तुम्हे भी इसी तरह गोली मार दूंगा। हम लोग डर की वजह से रुक गये। हमने तीनों मुल्जिमान को लालटेन व टार्चो की रोशनी में अच्छी तरह से पहचान लिया था।

मुल्जिमान के चले जाने के बाद मैंने इस घटना की तहरीरी रिपोर्ट प्रदर्श क 1 बोल कर लिखाई थी। जो कुछ मैंने बोला था वही मोहन लाल ने लिखा था पढ़वा कर सुनने के बाद मैंने इस पर अपने हस्ताक्षर शनाख्त किये। इसके बाद मैं अपने ताऊ को चुटैल अवस्था में लेकर थाना हयात नगर पहुँचा था। और वहाँ पहुंच कर मैंने उपरोक्त तहरीरी रिपोर्ट दीवान जी को दे दी थी। दारोगा जी ने मेरी बैटरी देखी थी और फिर वह मेरी ही सुपुर्दगी में दे दी थी।"

11. अभियोजन साक्षी सं0 3 ने मुख्य परीक्षा में कहा कि, "दि0 28.02.1981 को मैं थाना हयात नगर में हेड मोहर्रिर के पद पर तैनात था। उस दिन 5:20 AM पर वादी जयराम ने तहरीरी रिपोर्ट (इक्ज क 1) मुझे लाकर दी थी जिसके आधार पर मैंने चिक रिपोर्ट (इक्ज क 2) तैय्यार की थी जो मेरे हाथ की लिखी व दस्तखती है। इसका इन्द्राज जी0डी0 में रपट नं0 4 पर मुकदमा कायमी का मैंने उसी समय किया था। असल जी0डी0 मेरे सामने है उसकी सही नकल जो कि कार्बन कापी है और मूल के साथ उसी प्रोसेस में तय्यार की गई थी दाखिल करता हूँ। असल मेरे हाथ की लिखी व दस्तखती है। यह प्रदर्श क 3 है। इसके बाद मैंने मजरुब को हरिराम त्रिपाठी सी 280 के साथ डाक्टरी मुआयने के लिये अस्पताल भेज दिया था।" इस स्तर पर अभियोजन द्वारा इस साक्षी को पक्षद्रोही घोषित कर दिया गया।

12. सुरजीत सिंह एस0आई0 अन्वेषण अधिकारी Court Witness सी0डब्लू0-1 के रुप में अपना साक्ष्य दिया। उसने कहा कि, "दि0 28.02.1981 को मैं थाना हयात नगर में एस0आई0 के पद पर तैनात था। इसी दिन 5:00 ए0एम0 पर जयराम एस/ओ गंगाराम ने एक तहरीरी रपट इक्ज क 1 थाने पर दी। जिसके आधार पर धारा 307 आई0पी0सी0 के अन्तर्गत मुकदमा कायम किया गया। यह रपट हरिश्चनद वगैरह मुल्जिमान के खिलाफ थी। मुकदमा दस्तअन्दाजी कायम हुआ जिसकी विवेचना मेरे सुपुर्द की गई। वादी के साथ मजरुब बिहारी भी थाने पर आया हुआ था। सबसे पहले मैंने मजरुब बिहारी का ब्यान तहरीर किया और मजरुब की चिट्ठी मजदरुबी देकर सी0 हरिराम के साथ अस्पताल रवाना कर दिया था। फिर एच0एम0 चन्द्र किरण का ब्यान लिया। और उसके बाद घटना स्थल के लिये रवाना हो गये। वहाँ पर मैंने वादी जयराम का बयान तहरीर लिया, फिर गवाहान राम सहाय, नन्हे, ओम प्रकाश व मकबूल के ब्यान तहरीर किये।

फिर मुआयना घटना स्थल किया। घटना स्थल पर से नान बाबर चारपाई, मक्का की पत्ती व फूस सादे व खून आलूदा कब्जे में लिये। दोनों की अलग 2 फर्द बनाई। गवाहान की गवाही कराई। फर्दे मेरे हाथ की लिखी व

दस्तखती है जिन पर इक्ज क 5 व इक्ज क 6 डाला गया। इसके बाद मैंने एक अदद लालटैन चालू हालत में ली जिसकी रोशनी में वाका देखना बताया गया था। लालटेन सूरज मार्का थी और इस पर लटकाने के लिये तार लगा था। यह लालटेन अपने कब्जे में लेकर सुपुर्दगी में दे दी जिसकी फर्द लेने कब्जा व सुपुर्दगी मौके पर तय्यार की गवाहान की गवाही कराई गई। यह फर्द मेरे हाथ की लिखी व दस्तखती है। इस पर इक्ज क 7 डाला गया। एक टार्च वादी जयराम एस/ओ गंगाराम के कब्जे से बरामद की अपने कब्जे में लेकर जयराम की सुपुर्दगी में दे दी गई। यह फर्द बाबत लेने कब्जे टार्च व सुपुर्दगीनामा मौके पर तय्यार की गई। मेरे हाथ की लिखी व दस्तखती है। गवाहान की गवाही कराई थी। इस पर इक्ज क 8 डाला गया। यह टार्च चालू हालत में थी। एक और टार्च गवाह राम सहाय के कब्जे से ली गई। मौके पर देखी गई चालू हालत में थी व बाद लेने कब्जे राम सहाय की सुपुर्दगी में दे दी गई। जिसकी फर्द बाबत लेने कब्जे टार्च व सुपुर्दगी नामा मेरे हाथ का लिखा व दस्तखती है। मौके पर तय्यार शुदा है मौके पर गवाहान की गवाही कराई गई। यह इक्ज क 9 है। एक अन्य टार्च गवाह नन्हे पुत्र गुलजारी के कब्जे से ली गई। मौके पर देखी गई। चालू हालत में ली गई। मौके पर देखी गई। चालू हालत में पाई गई। व कब्जे में लेने के बाद नन्हे की सुपुर्दगी में दे दी गई। जिसकी फर्द बाबत लेने कब्जे टार्च व देने सुपुर्दगी में मौके पर तय्यार की गई। गवाहान की गवाही कराई गई जो मेरी लिखी व दस्तखती है। इस पर इक्ज क 10 डाला गया।

