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ALLAHABAD SERIES

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(2020)10ILR A1
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.08.2020

BEFORE

THE HON'BLE ARVIND KUMAR MISHRA-I, J.

Criminal Appeal Defective U/S 372 Cr.P.C. No. 70 of 2020

Smt. Dimpal ...Appellant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Appellant:
Sri Atul Kumar

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

Criminal Law - Criminal Procedure Code (2 of 1974) – Section 372 - Appeal against acquittal - There may be various alternatives to the situation in consideration but it is to be seen whether the alternative adhered to by the trial judge is supported by material on record - in case it is found to be supported on record - then the same is to be sustained - Merely, because another hypothesis was possible for recording finding of conviction is not a ground for reversing an order of acquittal - Advantage, in situation of two equally available alternatives, goes to the accused - finding which favours the accused is to be adopted & given preference (Para 17)

Dismissed (E-5)

(Delivered by Hon'ble Arvind Kumar Mishra-I, J.)

1. Heard Sri Atul Kumar, learned counsel for the appellant-informant, learned A.G.A. for the State and perused the material brought on record.

2. Grounds and reasons assigned for condoning the delay are satisfactory.

3. Delay is condoned.

4. Office is directed to allot regular number to this appeal.

5. Accordingly, delay condonation application is **allowed.**

6. By way of instant Criminal Appeal, leave to appeal has been sought by the appellant-informant against the judgment and order of acquittal dated 02.03.2020 passed by A.D.J./Special Court (POCSO Act), Saharanpur, in Sessions Trial No. 62 of 2015 (State of U.P. vs. Arjun and others), under Sections - 354A, 354D, 323, 504, 506 I.P.C. & 7/8 POCSO Act, Police Station ? Gagalheri, District - Saharanpur, whereby the accused-respondents Arjun, Rohit and Sumit have been acquitted of the charges under Sections - 354A, 354D, 323, 504, 506 I.P.C. & 7/8 POCSO Act by the aforesaid order.

7. The claim of the appellant is based primarily on two counts, first, that the finding of acquittal is conjectural and presumptive. Secondly, that the same is not based on material on record. Trivial contradictions have been relied upon for recording finding of acquittal. Substantial piece of evidence, as emanating from the testimony of the victim, has been brushed aside arbitrarily and has not been acted upon by the trial court. The established fact of the age of the victim was also erroneously disbelieved by the trial court. As per the date of birth appearing in the school certificate, the victim was minor, aged about 15 years, however the trial court erred while it misread and presumed the age of the victim to be above 18 years. The

wholesome view of the factual aspect and the testimonial merit of this case vis a vis the prevailing circumstances are fair enough to record conviction of the accused-respondent nos.2, 3 and 4. The judgment of acquittal is most casual and perfunctory. The finding of conviction on the face is arbitrary and not sustainable in the eye of law more particularly in view of the material produced by the prosecution.

8. Also heard the learned A.G.A.

9. I have considered the entirety of the arguments as well as perused the certified copy of the judgment brought before this Court, available from Page No.18 up to Page No. 34 of this file. As per the judgment, it appears that the victim, a student of Class - XI was studying in Siya Ram Inter College, Gagalheri, District- Saharanpur within Police Station - Gagalheri and she was returning back to her home after attending her tuition around 3:00 p.m., when an accident was caused with motorcycle by the accused-respondent nos. 2, 3 and 4 at place Pashu Paith by dashing it with the victim, near paddy field, due to which the victim fell down on the ground. The accused in the meanwhile came from behind and began to harass her by touching her limbs. Apart from that, they also tried to drag her towards the sugarcane field, whereupon alarm was raised by the victim, when Subhash, Sanjay and others rushed to the rescue of the victim on the spot. Consequently, the accused-respondent nos. 2, 3 and 4 fled away from the scene after threatening the victim. The informant went to report the matter at the Police Station - Gagalheri, but no action taken. When the accused came to know about the aforesaid development regarding approach to the police station being made by the victim side, the accused also threatened the informant side at around 5:00 p.m., the same evening i.e. in the evening of 28.8.2014. However, matter was lodged at the police station (Gagalheri) after interference of the S.S.P., Saharanpur and a case was registered at Police Station - Gagalheri, District - Saharanpur, under Sections - 354 Ka, 354 Gha, 323, 504, 506 I.P.C. and 7/8 POCSO Act at Case Crime No.213/214.

10. The matter was investigated and a charge sheet was filed against the accused-respondents. Charges under the aforesaid sections of I.P.C. and POCSO Act were framed read over and explained to the accused. The same were abjured by them and they claimed to be tried.

11. The prosecution in all examined P.W.-1, P.W.-2, P.W.-3 and P.W.-4. P.W.-1 being the informant, P.W.-2 being the victim, P.W.-3 is Ravi Kumar and P.W.-4 is Retd. S.I. Anand Pal Singh and Constable Rishi Pal Singh was examined as P.W.-5.

12. The defence did not lead any evidence-either oral or documentary.

13. Except as above, no other testimony was adduced, therefore, evidence for the prosecution was closed and the statement under Section - 313 Cr.P.C. was recorded, wherein it was claimed that on account of village *partibandi,* the accused respondent nos. 2 to 4 have been falsely implicated and involved in this case for no worthy reason and it was claimed that in fact, the incident was outcome of pure accident, it was not caused deliberately with a view to harass or tease the victim, a false case was lodged against them.

14. After considering the evidentiary merit of this case and the attendant facts and circumstances, the trial court recorded

aforesaid finding of acquittal and thereby acquitted the accused-respondents nos.2 to 4 under the aforesaid sections of I.P.C. and the POCSO Act, respectively.

15. Consequently, this appeal by the victim.

16. I have considered the line of argument set up by Sri Atul Kumar, learned counsel for the appellant-informant. Insofar as the meritorial aspect of this appeal is concerned, no doubt the victim has clarified about the incident in her examination-in-chief. However, insofar as the cross examination of the victim is concerned, it is evident that the prosecution story as was set up in the first information report that the prime concern of the accused was to tease and harass the girl/victim, was not, in fact, so. However, it so happened that there was a collision between the motorcycle of the accused-respondents and the bicycle of the victim and exchange of hot words followed by some altercation took place and due to which, a false case was cooked up against the accused-respondent nos. 2, 3 and 4.

17. Now the legal import of the force of contention that the finding of acquittal is per se erroneous and perverse as staked by the appellant is concerned, the same argument does not carry substance for the reason that the finding of acquittal is well grounded on record and the outcome of acquittal cannot be termed as perverse or illegal. There may be various alternatives to the situation in consideration but it is to be seen whether the alternative adhered to by the trial judge is supported by material on record and in case it is found to be supported on record, then the same is to be sustained. Merely, because another hypothesis was possible in the same situation which might have worked for finding of conviction would not work for the reason that the finding which favours the accused is to be adopted and given preference. Advantage, in such situation of two equally available alternatives always and legally goes to the accused and this is inviolable law of criminal jurisprudence.

18. Here, in this case, the conclusion of acquittal drawn is based on the evidenciary analysis and scrutiny of the prosecution evidence and it cannot be faulted with in view of fact that on page 6 of the testimony of the victim, she herself has testified in her cross examination, categorically that some accident took place and this led to some altercation between the parties, due to which the parents of the victim lodged this report. This generates doubt about the occurrence as set up by the prosecution. Consequently, it cannot be said that there is any perversity in the judgment of acquittal as recorded by the trial court.

19. The leave to appeal is refused.

20. Consequently, this appeal sans merit and the same is ***dismissed.***

(2020)10ILR A3
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.07.2020

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Criminal Appeal No. 648 of 1983

Balbir & Ors. ...Appellants(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:

Sri Tej Pal Singh, Sri A. Saran, Sri Armardan Singh, Sri Arimardan Yadav, Sri J.N. Singh, Sri Jadu Nandan Yadav, Sri O.P. Kulshrestha, Sri Rohit Tiwari, Sri Mahendra Kumar, Sri Pranvesh

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

Criminal Law - Indian Penal Code, 1860 - Section 391- Dacoity- Sections 395 and 397 IPC- Conviction of less than five persons- Finding has to be recorded about involvement of five or more persons- In case there is a conviction of less than five persons under Sections 395/ 397 IPC, Trial Court must arrive to a finding that there was involvement of five or more persons. In absence of such finding no conviction could be made out under aforesaid Sections. Trial Court has not recorded any such finding in this regard- Prosecution has completely failed, in the present case, either to prove the participation of five or more persons in commission of offence or establish their identity. The conviction and sentence of appellants is being repugnant to letter and spirit of Sections 391 and 396 IPC, the same cannot be sustained.