घटना स्थल का निरीक्षण किया तथा नक्शा मौका बनाया गया जो मेरे हाथ का लिखा व दस्तखती है। खसरा दर्ज है वलिहाज मौका सही है। इस पर इक्ज क 11 डाला गया। वाद तय्यार करने नक्शा नजरी गवाहान फर्द के ब्यान लिये गये और लोगों से तहकीकात की गई।

दि0 01.03.1981 को डाक्टरी मुआयना प्राप्त हुआ। ता 03.03.1981 को मुल्जिमान को तालाश किया नहीं मिले। 14.04.1981 को मालूम हुआ कि मुल्जिमान लाल सिंह व तारा चन्द गिरफ्तार करके जेल भेज दिये गये है। दि0 13.05.1981 को मुल्जिम हरिश्चन्द का रोबकार हाजिर अदालत प्राप्त हुआ। उसी तारीख को थाने से रवाना होकर न्यायालय श्रीमान एम0एम0 4 मुरादाबाद के आदेशानुसार मुल्जिमान के जेल में जा कर ब्यान लिये। बाद तफ्तीश चार्ज शीट प्रेषित की जो मेरे हाथ की लिखी व दस्तखती है। इस पर इक्ज क 12 डाला गया।"

13. अभियोजन साक्ष्य के उपरान्त अभियुक्तों के ब्यान धारा 313 दं0प्र0सं0 के अन्तर्गत अभिलिखित किये गये जिसमें अभियोजन के साक्ष्यों को गलत बताया। अभियुक्त हरिश्चन्द ने प्रश्न सं0 9, 10, 11के निम्न उत्तर दिये:

*"**प्रश्न-9**- आप के खिलाफ मुकदमा क्यों चला?*

***उत्तर**- वादी बिहारी के लाख में एक बार आग लगी थी तब उसने मेरे खिलाफ रिपोर्ट लिखायी थी। इसी रंजिश से यह मुकदमा झूठा चलाया।*

***प्रश्न-10**- क्या आपको कुछ और कहना है?*

***उत्तर**- कुछ नहीं।*

***प्रश्न-11**- आपने सरजीत सिंह एस0आई0 सी0डब्लू 1 बयान सुना आपको क्या कहना है?*

***उत्तर**- मुद्दई के असर से गवाही दी।"*

14. अभियुक्त तारा चन्द ने प्रश्न सं 9, 10, 11 के निम्न उत्तर दिये

*"**प्रश्न-9**- आप के खिलाफ मुकदमा क्यों चला?*

***उत्तर**- बिहारी के लाख में आग लगी थी तभी से यह रंजिश मानता क्यों कि उसका खयाल था कि हरिश्चन्द ने आग लगाई थी।*

प्रश्न-10- *क्या आपको कुछ और कहना है?*

उत्तर- *कुछ नहीं।*

प्रश्न-11- *आपने सी0 डब्लू 1 सरजीत सिंह एस0 आई0 का बयान सुना। आपको क्या कहना है?*

उत्तर- *मुद्दई के असर से गवाही दी।"*

15. अभियुक्त लाल सिंह ने प्रश्न सं0 9, 10, 11 के निम्न उत्तर दिये

"***प्रश्न-9***- *आप के खिलाफ मुकदमा क्यों चला?*

उत्तर- *एक बार बिहारी के लाख में आग लग गयी थी तो उसने मेरे भाई हरिश्चन्द के नाम रिपोर्ट लिखायी थी तभी से रंजिश मानता है।*

प्रश्न-10- *क्या आपको कुछ और कहना है?*

उत्तर- *कुछ नहीं।*

प्रश्न-11- *आपने सी0 डब्लू 1 सरजीत सिंह एस0 आई0 का बयान सुना। आपको क्या कहना है?*

उत्तर- *वादी की असर से गवाही दी।"*

16. अभियुक्तों ने बचाव पक्ष के साक्षी गोपाल की गवाही कराई जिसने मुख्य परीक्षा में कहा कि, "बिहारी चुटैल, जयराम वादी व मुल्जिमा मेरे ही गाँव के रहने वाले है। मुल्जिमान के सगे बड़े भाई का नाम खुशहाली है और इनके पिता जी का नाम कन्हई है और जय किशन इनके दादा थे। खुशहाली कई साल से बीमार रहता है।

मैंने अब से करीब 3 साल पहले अपना दादालाही मकान रियासत धोबी के हाथ बेचा था। जब बेचा था तो वह खाली प्लाट था। अब इसमें करीब साल पहले रियासत में अपनी आबादी कर ली। हम तीन भाई हैं। मेरा नाम गोपाली, छोटे भाई का नाम नन्हे और तीसरे का नाम होरी लाल है। हम तीनो ने दादालाही मकान बेच कर अलग 2 तीन मकान बना लिये। बिहारी को जब गोली लगी तो इस बात को करीब 2 साल हो गये। बिहारी के गोली उसके घेर में लगी थी। इस घेर के बराबर में हमारा दादालाही मकान था जिस हम गोली लगने से एक साल पहले बेच चुके थे। घटना वाले दिनों इसकी मकानियत टूट चुकी थी और सब खाली थी।