It is settled law that for recording the conviction for an offence u/s 391IPC, a finding has to be recorded by the trial court of the presence or participation of five or more persons and in absence of such a finding less than five persons cannot be convicted for an offence of dacoity.

Criminal Appeal allowed.(Para 13, 14) (E-3)

Case law relied upon/ Discussed:-

1. Raj Kumar @ Raju Vs. St. of Uttaranchal (Now Uttarakhand), (2008) 11 SCC 709

2. Manmeet Singh @ Goldie Vs. St. of Punj., (2015) 7 SCC 167.

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. Heard Sri Pranvesh, Advocate holding brief of Sri Jadu Nandan Yadav, learned counsel for appellants, at length, on facts and law both, and learned A.G.A. for State.

2. This Criminal Appeal under Section 374 of Criminal Procedure Code *(hereinafter referred to as "Cr.P.C.")* has been filed by three appellants, namely, Balbir, Mohar Pal alias Chhakauri and Lala Ram against judgment and order dated 11.03.1983 passed by Sri D.C. Srivastava, Judge Special Court (Dacoity), Kanpur Dehat in Session Trial No. 467 of 1981 (State vs. Balbir and others) convicting appellants, Balbir and Lala Ram under Section 395 IPC and appellant, Mohar Pal alias Chhakauri under Sections 395 read with 397 IPC and sentencing appellants, Balbir and Lala Ram to five years rigorous imprisonment and appellant, Mohar Pal alias Chhakauri to seven years rigorous imprisonment.

3. As per first Informant, PW-1, Raj Kumar, the prosecution story is, that, in the intervening night of 26/27.06.1981 appellants alongwith four others committed dacoity in three houses in Village Badra Majra Bakauthia, Police Station Kakwan, District Kanpur Dehat. At about 11.00 O'clock four dacoits jumped into the Courtyard of First Informant and opened door, which allowed other six dacoits to enter into the house. They started beating the inmates and looted belongings. PW-1 ran away and raised alarm. After committing dacoity in the house of First Informant all of them looted houses of Ochhey Lal and Ganga Ram in the same village. They also used firearm in the course of dacoity. As per prosecution story in the light of lantern, torches and fire of Pual, the witnesses saw the features of

known dacoits and also recognized three known dacoits, who are appellants. In support of their case prosecution examined PW-1, Ram Kumar, scriber of complaint; PW-2, Sheo Singh, an eye witness of dacoity; PW-3, G.P. Thapalyal, Executive Magistrate, who conducted identification parade; PW-4, S.O. R.K. Verma; PW-5, Head Constable, Sri Krishan, who are formal witnesses and PW-6, SI, Ram Bilas, who was Investigating Officer of the case.

4. After filing of charge sheet charges were framed against appellants, who pleaded not guilty and and claimed to be tried on merits.

5. Trial Court after considering the evidence and other material on record convicted appellants, as mentioned above. Relevant finding of Trial Court are as follows:

"35. Thus, after considering the statements of these two witnesses an irresistible conclusion can be drawn that the three accused facing trial before me, were also amongst the decoits, who had committed dacoity in the night of occurrence, in the house of Raj Kumar. Since the evidence on record, does not justify two views, the view in favour of the accused in the circumstances of the case cannot be taken. The case of Kali Ram vs. State of H.P. AIR 1973 (S.C.) 2773 is thus distinguishable on facts.

36. To sum up, it can be said that the prosecution has successfully established that the three accused committed dacoity in the house of Raj Kumar in the night of occurrence. It appears that after disclosure of a material fact by Raj Kumar in his cross-examination that accused Mohar Pal alias Chhakauri fired from his gun at the time of leaving his house, the charges under Section 395 IPC was amended against accused Mohar Pal alias Chhakauri and was regulated with charge under Section 397 IPC. I do not find any reason to disbelieve Raj Kumar on the point that Mohar Pal alias Chhakauri had used fire-arm, during the course of dacoity. The situation would have been different if the witness would have given voluntary statement on the point. On the other hand, the fact was brought on record by the effort of the defence counsel and to my mind, such statement, cannot be called as belated nor it can be rejected on ground of being un-reliable. Thus, to my mind, the prosecution has been successful in establishing the charge under Section 395 IPC against accused Balbir and Lala Ram and the charge under Section 395 read with Section 397 IPC against accused Mohar Pal alias Chhakauri. They have, therefore, to be convicted." (emphasis supplied)

6. Learned counsel for appellants submits that, even on merit, the prosecution is not able to prove its case beyond reasonable doubt as the witnesses are interested witnesses and no independent witness was examined. He submits that Trial Court has erroneously convicted appellants, who are three in numbers, under Sections 395 and 397 IPC, as they are less than five persons, which is against the essential ingredients of Section 391 IPC. In support of submission he placed reliance on Supreme Court's decisions in **Raj Kumar alias Raju vs. State of Uttaranchal (Now Uttarakhand) : (2008) 11 SCC 709** and **Manmeet Singh alias Goldie vs. State of Punjab : (2015) 7 SCC 167.**

7. Opposing the submission of learned counsel for appellants, learned A.G.A. appearing for State, has also relied on the above judgments to submit that in

the present case Trial Court has convicted appellants by mentioning that they were part of the persons who committed dacoity. On the merit of case, he submits that PWs-1 and 2, who are eye witnesses, have supported prosecution case in its entirety and Trial Court has rightly convicted appellants.

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

9. Appellants are convicted under Sections 395 and 397 IPC which are reproduced as under:

*"**395. Punishment for dacoity.**--Whoever commits dacoity shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine."*

*"**397. Robbery, or dacoity, with attempt to cause death or grievous hurt.**--If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years."*

10. "Dacoity" is defined in Section 391 IPC, which is reproduced as under:

*"**391. Dacoity.**--When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit "dacoity".*

11. Supreme Court in **Raj Kumar alias Raju (supra)** has considered the issue in question in paras 21 and 35 of the judgment, which is relevant for present case and reproduced as under:

"21. It is thus clear that for recording conviction of an offence of robbery, there must be five or more persons. In absence of such finding, an accused cannot be convicted for an offence of dacoity. In a given case, however, it may happen that there may be five or more persons and the factum of five or more persons is either not disputed or is clearly established, but the court may not be able to record a finding as to identity of all the persons said to have committed dacoity and may not be able to convict them and order their acquittal observing that their identity is not established. In such case, conviction of less than five persons--or even one--can stand. But in absence of such finding, less than five persons cannot be convicted for an offence of dacoity."

"35. In the instant case, as observed earlier, there were six accused. Out of those six accused, two were acquitted by the trial court without recording a finding that though offence of dacoity was committed by six persons, identity of two accused could not be established. They were simply acquitted by the court. In our opinion, therefore, as per settled law, four persons could not be convicted for an offence of dacoity, being less than five which is an essential ingredient for commission of dacoity. Moreover, all of them were acquitted for an offence of criminal conspiracy punishable under Section 120B IPC as also for receiving stolen property in the commission of dacoity punishable under Section 412 IPC. The conviction of the appellant herein for an offence punishable under Section

396 IPC, therefore, cannot stand and must be set aside."(emphasis supplied)

12. The above judgment has been followed by Supreme Court in subsequent judgment in **Manmeet Singh alias Goldie (supra)** and relevant paras 32, 33 and 34 of the judgment are as under:

"32. With reference to the offence of dacoity under section 391, IPC in particular and the import of section 149, IPC, this Court in Raj Kumar vs. State of Uttaranchal 2008 (11) SCC 709 had propounded that in absence of a finding about the involvement of five or more persons, an accused cannot be convicted for such an offence. Their Lordships, however, clarified that in a given case it could happen that there might be five or more persons and the factum of their presence either is not disputed or is clearly established, but the Court may not be able to record a finding as to their identity resulting in their acquittal as a result thereof. It was held that in such a case, conviction of less than five persons or even one can stand, but in the absence of a finding about the presence or participation of five or more persons, less than five persons cannot be convicted for an offence of dacoity.