मेरा भाई नन्हे बिहारी के यहाँ काम करता है और कभी 2 कहीं और भी कर लेता है। घटना वाले दिनों हम जिस मकान में रहते थे उसी में अब भी रहते हैं। यह मकान बिहारी के घेर से करीब 100 कदम पच्छम को है और जयराम का मकान मेरे मकान से करीब 50 कदम और पच्छम को है नन्हे घटना के समय जिस मकान में रहता था उसमें अब भी रहता है। नन्हे का मकान बिहारी के घेर से 200 कदम पहाड़ की तरफ है। घटना वाली रात मैं अपने घर पर सो रहा था। फायर से मेरी आंख खुली तो मैं बैठा हुआ कि उसके बाद रोवा पीटी पड़ गई तो मैं बिहारी के घर पर पहुँचा। मेरे बिहारी से बड़े अच्छे ताल्लुकात है। जब मैं वहाँ पहुँचा तो वहाँ विसियों आदमी थे। जयराम मेरे पीछे 2 पहुँचा। नन्हे मुझसे कुछ देर बाद पहुँचा। मैंने बिहारी से पूछा तो बिहारी ने बताया कि जाने कौन गोली मार गया। मैंने वहाँ पर कोई लालटैन नहीं देखी। घटना के दिनों बिहारी की अतीक से दुश्मनी चल रही थी। बिहारी की लड़की रामवती है वह बोला दुआवर के लाल सिंह को ब्याही थी अब वह लड़की शहजादी सराय में है। बिहारी ने रामवती को लाल सिंह की मरजी के खिलाफ उसके यहाँ से हटा कर दूसरी जगह बैठा दिया। लाल सिंह व बिहारी के बीच दुश्मनी है। करीब 8 साल हुए बिहारी के लाख में आग लगी थी। बिहारी ने इसकी रिपोर्ट हरिश्चन्द मुल्जिम के खिलाफ लगाई थी। इस केस में हरिश्चन्द छूट गया। जयराम जब बिहारी को थाने लेकर गया था तो मैं उसके साथ गया था।

हरिश्चन्द वगैरह मुल्जिमान से मेरा झगड़ा हो चुका है। इन्होने मेरे खिलाफ रपट भी लिखाई थी और दरखास्त भी दी थी।"

17. विचरण न्यायालय ने सभी तथ्य, परिस्थितियों, पत्रावली व साक्ष्यों की गवाही को ध्यान में रखते हुए यह पाया कि अभियोजन, अभियुक्तों के विरुद्ध आरोपों को यथोचित संदेह के परे साबित करने में सफल रहा। अवर न्यायालय के निष्कर्ष निम्न है-

17.01 घटना के पीछे का कारण चोटिल पिड़िता ने अभियुक्तों को चोरी न करने व अच्छा काम करके खाने पीने के लिए कह कर उनकी बेइज्जती करना था जो वर्तमान अपराध करने के लिए पर्याप्त कारण था।

17.02 बचाव पक्ष यह सिद्ध करने में असफल रहा कि अभियुक्त के दुश्मन और लोग थे तथा घटना उन्होने ही कारित करी थी।

17.03 अभियुक्त व पीड़ित एक ही गाँव के रहने वाले थे। साक्ष्य में यह आया है कि बिहारी जहाँ लेटा था वहाँ लालटेन थी। मेडिकल रिपोर्ट से यह साबित होता है कि गोली 3-4 फीट की दूरी से चलाई गयी थी अतः बिहारी द्वारा अपने गाँव के निवासियों से 3-4 फीट की दूरी पर आवाज से भी पहचाना जा सकता है।

17.04 यह संदिग्ध है कि अ0सं0 जय सिंह ने घटना को शुरुआत से अन्त तक देखा हो क्योंकि वो घटना स्थल से 25-30 कदम दूर पर सो रहा था और चोटिल बिहारी के साक्ष्य के अनुसार पूरी घटना बहुत कम समय में घटित हो गयी परन्तु इस साक्ष्य भी उपस्थिति को नकारा नहीं जा सकता और उसने अवश्य रुप से अभियुक्तों को घटना के बाद भागते हुए देखा था।

17.05 अ0सं0 नन्हे अभियोजन द्वारा पक्षद्रोही घोषित किया गया है उसने केवल इतना कहा कि वो गोली चलने की आवाज सुनकर घटना स्थल पर आया जहाँ तीन लोग बिहारी पर गोली चला रहे थे, परन्तु उसने किसी का चेहरा नहीं देखा।

17.06 पिड़िता बिहारी का मौखिक साक्ष्य, चिकित्सा साक्ष्य को परिपुष्ट करता हैं तथा यह साक्ष्य भी अभियुक्तों को धारा 307 भा0दं0सं0 के अन्तर्गत दोष सिद्ध करने के लिए पर्याप्त है।

17.07 बचाव पक्ष के साक्षी गोपाली ने भी अभियोजन पक्ष को उस स्तर तक समर्थन किया है कि घटना स्थल पर गोली चली थी परन्तु उसका यह कहना कि चोटिल बिहारी गोली चलाने वाले की पहचान नहीं पाया था,विश्वसनीय नहीं है।

17.08 पत्रावली पर उपस्थित साक्ष्य से यह सिद्ध होता है कि अभियुक्तों ने बिहारी पर जानलेवा हमला किया जिसमें उसकी एक आंख की रोशनी चली गयी।

18. यह अपील वर्तमान में केवल अपीलार्थी सं0 2, लाल सिंह के सापेक्ष ही जीवंत रह जाती है। उसके विद्वान अधिवक्ता ने निम्न दलीले दी है:

18.01 अभियोजन पक्ष की कहानी अगर पूर्ण रुप से सत्य मान भी ली जाये तो जीवंत अपीलार्थी पर केवल दूसरे दो अभियुक्तों के साथ घटनास्थल पर जाने का आरोप है। गोली चलाने का आरोप केवल एक अपीलार्थी (हरिशचन्द्र) पर था जिसकी मृत्यु हो चुकी है। अपीलार्थी को केवल धारा 34 भा0दं0सं0 की मदद से दोष सिद्ध किया गया है।