33. The above pronouncements do acknowledge the extension of the concept of collective culpability enshrined in Section 149 IPC in Section 396 IPC contemplating murder with dacoity. An assembly of five or more persons participating in the offence is thus the sine qua non for an offence under Section 396 IPC permitting conviction of any one or more members thereof even if others are acquitted for lack of their identity. In absence of such an assembly of five or more persons imbued with the common object of committing dacoity with murder, any member thereof cannot be convicted for the said offence irrespective of his/her individual act of murder unless independently and categorically charged for that offence.

34. As adverted to hereinbefore above, the prosecution has completely failed in the instant case to either prove the participation of five or more persons in the commission of the offence or establish their identity. In that view of the matter having regard to the above principle of law as authoritatively laid down by this Court and in absence of a singular charge under Section 302 IPC against the appellant sans the assembly, we are of the unhesitant opinion that his conviction for dacoity with murder punishable under Section 396 IPC, in the facts and circumstances of the case, cannot be sustained in law. The attention of the courts below we understand had not been drawn to this vital and determinative facet of the case."(emphasis supplied)

13. From the above mentioned judgments, it is clear that in case there is a conviction of less than five persons under Sections 395/ 397 IPC, Trial Court must arrive to a finding that there was involvement of five or more persons. In absence of such finding no conviction could be made out under aforesaid Sections. As rightly pointed out by the counsel for appellants that Trial Court has not recorded any such finding in this regard and it simply mentioned in the judgment that "three accused, facing trial before me, were also alongwith dacoits who committed dacoity in the house of Raj Kumar" and "prosecution has successfully established that the three accused committed dacoity in the house of Raj Kumar in the night of occurrence". In my opinion, the above mentioned finding is not

sufficient to conclude that five or more persons were involved in the offence and not sufficient to convict appellants, who are three in numbers under the offence of dacoity.

14. In view of above, prosecution has completely failed, in the present case, either to prove the participation of five or more persons in commission of offence or establish their identity. Therefore, in my considered view the conviction and sentence of appellants is being repugnant to letter and spirit of Sections 391 and 396 IPC, the same cannot be sustained.

15. In the result, appeal is allowed. Judgment and order dated 11.03.1983 passed by Sri D.C. Srivastava, Judge Special Court (Dacoity), Kanpur Dehat in Session Trial No. 467 of 1981 (State vs. Balbir and others), is hereby set aside. The appellants are acquitted of the charges and are hereby ordered to be set at liberty forthwith. The bail bonds stand discharged.

16. Lower Court record alongwith a copy of this judgment be sent back immediately to District Court concerned for compliance and further necessary action.

17. Before parting, this Court appreciates the assistance given by Sri Pranvesh, Advocate appearing for appellants, though he was initially hesitant to argue this appeal, being his first criminal appeal before this Court.

(2020)10ILR A8
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.10.2020

BEFORE

THE HON'BLE RAMESH SINHA, J.

THE HON'BLE SAMIT GOPAL, J.

Criminal Appeal No. 1581 of 2002

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

Counsel for the Petitioner:
Sri S. Alim Shah, Sri M.J. Akhtar, Sri Tiwari Abhishek Rajesh, Sri V.M. Zaidi

Counsel for the Opposite Party:
A.G.A., Sri Siddharth Sinha, Sri Siddharth Srivastava

Evidence Law - Indian Evidence Act, 1872- Section 134 - The trustworthy evidence given by a single witness would be enough to convict the accused whereas the evidence given by half-a-dozen witnesses which is not trustworthy, would not be enough to sustain conviction.

It is the quality and not the quantity of evidence that is important and the court can record conviction on the basis of a solitary witness provided the evidence is trustworthy and credible.

Evidence Law - Indian Evidence Act, 1872- Section 134 – Solitary witness- Contradictions- Absence of corroboration- Other witnesses hostile- The presence of P.W.-1 at the shop of the deceased-No convincing reason for his presence at the place of occurrence coupled with the fact that he claims that his pant had sustained blood stains which were not disclosed by him to the Investigating Officer and even the Investigating Officer did not see the same on his clothes with the further fact that the two eye witnesses mentioned by him in the F.I.R., P.W.-2 and P.W.-3, have not supported the prosecution case and have been declared hostile, the presence of P.W.-1 at the place of occurrence is highly doubtful. Recovery as shown of a country-made pistol of 12 bore and one empty cartridge embedded in the same, no charge under the Arms Act has been framed, the charge sheet also has not

been submitted by the police under any provisions of the Arms Act- No sanction on record of the District Magistrate for prosecuting the appellant under the Arms Act. The appellant was not tried under the Arms Act. The report of ballistic expert even does not corroborate the use of the said weapon. The testimony of P.W.-1 remains uncorroborated with any other evidence. P.W.-1 is an interested, artificial and unnatural witness and was not present at the place and time of occurrence and is thus totally unreliable. The conviction of the appellant on the basis of sole testimony of P.W.-1 by the trial court is not sustainable in the eyes of law.

Where the presence of the solitary witness at the place of the occurrence is doubtful and his testimony fails to get corroboration from other evidence, the other witnesses have not supported the story of the prosecution, then the conviction of the accused on the basis of such testimony cannot be secured.

Criminal Appeal allowed. (Para 19, 23, 24, 25, 26, 27, 28) (E-3)

Case law relied upon/ Discussed:-

1. Masalti Vs St. of U.P., AIR 1965 SC 202

2. Vadivelu Thevar Vs St. of Madras, AIR 1957 SC 614

3. Laxmibai (Dead) thru Lrs. & anr Vs Bhagwantbuva (Dead) thru Lrs. & ors, (2013) 4 SCC 97

(Delivered by Hon'ble Samit Gopal, J.)

1. This appeal has been preferred against the judgement and order dated 4.3.2002 passed by the Additional Sessions Judge, Court No. 8, Moradabad in Sessions Trial No. 1408 of 2000 (State of U.P. Vs. Safat and two others) whereby Safat has been convicted and sentenced under Section 302 I.P.C. for life imprisonment along with a fine of Rs.5,000/- and in default of payment of fine, he has been directed to undergo six months additional rigorous imprisonment. In so far as the other two accused persons who were tried before the trial court namely, Firasat and Liyaqat are concerned, they have been acquitted by the same judgement and order of the charges levelled against them under Sections 302/34 of Indian Penal Code, 1860.

2. The prosecution case as per the first information report lodged by Jamal (P.W.-1) is that his nephew Nasiruddin had an enmity with Safat as Safat wanted the shop of Nasiruddin to be closed. On the fateful night i.e. 18.9.2000 at about 10.15 P.M. Nasiruddin was standing outside his shop in mohalla Chaudhary Sarai, Sambhal near Bhatthi and was talking to the first informant and Rasid Hussain wherein Safat who was armed with country-made pistol along with Firasat and Liyaqat came and Safat said that Nasiruddin will not close his shop and as such he will be finished and further, Safat fired on the hip region of Nasiruddin with an intention to kill him as a result of which he received injury and fell down on the road. It is stated that the said incident was witnessed by the first informant Jamal P.W.-1, Mohd. Subhan, who was examined as P.W.-2 and Rasid Husain, who was examined as P.W.-3, who had come there to meet the first informant, in the light of a lantern, which was burning there and spreading ample light. It is stated that the accused persons then ran away threatening all the three persons present there. It is then stated that Nasiruddin in an injured condition was taken to the hospital from where the doctor referred him to Moradabad. The condition of Nasiruddin was stated to be precarious.

3. The first information report was got registered by Jamal on 18.9.2000 at 23.10 hours under Section 307 I.P.C. The same is

Ex. Ka-9 of the records. An application dated 18.9.2000 was given by Jamal for lodging of the F.I.R. which is marked as Ex. Ka-1 of which Gopal Shukla is the scribe and the same has been registered as Case Crime No. 375 of 2000 at Police Station Kotwali Sambhal, District Moradabad which is having distance of about two kilometers from the place of occurrence. Nasiruddin is the deceased in the present matter and his post mortem examination was conducted on 19.9.2000 at 02.40 P.M. by Dr. Mohammad Tareek Ali (P.W.-5) which is marked as Ex. Ka-5. The doctor found the following ante mortem injuries on the body of the deceased:-

(a) A gun shot wound of entry on the back of the left side of abdomen. Size of wound of entry is 3.0x3.0 cm X cavity deep. Blackening around the wound present. Wound is 8.0 cm below the scapular region. About 1.5 litre blood in the abdominal cavity and one cap plastic and 13 small metallic pellets recovered from the abdominal cavity. 15 small metallic pellets from left lung and 5 small metallic pellets from left kidney recovered.

The cause of death has been opined to be shock due to haemorrhage as the result of anti mortem injuries.

4. Investigation in the present matter was taken up and a charge sheet being Charge Sheet No. 158 of 2000 dated 06.10.2000 was submitted against all three accused persons under Section 302 I.P.C. The same is marked as Ex.Ka-6 to the records.

5. The trial court on 3.3.2001 framed charges against all three accused persons under Section 302 I.P.C. The accused pleaded not guilty and claimed to be tried.

6. The prosecution in order to prove its case examined Jamal P.W.-1 the first informant and the uncle of the deceased as an eye witness, Mohd. Subhan P.W.-2 a co-villager as another eye witness and Rasid Hussain P.W.-3 who is also a co-villager as an eye witness of the occurrence and Rakesh Pratap Singh being the second Investigating Officer from 20.9.2000 till conclusion of the same as P.W.-4, Dr. Mohamnad Tareeq Ali, who conducted the post mortem examination as P.W.-5, Surendra Singh Barach, the first Investigating Officer up to 19.9.2000 only as P.W.-6 and Ms. Rajeshwari Saxena, Assistant Sub-Inspector, who conducted the inquest on the body of the deceased at mortuary at Sadar Hospital, Moradabad on the information of sweeper of the hospital as P.W.-7. The accused denied the occurrence and claimed false implication due to enmity. No defense evidence was led.

7. The trial court after considering the entire evidence on record came to the conclusion that murder of Nasiruddin was committed by the accused-appellant Safat by firing upon him from a country-made pistol which he was carrying at the time and the place of occurrence and the manner as stated by the prosecution, convicted him whereas found that the implication of Firasat and Liyaqat is not borne out and thus, acquitted them of the charges levelled against them.

8. We have heard Sri Tiwari Abhishek Rajesh, learned counsel for the appellant-Safat and Ms. Kumari Meena, learned A.G.A. for the State of U.P. and perused the entire record including the impugned judgement and order of conviction. Sri Siddharth Sinha and Sri Siddharth Srivastava, learned counsels for the first informant are not present though the matter has been called out in the revised list.

9. In the present case Safat was arrested on 24.9.2000 and it is alleged that he gave his confessional statement to the police and further stated that he will get the weapon of assault recovered and it is stated that on his information he was taken to the said place and then from somewhere around the root of a tree in a bush he took out a polythene having some articles which were found to be a country made pistol of 12 bore having one empty cartridge in it. The recovery memo of the same is Ex. Ka-3 to the records.

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

(i) The presence of P.W.-1 Jamal is doubtful and as a matter of fact he was not present at the time and the place of occurrence so as to witness the said incident as stated by him.

(ii) The reason for murder is other than that mentioned by the prosecution which has been specifically put to P.W.-1 in the cross-examination though it has been denied by him.

(iii) The alleged recovery of country made pistol along with empty cartridge in it is, in no manner, incriminating. The alleged recovery is manipulated as the police did not even make an attempt to secure any independent witness to the said recovery which thus is not supported by the evidence of any independent witness. The same was alleged to be recovered from an open place easily accessible by all. The the alleged recovered weapon was sent for the ballistic examination and the ballistic report which is Ex. Ka-19 does not, in any manner, opine that the said weapon was used in the present murder. It is thus argued cumulatively that the alleged recovery of said weapon is not incriminating, in any manner, and the use of the said weapon does not find corroboration in the prosecution case at all.

(iv) The conduct of P.W.-1 is wholly unjustified which would clearly go to show that he was not present at the place of occurrence.

11. Learned A.G.A., on the other hand, opposed the submissions of learned counsel for the appellant by arguing that the presence of P.W.-1 cannot be doubted and he is a natural witness to the incident. It is argued that though he is a related witness but same would not, in any manner, go to show that he is not a credible witness. His testimony is of the nature of true and a truthful witness. The appeal lacks merit which is liable to be dismissed.

12. P.W.- 1 Jamal is the first informant of the present case. He is a relative of the deceased and has stated the deceased was his nephew (bhanja). He claims himself to be an eye witness of the incident. While being examined in trial court in the examination-in-chief, he has stated that the deceased Nasiruddin had no enmity with anyone. He further in his statement stated that he does not know as to which accused was armed with which weapon as he was standing there and talking. While assigning the roles to the accused persons in the examination-in-chief later on he has stated that accused Liyaqat and Firasat (two acquitted persons) had caught hold of Nasiruddin and Safat had shot him. While being cross-examined regarding motive for the appellant to commit the offence, he has stated that the deceased had no enmity with any person. He is the resident of the same village and stated to be known to the accused persons. He stated to be present at the place of occurrence for drinking milk. He further

states that in spite of the fact that he also has a shop of milk, he had on the fateful night come at around 9.00 P.M. at the shop of the deceased to drink milk and had no other work. While being cross-examined he has admitted the fact that had he not come to drink milk he would not have seen the occurrence. The purpose regarding the presence of P.W.-1 being present at the place of occurrence is missing in the F.I.R. and was also missing in his statement recorded during investigation. The same has been stated by him for the first time in the trial court while being cross-examined. Further he states that blood had spilled over on his pant which he was wearing at the time of occurrence but he did not show the same to anyone and even to the police. He states that the police arrested Safat on the same night and he was kept at the police station for about two days and then he was challaned and a recovery of weapon was effected on his pointing out. On a suggestion to him that he has not seen the occurrence and is not an eye witness, he denied the same.

13. Mohd. Subhan who has been mentioned as one of the eye witnesses in the F.I.R. and in the statement of P.W.-1, was examined as P.W.-2 who has at the very outset, denied his seeing the occurrence and his presence at the place of occurrence. He has been then declared hostile by the prosecution and was cross-examined by the prosecution but no benefit could be drawn from his statement by the prosecution.

14. Even Rasid Hussain who has been examined as P.W.-3 and was also mentioned as an eye witness to the incident in the F.I.R. and in the statement of P.W.-1, has also denied his seeing the occurrence and his presence at the place of occurrence. He has been then declared hostile by the prosecution and was cross-examined by the prosecution but no benefit could be drawn from his statement by the prosecution.

15. Now after the evidence of P.W.-2 Mohd. Subhan and P.W.-3 Rashid Hussain was completed and they were declared as hostile witnesses by the prosecution, the present case rests on the sole testimony of P.W.-1 Jamal who is the first informant and the maternal uncle of the deceased as the sole eye witness of the incident.

16. Surendra Singh Barach P.W.-6 is the first Investigating Officer of the present matter. He took up the investigation from the date of lodging of the first information report i.e. 18.9.2000 and the matter remained with him till the next day i.e. 19.9.2000. While proceeding with the investigation he states to have recorded the statement of scribe of the first information report and the first informant and he then proceeded along with Sub-Inspector Shivraj Singh to the place of occurrence and inspected the spot of the occurrence at the pointing out of the first informant. He further states to have recorded the statement of other witnesses and prepared the site plan which is marked as Ex. Ka-7 to the records. He collected the blood stained mud and plain mud and also took in his possession the lantern which was said to be the source of light at the place of occurrence. The recovery memo of the said lantern is marked as Ex. Ka-2 and the recovery memo of the mud is marked as Ex.Ka-8. He then took steps for arrest of the accused persons and on receiving of information regarding the death of the deceased Nasiruddin the matter was converted into one under Section 302 I.P.C. The case was then taken over from him. In his cross-examination he has stated that

Jamal did not inform him that he was drinking milk at the time of occurrence while he was being interrogated under Section 161 Cr.P.C. He further stated that he did not see blood stains on the clothes of Jamal and if he would have seen the blood stains, then he would have surely taken them in his custody.

17. Rakesh Pratap Singh the second Investigating Officer was examined as P.W.-4. He took up the investigation of the case from 20.9.2000. He states to have arrested Firasat and Liyaqat on the same day and then later on recorded the statement of the witness of recovery of lantern. He states to have arrested the appellant-Safat on 24.9.2000 and had recorded his statement and in furtherance of the same proceeded for recovery of the weapon of assault on the pointing out of Safat. He states that Safat from the bushes and roots of a tree took out a country-made pistol and a cartridge wrapped in polythene for which recovery memo was prepared by him which is marked as Ex. Ka-3 to the records. He then states to have recorded certain statement of some witnesses on 1.10.2000 and prepared the site plan of the place of recovery, sent the recovered material to the ballistic expert on 4.10.2000 and later on submitted a charge sheet no. 158 of 2000, which is marked as Ex. Ka-6 to the records. He was shown the country-made pistol and cartridge which he identifies in the court as that which was got recovered on the pointing out of accused-appellant Safat. In his cross-examination he states that he did not make any public person as witness to the recovery which is situated at about two kilometers away from the police station and is at the end of Abadi. Further he states that there is no signature of the accused on the recovery memo (Ex.Ka-3) and he does not know whether a copy of the same was given to the accused and receipt was taken from him. On the suggestion to him that the accused was not arrested on the said date he denied the same. Further on the suggestion that the said recovery is a false recovery he denied even the same. He further denied the suggestion that the first information report was lodged in consultation with the police and is ante timed.