18.02 घटना का समय जाड़े की रात के 2 बजे का बताया गया है। यह भी कहा गया कि घटना बहुत कम समय में कारित की गयी थी अतः इस बात की बहुत संभावना है कि चोटिल, तीनों अभियुक्तों को न पहचान पाया हो या केवल गोली चलाने वाले को ही पहचान पाया हो तथा जीवंत अपीलार्थी को केवल गोली चलाने वाले का भाई होने के नाते इस मामले में झूठा फंसाया गया हो।

18.03 अपीलार्थी पर केवल उकसाने का आरोप लगाया गया है। अतः उसका 307/34 भा0दं0सं0के अन्तर्गत दोष सिद्ध करना गलत है।

18.04 अभियोजन का पक्ष केवल चोटिल बिहारी की गवाही पर आधारित है। अन्य दो गवाहों के घटनास्थल पर उपस्थिती या उनके द्वारा पूरी घटना को देखना संदिग्ध है। अतः झूठे फंसाने की संभावना से इंकार नहीं किया जा सकता है।

18.05 अभियोजन ने कोई भी साक्ष्य मेडिकल रिपोर्ट के पक्ष में परिक्षित नहीं कराया है। अतः यह सिद्ध नहीं होता है कि गोली के कारण ही चोटिल की आंख की रोशनी चली गई हो।

18.06 बचाव पक्ष की ओर की गवाही को अवर न्यायालय ने सही रुप से विश्लेषण नहीं किया है। झूंठे फंसाने के कारण जो साक्ष्य में आये हैं, स्वयं में यह सिद्ध करने के लिये पर्याप्त है कि अपीलार्थी को झूठा फंसाया गया है तथा वास्तव में घटना चोटिल के किसी अन्य दुश्मन ने कारित कि थी।

18.07 वैकल्पिक रुप में अधिवक्ता से निवेदन किया कि घटना वर्ष 1981 की है, अपीलार्थी वर्तमान में करीब 60 वर्ष का है तथा उसका कोई और आपराधिक इतिहास नहीं है। अतः उसकी सजा अब तक की व्यतीत सजा की अवधि में परिवर्तित कर दिया जाये व चोटिल को उचित प्रतिकर भी दिलावाया जाये।

19. उ0प्र0 शासन की ओर से विद्वान शासकीय अधिवक्ता, आई0पी0 श्रीवास्तव ने अपीलार्थी की बहस का विरोध किया और निवेदन किया कि-

19.01 चोटिल बिहारी के साक्ष्य से यह पूर्णतः सिद्ध होता है कि जीवंत अपीलार्थी व दो अन्य ने सामान्य आशय से चोटिल की मृत्यु कारित करने के आशय से उनमें से एक ने गोली चला कर चोटिल को गंभीर रुप से घायल किया जिससे उसकी एक आंख की रोशनी चली गयी। अपीलार्थी पर उस सामान्य आशय के अग्रसर गोली चलाने के लिए उकसाने का आरोप है अतः उसका धारा 307 सपठित 34 भा0दं0सं0 के अन्तर्गत दोष सिद्ध होना, न्याय संगत है।

19.02 झूठे फंसाने की बचाव पक्ष का तर्क बलहीन है तथा बचाव पक्ष कोई भी ऐसा साक्ष्य नहीं ला पाया है, जिसको झूठे फंसाने के तर्क को माना जा सके।

19.03 वैकल्पिक निवेदन दंडादेश के सिद्धांत के विपरित है, क्यों कि अभी भी 4 वर्ष के कारावास का दंडादेश कम ही है।

20. उभयपक्ष को सुना व पत्रावली का ध्यान पूर्वक परिशीलन किया।

विश्लेषण:-

21. **सन्दर्भ :- घायल साक्षी की गवाही व झूठा फँसाने का तर्क :-**

21.01 घायल साक्षी की गवाही को अपराधिक विधि शास्त्र में एक विशेष दर्जा दिया गया है, जिसका कारण है कि गवाह को चोट लगना, अपराध के स्थान पर उसकी उपस्थिति की एक अन्तर्निहित प्रत्याभूति है। यह स्वाभाविक नहीं है कि कोई घायल साक्षी अपने वास्तविक हमलावर को बिना सजा दिलवाये छोड़कर किसी और को झूठे आरोप मे फँसाये। अत: घायल साक्षी के बयान पर तब तक भरोसा किया जाना चाहिए, जब तक कि उसमें विरोधाभासों और विसंगतियों इतनी प्रमुख न हों, कि उनके आधार पर उसके साक्ष्य को खारिज करने के लिए मजबूत आधार बन जायें।(देखें :- **मनु दत्त एवं एक अन्य बनाम उत्तर प्रदेश शासन (2012)4 एस सी सी 79**)।

21.02 वर्तमान प्रकरण में अभियोजन साक्षी संख्या 1, बिहारी एक घायल साक्षी है, जिसको अग्नेस्त्र से आँख पर चोट लगी थी।

घटना का रात 2 बजे होना बताया गया है तथा खाट जहां यह साक्षी लेटा था, वहाँ समीप ही लालटेन जल रही थी, जिसका चालू हालत में फ़र्द क़ब्ज़ा बनाया गया है। साक्षी ने कहा है कि घटना के पहले वो पिशाब करके आया था और खाट पर बैठा था तब ही तीनों अभियुक्त वहाँ आये और घटना कारित की। साक्षी ने तीनों अभियुक्त द्वारा सामान्य आशय के अग्रसर में किये गये अपराधिक कार्य को भी विशेष रुप से बताया है। अभियुक्त ताराचंद (अब मृतक) व लालसिह (जीवन्त अपीलार्थी) जो लाठी ले कर आये थे ने अभियुक्त हरिश्चंद्र (अब मृतक) जिसके पास तमन्चा था, एक साथ घटनास्थल पर पहुँच कर कहा "देखते क्या हो साले को गोली मार दो यह अपने को बहुत कुछ समझता है"। इस पर अभियुक्त हरिश्चंद्र ने घायल साक्षी को 3-4 फ़ीट की दूरी से गोली मार दी, जो उसके बायीं आँख के पास लगी, जिससे उसकी आँख की रोशनी चली गयी। चिकित्सकीय प्रतिवेदन भी इस चोट का समर्थन करता है।