18. Section 134 of the Indian Evidence Act, 1872 reads as under:

"134. Number of witnesses.--No particular number of witnesses shall in any case be required for the proof of any fact."

19. The law regarding the case where there is a single witness, has been well settled by the Hon'ble Apex Court in the case of ***Masalti Vs. State of U.P., AIR 1965 SC 202*** wherein it has been held that under the Evidence Act the trustworthy evidence given by a single witness would be enough to convict the accused whereas the evidence given by half-a-dozen witnesses which is not trustworthy, would not be enough to sustain conviction.

20. Dealing with a situation where the case rests on the testimony of a single witness, in the case of ***Vadivelu Thevar Vs. State of Madras, AIR 1957 SC 614,*** the Hon'ble Apex Court has laid down the test to assess the quality of oral evidence led by the prosecution for proving or disproving a fact. It was held therein that *"..... Generally speaking oral testimony in this context may be classified into three categories, namely (1) wholly reliable (2) wholly unreliable and (3) neither wholly reliable nor wholly unreliable. In the first category of proof, the Court should have no*

difficulty in coming to its conclusion either way- it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses. Situations may arise and do arise where only a single person is available to give evidence in support of a disputed fact. The court naturally has to weigh carefully such a testimony and if it is satisfied that the evidence is reliable and free from all taints which tend to render oral testimony open to suspicion, it becomes its duty to act upon such testimony. There are exceptions to this rule, for example, in cases of sexual offences or of the testimony of an approver; both these are cases in which the oral testimony is, by its very nature, suspect, being that of a participator in crime. But, where there are no such exceptional reasons operating, it becomes the duty of the court to convict, if it is satisfied that the testimony of a single witness is entirely reliable."

21. Further in the case of ***Laxmibai (Dead) through Lrs. and Another Vs. Bhagwantbuva (Dead) through Lrs. and others, (2013) 4 SCC 97,*** it has been held by the Hon'ble Apex Court as under:

"39. In the matter of appreciation of evidence of witnesses, it is not the number of witnesses but quality of their evidence which is important, as there is no requirement in law of evidence that any particular number of witnesses is to be examiprotectionned to prove/disprove a fact. It is a time honoured principle that evidence must be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. The legal system has laid emphasis on value provided by each witness, rather than the multiplicity or plurality of witnesses. It is quality and not quantity, which determines the adequacy of evidence as has been provided by Section 134 of the Evidence Act. Where the law requires the examination of at least one attesting witness, it has been held that the number of witnesses produced do not carry any weight."

22. In the present matter the testimony of P.W.-1 Jamal is only left to be examined by this Court as he is the sole eye witness supporting the prosecution case after P.W.-2 Mohd. Subhan and P.W.-3 Rashid Hussain have been declared hostile and the prosecution could not gain any advantage even by cross examining them.

23. In the F.I.R. lodged by P.W.-1 Jamal it has been mentioned that there was an enmity of the deceased with the present appellant Safat in regard to shop being run by the deceased. While being cross-examined he has stated that there was no enmity of the deceased with any shop keeper. In so far as the presence of P.W.-1 Jamal at the place of occurrence is concerned, he has stated that he had reached the shop of the deceased which is the place of occurrence to take milk and has further stated that even he has a shop of milk, but on the fateful night had come to the shop of the deceased to consume milk. The fact regarding the reason for the

presence of P.W.-1 Jamal at the place of occurrence is conspicuously missing in the first information report and even in his statement given before the Investigating Officer during investigation.

24. He further states that his pant sustained blood of the deceased in the process of his being shifted to the hospital in an injured condition but he did not show the same to the police. Even the Investigating Officer P.W.-6 Surendra Singh Barach, who is the first Investigating Officer, has in his statement stated that he did not see any blood stains in the clothes of Jamal and had he seen the blood stains, he would have certainly taken the same in custody. Except for the reason of consuming milk on the fateful night as for substantiating the presence of P.W.-1 Jamal at the shop of the deceased, that too, which was not as a routine by him, there is no other convincing reason for his presence at the place of occurrence coupled with the fact that he claims that his pant had sustained blood stains which were not disclosed by him to the Investigating Officer and even the Investigating Officer did not see the same on his clothes with the further fact that the two eye witnesses mentioned by him in the F.I.R. being Mohd. Subhan P.W.-2 and Rashid Hussain P.W.-3 have not supported the prosecution case and have been declared hostile, the presence of P.W.-1 Jamal at the place of occurrence is highly doubtful.

25. Coming to the recovery as shown of a country-made pistol of 12 bore and one empty cartridge embedded in the same, no charge under the Arms Act has been framed and even, the charge sheet also has not been submitted by the police under any provisions of the Arms Act. There is also no sanction on record of the District Magistrate for prosecuting the appellant-Safat under the Arms Act. The appellant was not tried under the Arms Act. P.W.-4 Rakesh Pratap Singh, who is the second Investigating Officer, has in his examination-in-chief stated about the recovery of the said weapon and has proved the recovery memo as Ex. Ka-3, but while being cross-examined he has admitted the fact that he did not make any public person as a witness to the said recovery. Even from perusal of Ex. Ka-3 which is the recovery memo of the recovery of the alleged weapon, it is clear that the Investigating Officer did not make any effort whatsoever to secure the presence of any public witness. In the cross-examination he has admitted that in the Ex. Ka-3 there is no signature of the accused and he does not know as to whether any copy of the same was given to him or not and any receipt was taken from him or not. It has been lastly suggested to him that the entire process of recovery is false and there was, as matter of fact, no recovery on the pointing out of the appellant-Safat. The report of ballistic expert which is Ex. Ka-19 to the records even does not corroborate the use of the said weapon. While giving opinion after scientific examination the ballistic expert came to a conclusion that it is impossible to decipher as to whether the death of the deceased is from the cartridge found in the recovered weapon which has been marked as EC-1.

26. The testimony of P.W.-1 Jamal remains uncorroborated with any other evidence. In the F.I.R. he had assigned the role of exhortation to Firasat and Liyaqat who have been acquitted of the charges levelled against them and has assigned the role of shooting upon the deceased by the appellant, but later on while being examined in the court he has assigned the

role of catching hold of the deceased to Liyaqat and Firasat. He has even in his examination-in-chief stated in specific terms that the deceased Nasiruddin did not have any enmity with anyone, but in the F.I.R. had stated that he was having enmity with the appellant- Safat due to the reason of his running a shop.

27. Hence this Court comes to the conclusion that P.W.-1 Jamal is an interested, artificial and unnatural witness and was not present at the place and time of occurrence and is thus totally unreliable.

28. Thus the conviction of the appellant on the basis of sole testimony of P.W.-1 Jamal by the trial court is not sustainable in the eyes of law. The trial court committed error in recording the conviction and sentence of the appellant. Hence the impugned judgement and order dated 4.3.2002 passed by the trial court is liable to be set aside, which is accordingly set aside.

29. The present appeal is allowed.

30. The appellant- Safat is in jail in pursuance of non-bailable-warrant issued by this Court vide order dated 18.9.2019, he is directed to be released forthwith unless wanted in any other case.

31. Keeping in view the provisions of Section 437-A Cr.P.C. the accused-appellant Safat is directed to forthwith furnish a personal bond in terms of Form No. 45 prescribed in the Code of Criminal Procedure of a sum of Rs.25,000/- with two reliable sureties in the like amount before the court concerned 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 the instant judgement or for grant of leave, the aforesaid appellant on receipt of notice thereof shall appear before the Hon'ble Supreme Court.

31. The lower court record along with a copy of this judgement be sent back immediately to the trial court concerned for compliance and necessary action.

32. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad before the concerned Court/Authority/Official.

33. The computer generated copy of such order shall be self attested by the counsel of the party concerned.

34. 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)10ILR A16
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.10.2020

BEFORE

THE HON'BLE PANKAJ NAQVI, J.
THE HON'BLE RAJEEV MISRA, J.