21.03 इस साक्षी ने प्रतिपरिक्षा में भी तीनों अभियुक्त द्वारा सामान्य आशय के अग्रसर में किये गये अपराधिक कार्य के बारे में अपना साक्ष्य स्थिर व संगत रखा है। प्रतिपरिक्षा मुख्य रुप से अभियुक्त को झूठा फ़साने के सम्बन्ध में रही परन्तु केवल इस कारण से कि प्रतिपरीक्षा में यह कहा गया है कि अभियुक्तों के विरुद्ध कोई चोरी की सूचना या मुक़दमा नहीं दर्ज हुआ है इसलिए अभियुक्तों के पास कोई घटना कारित करने का कोई उद्देश्य नहीं था या साक्षी की दुश्मनी अतीक व लाल सिंह नाम के व्यक्ति से क्रमश पूर्व में मुक़दमे व बेटी के विवाह के कारण थी, जिसको साक्षी ने ग़लत भी नहीं बताया है, यह घटना उनमें से किसी ने कारित करी होगी ऐसा नहीं माना जा सकता है। जैसा पूर्व में कहा है, घायल साक्षी सही अभियुक्त को छोड़कर किसी बेक़सूर को झूठा फँसायेगा ऐसा स्वाभाविक नहीं है तथा बचाव पक्ष न तो अभियोजन पक्ष को संधिघ्य बना पाया न ही इस साक्षी के बयान में कोई विरोधाभास दिखा पाया।

21.04 जीवन्त अपीलार्थी के विद्वान अधिवक्ता का कथन है कि घटना सर्दी की रात क़रीब 2 बजे की बतायी गयी है जो बहुत ही कम समय में घटित हो गयी थी, ऐसी परिस्थितियों में केवल लालटेन की रोशनी में,घायल साक्षी द्वारा तीनों अभियुक्तों को पहचान लेना व उनका विनिर्दिष्ट कृत भी देख लेना, सम्भव नहीं है तथा घायल साक्षी का घटना से थोड़ा से पहले पिशाब करके आना व घटना के समय खाट पर बैठा होना भी असामान्य है तथा जीवन्त अपीलार्थी को केवल मुख्य अभियुक्त का भाई है इस नाते से झूठा फँसाया गया है तथा उसने सामान्य आशय के अग्रसर में कोई भी अपराधिक कार्य नहीं किया है।

21.05 मैंने घायल साक्षी का सम्पूर्ण साक्ष्य का गहनता से परिशीलन किया व बारीकी से जाँच की है। सम्पूर्ण साक्ष्य में साक्षी संगत रहा और अभियोजन पक्ष का सम्पूर्ण रुप से समर्थन किया है। लालटेन की रोशनी में इस साक्षी ने उस पर बहुत क़रीब से हमला करने वाले, जो उसके गाँव के रहने वाले एक ही परिवार से थे, स्वाभाविक रुप से पहचान लिया था तथा तीनों अभियुक्तों का व्यक्तिगत कृत को स्पष्ट रूप से बताना, भी अस्वाभाविक नहीं है, अपीलार्थी इस साक्षी के साक्ष्य में कोई भी ऐसा विरोधाभास दिखाने में पूर्णतः असफल रहा जिसकी प्रवृति वस्तुगत हो।

21.06 अब यह विचार करना है कि क्या झूठा फँसाने का कोई मामला बनता है? सर्वप्रथम यह विचार करना है कि क्या वर्तमान प्रकरण में प्रथम सूचना रिपोर्ट तुरंत दर्ज करायी गयी है या इसमें देरी हुई है, जिसका उपयोग अभियुक्तों को झूठा फँसाने में किया गया है। अभियोजन के अनुसार घटना रात में क़रीब दो बजे घटी थी तथा प्रथम सूचना रिपोर्ट जयराम (अभियोजन साक्षी 2), जो घटनास्थल पर मौजूद था, ने सुबह 5.20 पर थाने पर तीनों नामित अभियुक्तों के ख़िलाफ़ दर्ज करवाई जो घटनास्थल सेकिमी दूर था। उसके बाद घायल

बिहारी को अस्पताल पहुँचाया गया। इससे यह स्पष्ट है कि प्रथम सूचना रिपोर्ट तुरंत दर्ज कराई गयी थी तथा इन परिस्थितियों में क़रीब 3 घटें का समय लगना अस्वाभाविक नहीं है और इस समय का उपयोग झूठा मामला बनाने में नहीं हुआ है।

21.07 जीवन्त अपीलार्थी के विद्वान अधिवक्ता ने पुरज़ोर बहस की है कि घायल साक्षी के और भी कई दुश्मन थे, जिनमें से किसी ने रात के अंधेरे में उस पर हमला किया, जिसको वो पहचान न पाया और अभियुक्तों को केवल संदेह के आधार पर नामित कर दिया। अभियुक्तों की घायल साक्षी से कोई दुश्मनी नहीं थी क्योंकि उनपर कभी भी चोरी का कोई मामला नहीं रहा, इसलिये घायल साक्षी के उनको समझाने से उनकी कोई रंजिश नहीं होती है। जबकि घायल साक्षी ने इस तथ्य से इंकार नहीं किया है कि अतीक व लाल सिंह से उसकी विभिन्न कारणों से रंजिश थी। परन्तु इस साक्षी की प्रतिपरिक्षा में ऐसा कोई तथ्य नहीं आया है, जिससे यह तर्क माना जा सके बल्कि साक्षी अपने बयान पर अडिग रहा और घटना का स्पष्ट विवरण दिया। ऐसा कोई भी तथ्य/साक्ष्य पत्रावली पर नहीं आया जो झूठा फँसाने के तर्क को थोड़ा भी बल दे सके, अत: मैं इस निष्कर्ष पर पहुँचता हूँ कि वर्तमान प्रकरण में घायल साक्षी का साक्ष्य विश्वसनीय व भरोसेमंद है तथा झूठा फँसाने का तर्क बलहीन होने के कारण निरस्त किये जाने योग्य है, अत: निरस्त किया जाता है ।

22. **<u>संदर्भ:- सामान्य आशय, जीवन्त अपीलार्थी का कृत व दंडादेश</u>** :-

22.01 जीवन्त अपीलार्थी के विद्वान अधिवक्ता ने वैकल्पिक रुप से निवेदन किया कि वर्तमान अपीलार्थी को धारा 34 भा0दं0सं0 की मदद से धारा 307 भा0दं0सं0 के अन्तर्गत दोष सिद्ध किया गया है तथा सामान्य आशय के अग्रसर में आपराधिक कृत के कारण दूसरे अभियुक्त जिसने गोली मारी थी के समान ही दण्ड दिया है, जबकि वर्तमान अपीलार्थी ने ना तो कोई बल का उपयोग किया है न ही कोई अत्युक्ति ही करी है, केवल उसने अन्य दो सह अभियुक्तों के साथ घटना स्थल पर जाकर गोली चलाने को बोला था, अत: उसने सामान्य आशय के अग्रसर कोई अपराधिक कार्य नहीं किया है और न ही ऐसा कोई साक्ष्य पत्रावली पर है जो घटना से पूर्व किसी सलाह मशविरा के बारे में बताता हो। अत: जीवन्त अपीलार्थी को केवल उसके द्वारा किये गये अपराधिक कार्य के लिए सजा दी जाये तथा इस दृष्टिकोंण से चार वर्ष की सजा बहुत अधिक है तथा अपीलार्थी द्वारा अब तक सजा की व्यतीत अवधि जो करीब ३६ दिन है में परिवर्तित कर दी जाये ।

22.02 धारा 34 भा0दं0सं0 में निहित संयुक्त दायित्व के सिद्धांत को किसी आपराधिक कार्य के कारित होने में लागू करने के लिए अभियोजन पक्ष को यह दिखाना पड़ेगा कि विचाराधीन आपराधिक कार्य सभी अभियुक्त व्यक्तियों में से एक ने सभी के सामान्य आशय को अग्रसर करने के लिए किया था। सामान्य आशय पूर्व-योजित योजना के माध्यम से हो सकता है, या यह घटना से ठीक पहले भी योजित किया जा सकता है। सामान आशय से तात्पर्य है एक योजित होकर कार्य करना, जो पूर्व मन्त्रणा को दर्शाता है। उनके कृत्य और चरित्र भिन्न हो सकते हैं, लेकिन वे सभी सामान्य आशय से कार्य करते हैं। सामान्य आशय है या नहीं, प्रत्येक मामले के साबित तथ्यों और परिस्थितियों के परिणाम पर निर्भर करता है। आरोपी व्यक्तियों का अपराध करने का सामान्य आशय था या नहीं, इसका निष्कर्ष, परिस्थितियों की समग्रता को ध्यान में रख कर ही किया जा सकता है। (देखे **वीरेंद्र बनाम हरियाणा राज्य, (2020) 2 एससीसी 700**)

22.03 वर्तमान प्रकरण में घायल साक्षी व अन्य साक्षी के साक्ष्य से यह विदित है कि तीनों अपराधी एक साथ घटना स्थल पर

आये थे। अपराधी ताराचंद (अब मृतक) व लालसिह (जीवन्त अपीलार्थी) ने लाठी व अपराधी हरिश्चंद्र (अब मृतक) ने तमन्चा ले रखा था। अपराधी ताराचंद (अब मृतक) व लालसिह (जीवन्त अपीलार्थी) ने घटनास्थल पर पहुँचते ही अपराधी हरिश्चंद्र (अब मृतक) से घायल साक्षी बिहारी को गोली मारने के लिए प्रबोधित किया, जिसपर अपराधी हरिश्चंद्र (अब मृतक) ने घायल साक्षी बिहारी को बहुत नज़दीक से गोली मार दी जो उसके आँख के पास लगी , जिससे उसकी एक आँख की रोशनी चली गयी। उसके बाद अन्य साक्षीयों के घटना स्थल पर पहुँचनें पर तीनों अभियुक्त एक साथ भाग गये।उपरोक्त विधि उद्धरण को उपरोक्त तथ्यात्मक प्रारूप में अगर लागू किया जाये तो केवल एकमात्र निष्कर्ष निकालता है कि तीनों अभियुक्तों ने पीड़ित बिहारी की हत्या का प्रयत्न कारित करने के सामान्य आशय के अग्रसर में कार्य किया, अत: धारा 307 सपठित धारा 34 भा0दं0सं0 के अन्तर्गत दोष सिद्ध किये गये, जिसमें कोई विधिक त्रुटि नहीं है।

23. अन्त में यह निर्धारित करना है,की वर्तमान मामले के तथ्य व परिस्थितियों में, यह ध्यान में रखते हुए कि घटना वर्ष 1981 की है तथा वर्तमान में लालसिह (जीवन्त अपीलार्थी) की उम्र क़रीब 60 वर्ष है तथा उसका और कोई अपराधिक इतिहास नहीं है, क्या लालसिह (जीवन्त अपीलार्थी) जिसका कर्त प्रबोधित करना था, उसका 4 वर्ष का दंडादेश, उसके द्वारा अब तक व्यतीत सजा जो करीब ३६ दिन है में परिवर्तित किया जा सकता और पिड़ित को क्या उचित प्रतिकर दिया जा सकता है?