Criminal Appeal No. 2102 of 1983

Lakhan Singh & Ors. ...Appellants(In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri P.N. Misra, Sri A.N. Dayal, Sri Apul Misra, Sri Sarvesh, Ms. Anjali Singh, Sri Anoop Trivedi

Counsel for the Respondent:
A.G.A., Sri Arun Kumar Singh, Sri K.K. Tripathi, Sri R.K. Paramhansh

Civil Law - Juvenile Justice (Care and Protection of Children) Act, 2015 Section 111- Claim for juvenility after rejection of Criminal Appeal- Decided with reference to Section 49 of the 2015 Act-Matters pending under the Act of 2000 to be decided under the new Act of 2015 - The application for claiming juvenility was filed by accused-appellant-2 after he had been convicted by Court below. At this point of time, Act 2000 was in force. Act, 2000 came to be repealed by Act 2015 which came into force on 1.1.2016. The appeal was dismissed, but the application dated 28.10.2015 was not decided. To carry out the provision of Act, 2015, "The Juvenile Justice (Care and Protection of Children) Model Rules, 2016", have been framed. However, there is no provision in the aforesaid Rules supplementing the provisions of Section 49 of Act, 2015 which deals with presumption and determination of age of a child who is in conflict with law. Therefore, the Court has to decide the issue of juvenility as raised in above noted application with reference to Section 49 of Act, 2015. On date, the provisions of Act, 2015 are in force. By virtue of Section 111 of Act, 2015, the provisions of this very Act alone shall apply. Accordingly, the issue of juvenility raised by accused-appellant- 2 claiming himself to be a juvenile on the date of occurrence i.e. 20.7.1982 has to be decided as per the mandate of law contained in Section 94 of Act, 2015 alone.

As per the mandate of Section 111 of the 2015 Act although the application claiming juvenility was filed when the Act of 2000 was in operation but after the repeal of the said Act, the Application has to be now decided on the basis of the Act of 2015, with reference to Section 49 of the Act of 2015.

Civil Law - Juvenile Justice (Care and Protection of Children) Act, 2015- Section 94 of Act, 2015- Determination of age in absence of relevant documents- Ossification Test- There is no date of birth certificate or matriculation or equivalent certificate of accused-appellant-2. Similarly, there is no birth certificate given by a corporation or a municipal authority or a panchayat of accused-appellant-2 on record. Therefore, of necessity the age of accused-appellant-2 can be determined only by getting conducted an ossification test/radiological test. Duly constituted medical Board got conducted the radiological test as well as ossification test and on the basis the age of accused-appellant-2 Ram Vijai Singh falls below 17 years.

In absence of birth certificate from school and birth certificate issued by corporation or municipal authority, the age of the person has to be determined by ossification test done by a duly constituted medical board.

Accused-appellant-2 was enlarged on bail by this Court during the pendency of trial, primarily on the ground that as per the report of radiologist, his age is between 15 ½ to 17 ½ years. However, the radiological report referred to in the order granting bail is not on record. Once the recital contained in the order granting bail to the Appellant No. 2 , has not been challenged at any point of time, the correctness or otherwise of the recital contained in the order qua the age of accused-appellant-2 , cannot be agitated at this stage.The gun license has been issued to accused-appellant-2 after the occurrence had taken place, but there is nothing on record to show that accused-appellant-2 crossed the age prescribed for a juvenile before 20.7.1982 or after 20.7.1982. The State has not filed the copy of gun license issued to accused-appellant-2 or the extract of any register pertaining to grant of gun license maintained by the office of District Magistrate, Kanpur to demonstrate that accused-appellant-2 was a major on the date of occurrence. Perusal of the objections filed by informant does not indicate the grounds on which the member of the Medical Board is sought to

be examined and secondly, no such material has been appended along with the objections file by informant on the basis of which prima facie we could feel satisfied to summon a member of Medical Board.

During the pendency of trial, the appellant was enlarged on bail, the State has failed to demonstrate by any evidence to show that the appellant was a major on the date of the occurrence and no grounds have been made out in the Objections filed by the first informant to justify the summoning of a Member of the Medical Board, hence application filed by accused-appellant-2 claiming himself to be a juvenile on the date of occurrence is allowed.

Application allowed.(Para 32, 33, 35, 37, 38, 40, 43, 44) (E-3)

Case law cited/ Discussed:-

Mukarrab & ors. Vs St. of U.P, (2017) 2 SCC 210

(Delivered by Hon'ble Rajeev Misra, J.)

1. The present criminal appeal arises out of the judgement and order dated 3.9.1983, passed by IIIrd Additional Sessions Judge, Kanpur, in Sessions Trial No. 466/M of 1980 (State Vs. Lakhan Singh and others) whereby, accused-appellants Lakhan Singh, Ram Vijai Singh and Shiv Vijai Sigh have been convicted under section 302 read with section 34 I.P.C. and consequently, sentenced to rigorous imprisonment for life.

2. We have heard Mr. Anoop Trivedi, learned Senior Advocate, assisted by Ms. Anjali Singh, learned counsel for accused appellant-2, Ram Vijai Singh. Mr. A.N. Mulla, learned A.G.A along with Mr. Sameer Shankar A.G.A. as well as Mr. A.K. Kushwaha (AGA) and Mr. Arun Kumar Singh, learned counsel for informant.

3. Instant appeal came up for admission on 7.9.1983, when it was admitted and accused-appellants were enlarged on bail.

4. During the pendency of this appeal, appellant-1 Lakhan Singh died and therefore the appeal in respect of aforesaid appellant was abated vide order dated 26.11.2015.

5. After expiry of a period of more than 32 years, from the year of filing of present appeal, accused-appellant-2 Ram Vijai Singh filed an application dated 28.10.2015, claiming juvenility, to the effect on the date of occurrence i.e. on 20.7.1982, he was aged about 13 years and therefore a juvenile.

6. Instant criminal appeal was heard on 26.2.2020 and judgement was reserved. Ultimately, the appeal came to be dismissed by this Court vide judgment and order dated 22.4.2020. However, the application dated 28.10.2015, filed by accused appellant-2 Ram Vijai Singh claiming juvenility remained undecided.

7. Feeling aggrieved by judgement and order dated 22.4.2020, accused appellant-2 Ram Vijai Singh preferred Special Leave to Appeal (Criminal) No. 2898 of 2020 (Ram Vijai Singh vs. State of U.P) before Apex Court. Aforesaid special leave petition came up for orders on 28.7.2020 and Court passed the following order:-

"Having heard Shri Pranav Sachdeva, learned counsel for the petitioner, for some time, we are of the view that the miscellaneous application that was filed in 2015 raising the claim of the petitioner's juvenility at the time of the offence which has still not been decided, be decided within a period of four weeks from today by the High Court and if possible,

judgment on the same be delivered within two weeks thereafter.

Adjourned.

Liberty to mention."

8. Pursuant to order dated 20.7.2020, Hon'ble the Chief Justice, vide order dated 30.7.2020 nominated instant Criminal appeal to this Bench for disposal of application dated 28.10.2015, filed by accused appellant-2 Ram Vijai Singh, claiming juvenility. This is how the present criminal appeal has come up for orders before this Bench.

9. The Bench proceeded with the matter. Considering the intricate issue involved in this application, the Court passed following order on 5.8.2020:-

"Re: Criminal Misc. Application dated 28.10.2015.

Pursuant to the order of the Apex Court dated 20.7.2020 in Special Leave Petition (Criminal) No. 2898 of 2020 (Ram Vijay Singh Vs. State of U.P.), the matter is listed before us. The Apex Court has called upon us to decide the application claiming juvenality of appellant no. 2- Ram Vijai Singh.

Case called out.

No one responds on behalf of appellant No.2 - Ram Vijai Singh.

An application dated 28.10.2015 claiming juvenality has been filed by Sri Apul Mishra, Advocate, but the Bench Secretary informed that Mobile phone of Sri Apul Mishra, Advocate, is switched off.

Issue notice to the informant or his legal heirs, if any, in order to enable him / her to file objections to the application dated 28.10.2015.

Learned A.G.A. is also at liberty to file his objection, if any.

The Chief Metropolitan Magistrate, Kanpur Nagar or the Judicial Magistrate concerned, as the case may be, is directed to ensure service of notice along with copy of application dated 28.10.2015 on the informant or his legal heir, if any, as the case may be.