24. उपरोक्त के निर्धारण के लिये सर्वप्रथम दंडादेश के सिद्धांत क्या है ? इसका विश्लेषण करना आवश्यक है।

25. **<u>संदर्भः-दंडादेश के सिद्धांतः</u>**-

25.01 भारतीय विधायी ने दंडादेश के सम्बंध में कोई नीति निर्धारित नहीं करी है, परंतु **मालिमथ समिति (2003)** व **माधव मेनन समिति (2008)** ने दंडादेश नीति निर्धारित करने की आवश्यकता पर जोर दिया है व नीति बनाने के लिए सिफारिश भी की है।

25.02 दंडादेश के सिद्धांत या दंडादेश की नीति क्या हो, उच्चतम न्यायालय यह विषय पर चिंतित रहा है और समय-समय पर अपने विभिन्न विधिक उद्धरण के द्वारा इस विषय पर स्पष्टता लाने का प्रयास भी किया है तथा अवर न्यायालय व उच्च न्यायालय द्वारा दंडादेश पारित करते समय लापरवाही होने से रोकने के लिये सचेत भी किया है।

25.03 उच्चतम न्यायालय की तीन सदस्यीय पीठ द्वारा हाल में ही पारित अपने निर्णय (**मध्यप्रदेश शासन बनाम ऊधम और अन्य : (2019) 10 १० एस सी सी 300**) में एक बार फिर से दंडादेश के सिद्धांत पर प्रकाश डाला है और अभिनिर्धारित किया कीः-

"8. आरंभ में, यह ध्यान रखना उचित है कि प्रत्यार्थीगण-अभियुक्तगणों की अपीलों को आंशिक रूप से स्वीकृत करने और आलोच्य आदेश को पारित के लिए उच्च न्यायालय का यह तर्क कि यह सजा तक सीमित है। उच्च न्यायालय अपने आदेश में कहते है कि अपराध की प्रकृति को देखते हुए, यह तथ्य कि यह प्रत्यार्थीगण का प्रथम अपराध है और उनके द्वारा पहले से ही सजा की अवधि व्यतीत कर ली है तब यह आलोच्य आदेश पारित किया जाता है।

9. इस स्तर पर, इस न्यायालय के अभियुक्त 'X' बनाम महाराष्ट्र राज्य (2009) 7 एस. सी. सी. 1, जिसमें हम में से दो सदस्य पीठ के भाग थे, की टिप्पणी भारत में सजा के संबंध में प्रांसंगिक है-

"49. आपराधिक प्रतिबंधो का उचित आबंटन, जो कि ज्यादातर न्यायिक शाखा द्वारा दिया जाता है। {निकोला पैडफील्ड, रॉड मॉर्गन और माइक मैगुइयर" न्यायालय से बाहर, दृष्टि से

बाहर" आपराधिक प्रतिबंधों और कोई न्यायिक निर्णय नही", ओक्सफोर्ड, अपराध शास्त्र की पुस्तिका (5 वां, संस्करण)}। विचारण के अंत में होने वाली यह प्रक्रिया अभी भी एक आपराधिक न्याय प्रणाली की प्रभावकारिता पर बडा प्रभाव डालती है। ***यह स्थापित है कि सजा एक सामाजिक-कानूनी प्रक्रिया है जिसमें एक न्यायाधीश तथ्यात्मक, परिस्थितयों और ओचित्य पर विचार करते हुए अभियुक्त के लिए उचित दण्ड को ढूंढता है। इस तथ्य के प्रकाश में यह जरूरी हो जाता है कि विधायिका ने न्यायाधीशों को सजा देने के लिए विवेक प्रदान किया, कि इसका उपयोग एक सैद्धांतिक तरीक से करे।*** *हमें यह प्रोत्साहित करने की जरूरत है कि सजा देने में एक सख्त निर्धारित दण्ड की सोच को माना नही जा सकता है जैसा कि न्यायाधीश को पर्याप्त स्वविवेक की जरूरत होती है।*

50. इस प्रकरण का परीक्षण करने से पूर्व, हमें सजा देने की प्रक्रिया में तांर्किकता के प्रभाव के प्रश्न को संबोधित करने की जरूरत है। विचारण न्यायालय की तांर्किकता कारित किये गये अपराध की सजा के लिए सामान्य स्तर और तथ्यों और परिस्थितियों के बीच की कड़ी के जैसे कार्य करती है। विचारण न्यायालय को सजा देने के लिए तर्कों को देने के लिए बाध्य है, ***प्रथमता जैसे कि नैसर्गिक न्याय का मूलभूत सिद्धांत है कि न्यायकर्ता को निर्णय तक पहुंचने के लिए कारण जरूर बताना चाहिए, और दूसरा कारण अधिक महत्व रखता है क्योंकि अभियुक्त की स्वतंत्रता उपरोक्त वर्णित तर्क के अधीन है।*** *इसके आगे, अपीलीय न्यायालय के पास चुनौती दी गयी सजा की मात्रा की शुद्धता को जाँचने के लिए उत्तम सुविधा से सुसज्जित है, यदि विचारण न्यायालय ने कारणों सहित उचित बताया है……"*

(जोर दिया गया)

11. हमारी यह राय है कि निचले न्यायालय द्वारा अपर्याप्त या गलत सजा दिये जाने के कारण इस न्यायालय के समक्ष बड़ी संख्या में प्रकरण दायर किये जा रहे है। हमें समय है और हम फिर से दोषपूर्ण तरीके के विरूद्ध चेतावनी देते है जिसमें की कुछ प्रकरणों में सजा से निपटते है। इसमें कोई दो राय नही है कि सजा देने के पहलुओं को हल्के में नही लेना चाहिए, जैसे आपराधिक न्याय व्यवस्था का यह भाग समाज पर निर्णायक प्रभाव डालता है। इसके प्रकाश में हमारी राय है कि हमें इसको और स्पष्टता प्रदान करने की जरूरत है।