List on 27.8.2020 in the additional cause list.

It is made clear that on the next date matter shall not be adjourned. We further make it clear that in the event learned counsel appearing on behalf of appellant No.2 - Ram Vijai Singh, does not ensure his presence, we may have no option but to appoint an Amicus.

Registry to take follow up action forthwith.

Copy of this order be also served upon Sri. A.N. Mulla, learned A.G.A. forthwith. "

10. Thereafter matter was taken up on 10.9.2020 and the Bench passed following order:-

"This is an expedited appeal from the Apex Court.

Sri Arun Kumar Singh, learned counsel for the informant has filed a counter affidavit, after serving a copy thereof to learned counsel for appellant no. 2 / Ram Vijai Singh today in the Court.

Sri Anoop Trivedi, the learned Senior Counsel for appellant no. 2 prays for and is granted time till Monday (14.9.2020) to rebut the affidavit.

Sri A.N. Mulla, assisted by Sri Sameer Shankar, learned AGA's are also directed to file a counter affidavit, averring therein the factum of obtaining of a fire-arm-licence by appellant no. 2.

Meanwhile, we deem appropriate to call for a radiological / ossification

report as regards the age of appellant no. 2 / Ram Vijai Singh.

We, accordingly, direct the Jail Superintendent concerned and the Director, S.G.P.G.I., Lucknow to carry out radiological / ossification or any other latest technique test forthwith in order to ascertain the age of appellant no.2 / Ram Vijai Singh. The report must reflect the inner and the outer limit of age.

List in the additional cause list on 15.9.2020 along with the proposed report in a sealed cover.

Sri Sameer Shanker, the learned AGA shall obtain a computer generated copy of this order and intimate the authorities concerned personally forthwith for immediate compliance of this order as the present exercise is being carried out expeditiously under the orders of the Apex Court. "

11. Pursuant to order dated 10.9.2020, requisite correspondence was made with Sanjay Gandhi Postgraduate Institute of Medical Sciences (S.G.P.G.I), Lucknow to determine the age of accused appellant-2 Ram Vijai Singh by conducting radiological and ossification test. However as age determination facility is not available at S.G.P.G.I, Lucknow, the case of accused appellant-2 Ram Vijai Singh was accordingly referred to King George's Medical University (K.G.M.U), Lucknow.

12. Accordingly, a medical Board was constituted at K.G.M.U, Lucknow to determine the age of accused-appellant-2 Ram Vijai Singh. The same comprised of (1) Professor A.A. Mehdi, Chief Medical Superintendent, G.M. and Associated Hospitals, Lucknow, Professor (2) Dr. Mausami Singh, Additional Professor, Forensic Medicine & Texicology, (3) Dr. Garima Sehgal, Associate Professor, Department of Anatomy, (4)Pro. Pavitra, Rastogi, Department of Peridontolody, King George's Medical University (5) Dr. Sukriti Kumar, Assistant Professor, Department of Radiodiagnosis, KGMU, UP, Lucknow. Accused-appellant-2 gave his consent in writing for Medical Examination. Accordingly, X-ray of accused-appellant was taken on 14.9.2020 thereafter aforesaid Medical Board examined accused-appellant-2 Ram Vijai Singh and submitted report dated 18.9.2020 regarding his age. In the opinion of Medical Board, present age of accused-appellant-2 Ram Vijai Singh is in between 40-55 years. For ready reference report dated 18.9.2020 is reproduced herein under:-

KING GOERGE'S MEDICAL UNIVERSITY, U.P.,LUCKNOW.

DEPARTMENT OF FORENSIC MEDICINE & TOXICOLOGY

Ref. No.....

Date. 18/09/2020

EXAMINATION FOR DETERMINATION

Name of the person: Ram Vijai Singh

Address: District Jail, Kanpur

Requisition no: Cri 9089/GA/HC/ALLD/Dated: 10.9.2020

Dated

18/09/2020

From SI: ---- **P.S.** .....

Brought by PC: Ramesh Babu **No**: HC-1071 **P.S**: Police Line, Kanpur

History:------.

Age: 52 years (as stated by the individual)

Consent: from subject/parent: Attached

Date and time of examination: 18/09/2020, 2:35 PM

Marks of identification (1) Pin point brown mole presentation left side of face, 3 cm lateral to lateral canthus of left eye & 9.5 cm above left angle of .....

(2) Old healed scar mark of size 1.8 cm x 2.5 cm

present at dorsal surface of right forearm, 1.5

cm proximal to right styloid process & 25 cm distal to right

elbow joint.

Physical Examination:

Height 168 cm.

Weight 76.7 kg.

General Built Good dood/moderate/poor

Voice Deep (Deep or soft)

Adam's Apple prominent (prominent/not prominent)

Hairs: Pubic Bushy (Absent/Downy/Sparse/Black/Rich/Bushy)

Axillary Bushy (Absent/Downy/Sparse/Black/Rich/Bushy)

Moustache Bushy (Absent/Downy/Sparse/Black/Rich/Bushy)

Breasts: NA.

External genitaia: Well develioped

History of menarche/ejaculation NA

Other features, if any .....

Dental Examinaton

Total Number of Teeth: 29

Dental Formula (FDI/Modified)

17 16 15 14 13 12 11	22 22 23 24 25 26 27 28
47 46 45 44 43 42 41	31 32 33 34 35 36 37

Radiological examination:

X-Rays were taken on:

14/09/2020

Regions Findings:

1. X-Ray skull (Lateral & frontalview) 1. Xiphoid Process has been completely fused with body of sternum

2. X-Ray Chest (PA & lateral view) 2. Manubrium has not been fused.

3. 3. Lambdoid, Coronal & Sagittal Sutures are in uniting phase. They have not been fused completely

NCCT head

O.Pg

Opinion:

Based on the physical, dental and radiological findings. I am of the opinion that the person is aged above **Forty (40)** years & below **Fifty Five (55)** years.

Place: Lucknow **Head** Department of Forensic Medicine & Toxicology K.G's Medical University, UP, Lucknow

(1) Dr. Mousami Singh (3) Pro. Patitra Rastogi Additional Professor Department of Periodontology Forensic Medicine & Toxicology King George' Medical University

(2) Dr. Garima Sehgal (4) Dr. Sukriti Kumar Associate Professor Assistant Professor Department of Anatomy Department of Radiodiagnosis KGMU, UP Lucknow

(5) Prof. A.A. Mehdi Chief Medical Superintendent G.M & Associated Hospitals Lucknow

13. Medical report dated 18.9.2020, was sent to this Court, through the Government Advocate, in a sealed cover.

14. Subsequent to 10.9.2020, the Bench heard the matter on 23.9.2020. On aforesaid dates, above mentioned medical

report was placed before the Bench in a sealed cover. The same was taken on record. Thereafter, it was opened and perused by the Bench. In the light of above, the Bench passed following order on 23.9.2020:

"Re: Crl. Misc. Application dated 28.10.2015

Rejoinder affidavit filed today is taken on record.

Two sealed envelops are opened before us, one bearing a letter of the Superintendent Jail, with the endorsement that as the age determination test facility is unavailable at the SGPGI, Lucknown, King George Medical University, Lucknow is being requested to conduct the requisite test of the appellant concerned, and the other is the medical report of the appellant concerned from the latter.

We take the report on record.

The office is directed to tender a copy of the report of the King George Medical University, Lucknow dated 18.9.2020, to all the parties concerned forthwith. Parties are at liberty to file a rebuttal, if any, positively by 26.9.2020.

Sri A.N. Mulla, the learned A.G.A, assisted by Sri Sameer Shanker, appeared for the State.

Put up for further hearing in the additional cause list on 28.9.2020. This date is fixed with the consent of all. "

15. In compliance of order dated 23.9.2020, State has filed a short counter affidavit dated 11.9.2020, whereas, informant has filed his objections dated 27.9.2020 to the Medical Report dated 18.9.2020 submitted by K.G.M.U, Lucknow. We shall refer to above noted counter affidavit/objection in the later part of this order.

16. Ultimately, counsel for parties were heard at length on 28.9.2020 and orders on the application dated 28.10.2015 filed by accused-appellant-2 Ram Vijai Singh claiming juvenility was reserved.

17. Before proceeding to consider the claim of accused-appellant-2 Ram Vijai Singh regarding juvenility, it would be prudent to refer to the statutory provisions contained in the relevant Act and Rules in the light of which, the contested claim of accused-appellant-2 regarding juvenility is to be decided.