12. ***अपराधों के लिए सजा को तीन परीक्षण अर्थात अपराध परीक्षण, आपराधिक परीक्षण और तुलनात्मक अनुपात परीक्षण के मापदण्ड पर परीक्षण किया जाना है। अपराध परीक्षण के कारकों में जैसे अपराध की योजना की सीमा, अपराध में इस्तेमाल हथियार का चुनना, अपराध का तरीका, अपराध कारित करना (यदि कोई हो), अभियुक्त की भूमिका, अपराधी की असामाजिकता या घिनौना चरित्र, पीडित की दशा सम्मलित रहते है।*** *आपराधिक परीक्षण में कारकों का मूल्यांकन जैसे अपराधी की आयु, अपराधी की लिंग, अपराधी की आर्थिक स्थिति या सामाजिक पृष्ठभूमि, अपराध के लिए प्रेरणा, प्रतिरक्षा की उपलब्धता, मानसिक स्थिति, मृतक के समूह में से किसी के द्वारा उत्प्रेरण, विचारण में पर्याप्त रूप से प्रतिनिधित्व, न्यायाधीश द्वारा अपीलीय प्रक्रिया में असहमति, पछतावा, सुधार की संभावना, पूर्ववर्ती आपराधिक अभिलेख (लंबित प्रकरणों को न लेना) और कोई अन्य सुसंगत कारण (एक विस्तृत सूची नहीं है) सम्मलित रहते है।*

13. इसके अतिरिक्त हमें यह ध्यान दे सकते है कि अपराध परीक्षण के अंतर्गत गंभीरता को सुनिश्चित किये जाने की जरूरत है। अपराध की गंभीरता को (I) पीड़ित की शारीरिक सम्पूर्णता; (ii) भौतिक समर्थन या सुख-सुविधा की हानि; (iii) मानभंग की सीमा;

और (iv) निजता के उल्लघंन के द्वारा सुनिश्चित की जा सकती है। "(उपरोक्त https://main.sci.gov.in/ Supremecourt vernacular/ 2013/ 10532_2013_3_1501_ 17728 Judgement_22_Oct_ 2019_ HIN. pdf से अधोभारण (download) किया गया है, जिसमें यह 'खंडन' लिखा गया है किः- "क्षेत्रीय भाषा में अनुवादित निर्णय से आशय केवल पक्षकारों को उनकी अपनी भाषा में समझने के लिये है एवं इसका प्रयोग किसी अन्य उद्देश्य के लिये नहीं किया जा सकेगा। सभी व्यवहारिक एवं कार्यालयीन उद्देश्य के लिये निर्णय का अंग्रेजी संस्करण ही प्रमाणित होगा और निष्पादन तथा क्रियान्वयन के उद्देश्य के लिये प्रभावी माना जायेगा।")

26. अपराधों के लिए सजा की अवधि निर्धारित करने के तीन परीक्षण है, जो है- अपराध परीक्षण, आपराधिक परीक्षण व तुलनात्मक अनुपात परीक्षण, जिनमें विभिन्न कारण है तथा अपराध की गंभीरता को भी विभिन्न कारकों की कसौटी पर सुनिश्चित किया जाना चाहिये। पूर्व में कुछ कारण उल्लेखित भी किये गये हैं। अगर इन कारको से वर्तमान प्रकरण में यह निर्धारित करने के लिये कि सजा की क्या उचित अवधि व प्रतिकर की क्या उचित राशी होनी चाहिये के लिये लागू करे तो विदित होता है कि जीवंत अपीलार्थी पर प्रबोधित करने का आरोप है। उसने कोई आपराधिक बल का प्रयोग नहीं किया और न ही उसका कोई घिनौना चरित्र प्रकट होता है। अन्य दो अपीलार्थी, जिसमें से एक पर गोली चलाने का आरोप सिद्ध हुआ था, की मृत्यु हो चुकी है। अपीलार्थी का कोई और आपराधिक इतिहास नहीं बताया गया है। इसके अतिरिक्त कि अपराध 1981 में घटित हुआ था वर्तमान में अपीलार्थी की उम्र करीब 60 वर्ष को भी मद्देनजर रखना चाहिये।

27. समस्त तथ्यात्मक व विधिक, अपराध व उचित सजा तथा प्रतिकर अपराधी की स्थिति, घायल साक्षी को हुआ शारीरिक नुकसान का अध्ययन करने पर यह न्यायालय इस निष्कर्ष पर पहुँचता है कि दंड की सजा की अवधि जो 4 वर्ष है उसको अब तक व्यतीत सजा की अवधि में परिवर्तित किया जाये व प्रतिकर के रुप में रु0 1 लाख पीड़ित साक्षी को दिलावाया जाये। अतः यह अपील आंशिक रुप से स्वीकार की जाती है तथा अपीलार्थी सं0 2, लाल सिंह की सजा जो अब तक करीब 36 दिन तक व्यतीत की है, की अवधि में परिवर्तित की जाती है व प्रतिकर के रुप में रु0 1 लाख अपीलार्थी सं0 2, लाल सिंह द्वारा पिड़ित बिहारी को दिये जाने का भी आदेश दिया जाता है। इस राशि को अभियुक्त/अपीलार्थी सं0 2, लाल सिंह इस आदेश की तिथि से दो मास के अन्दर पीड़ित साक्षी बिहारी को भुगतान करेगा अथवा अवर न्यायालय में जमा करेगा तथा उसी अवधि में उसका प्रमाण इस उच्च न्यायालय के कार्यालय में जमा भी करेगा। अवर न्यायालय में प्रतिकर जमा होने की दशा में अवर न्यायालय, पीड़ित बिहारी द्वारा दाखिल उचित आवेदन पर जमा की गयी राशि, उसके पक्ष में जारी करेगा। तदनुसार आदेशित किया जाता है।

28. उपरोक्त आदेशानुसार यह आपराधिक अपील आंशिक रुप से स्वीकार की जाती है।

29. इस आदेश की एक प्रति व समस्त पत्रावली अवर न्यायालय को अविलम्ब भेजी जाये।