18. In order to ameliorate children who are in conflict with law, it was felt necessary to enact a legislation which would be self sufficient in handling various facets of children who need care and protection and also children who are in conflict with law, as well as their reformation, punishment, custody, rehabilitation etc. Accordingly, The Juvenile Justice Act, 1986 was enacted. However, it was found that the act is deficient in catering the needs of a child who is in conflict with law. Accordingly, above Act, 1986 was repealed . Thereafter, Parliament enacted The Juvenile Justice (Care and Protection of Children) Act, 2000. The Act was a self contained Act as it encompasses within itself the method and methodology for reforming a child who is in conflict with law and also a child who needs care and protection. However, aforesaid Act could not keep face with the changing vicissitudes of time. Consequently, aforesaid Act was amended in the year 2006. Surprisingly the Rules supplementing the provisions of Act, 2000 were framed in 2015 known as Juvenile Justice (Care and Protection of Children) Rules, 2015. In spite of various amendments in Act 2000, it was felt that as Act 2000 is insufficient to answer the various contingencies which have arisen but are also required to be dealt with in an

effective manner, it was therefore felt imperative that the law in respect of a child who is in conflict with law needs to be streamlined. Accordingly Act, 2000 as amended in 2006 was repealed. Parliament, accordingly, enacted Juvenile Justice (Care and Protection of Children) Act, 2015. To carry out the provisions of Act, 2015 the Juvenile Justice (Care and Protection of Children) Model Rules, 2016 were framed.

19 We shall now refer to the relevant provisions of Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as "Act, 2000"), as amended in 2006 and also the relevant rules of Juvenile Justice (Care and Protection of Children) Rules, 2015 (hereinafter referred to as "Rules, 2015"), which have a material bearing on the issue in hand. Section 49 of Act, 2000 and Rule 12 of Rules 2015 are relevant for the controversy in hand. Accordingly, same are reproduced herein under:-

"49. Presumption and determination of age.--

(1) Where it appears to a competent authority that person brought before it under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a juvenile or the child, the competent authority shall make due inquiry so as to the age of that person and for that purpose shall take such evidence as may be necessary (but not an affidavit) and shall record a finding whether the person is a juvenile or the child or not, stating his age as nearly as may be.

(2) No order of a competent authority shall be deemed to have become invalid merely by any subsequent proof that the person in respect of whom the order has been made is not a juvenile or the child, and the age recorded by the competent authority to be the age of person so brought before it, shall for the purpose of this Act, be deemed to be the true age of that person."

"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 Ihe 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."

20. Section 94 of Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as "Act, 2015") provides for presumption and determination of age of a juvenile. For ready reference, the same is reproduced herein under:

Presumption and determination of age

(1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining--

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

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

(iii) and only in the absence of (I) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the

Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person.

21. It will not be out of place to mention here that to carry out the provision of Act, 2015, "The Juvenile Justice (Care and Protection of Children) Model Rules, 2016", have been framed. However, there is no provision in the aforesaid Rules supplementing the provisions of Section 49 of Act, 2015 which deals with presumption and determination of age of a child who is in conflict with law. Therefore, the Court has to decide the issue of juvenility as raised in above noted application with reference to Section 49 of Act, 2015.

22. Accused-appellant-2 Ram Vijai Singh has claimed juvenility on the ground that on the date of occurrence, he was juvenile as he was aged about 13 years. In support of his claim of juvenility, he has relied upon the entry occuring in the extract of family register, issued in the year 2015-16, wherein the approximate age of accused-appellant-2 Ram Vijai Singh has been mentioned as 31 years in the year 2001. Support has also been drawn from the Adhar Card issued to accused-appellant-2, wherein his year of birth has been mentioned as 1969. On the basis of aforesaid documents, it is sought to be urged by Mr. Anoop Trivedi, learned Senior Counsel for accused-appellant-2 Ram Vijai Singh that on the date of occurrence, accused-appellant-2 was aged about 13 years and therefore a juvenile. Lastly, reliance has been placed upon the order dated 22.10.1982, whereby, this Court enlarged accused-appellant-2 on bail during the pendency of trial on the ground of his being juvenile as per the report of radiologist. For ready reference order dated 22.10.1982 is reproduced herein under:

"The Radiologist's report, admittedly is that the applicant is between 15 ½ to 17 ½ years old. For that consideration alone and also taking in view that the applicant was armed with a Lathi, which is not a deadly weapon as such, the bail application is allowed.

Applicant, Ram Vijai Singh, be released on bail on his furnishing a personal bond with two sureties in the like amount to the satisfaction of the Chief Judicial Magistrate, Kanpur in Crime No. 128 of 1982, P.S. Bidhuna District Kanpur. "

With reference to order dated 22.10.1982, it is sought to be urged by learned Senior Counsel appearing for appellant/accused-appellant-2 that this Court has already enlarged the accused-appellant-2 Ram Vijai Singh on bail on the ground that as per the radiological report, the age of accused-appellant-2 is between 15 ½ to 17 ½ years. The recital contained in the order dated 22.10.1982 shall be deemed to be correct and is not open to challenge. In case the same is diputed by any party, remedy was to approach the court which passed the order dated 22.10.1982. As same has not been done, the correctness or otherwise of the same cannot be examined now. It is also urged by learned Senior Counsel that since the rediologist report referred to in the order dated 22.10.1982 is not on record, the said issue cannot be raised or examined now.

23. Learned A.G.A. has filed short counter affidavit in above mentioned application, wherein it has been averred

that information regarding age of accused-appellant-2 was sought to be obtained from Sri Thakur Ji Uttar Madhyamik Vidhyalaya, Koriyan, Sanigawan, Kanpur Nagar. However, the Principal of aforesaid Institution vide his letter dated 5.9.2020, has categorically stated that accused-appellant-2 has never studied in aforesaid institution.

24. It is also averred in counter affidavit that on 24.7.1982 an arm's licence bearing no. 7580, pertaining to S.B.B.L gun was issued in favour of accused-appellant-2.

25 Mr. A.N. Mulla learned A.G.A. alongwith Mr. Sameer Shankar (A.G.A.) and Mr. A.K. Kushwaha (A.G.A) submits that a paradoxical position has emerged in this case. On the one hand is the order dated 22.10.1982 passed by this Court whereby accused-appellant-2 Ram Vijai Singh was enlarged on bail on the ground of his being aged between 15 ½ & 17 ½ years, as per the report of radiologist. But the report of the radiologist relied upon by Court while passing order dated 22.10.1982 is not on record. On the other hand the accused-appellant-2 was issued a gun license bearing no. 7580 on 24.7.1982, whereas the occurrence took place on 20.7.1982. However, there is nothing on record to show that accused-appellant-2 had attained majority before 20.7.1982 or between 20.7.1982 to 24.7.1982.

26. Except for bringing the above noted facts on record, nothing substantial has been averred in the counter affidavit filed by State.

27. Informant has filed an objection to the medical report dated 18.9.2020, primarily on the ground that since gun license was issued in favour of accused-appellant-2, therefore, accused-appellant-2 was a major on the date of occurrence. Accused-appellant cannot blow hot and cold at the same time.

28. In the submission of Mr. Arun Kumar Singh, learned counsel for informant, medical report submitted by Medical Board alone is not sufficient to decide the age of accused appellant-2 and this Court can itself decide the claim of juvenility raised by accused-appellant-2. In support of aforesaid submission, reliance is placed upon **Mukarrab and Others Vs. State of Uttar Pradesh,** reported in **(2017) 2 SCC 210.** Referring to section 293 Cr.P.C. it has also been averred in the objection that at least one member of the Board should be summoned by this Court for cross-examination to ascertain the veracity of medical report dated 18.9.2020 submitted by Medical Board, K.G.M.U, Lucknow.

29. On the aforesaid pleadings and submissions urged by respective counsel, this Court has to decide the issue of juvenility raised by accused-appellant-2 Ram Vijai Singh.

30. Before we proceed to evaluate the material on record in the light of provision contained in Section 94 of Act, 2015, it would be worthwhile to refer to the judgement in **Mukarrab and Others (Supra),** wherein Court has dealt with the issue regarding determination of juvenility in a very pragmatic manner. Paragraphs 10, 11, 12, 15, 18, 19, 21, 22, 23, 24, 25, 26, 27 and 28 are relevant for the controversy in hand and accordingly, they are reproduced herein under:

"10. Age determination is essential to find out whether or not the person claiming to be a child is below the

cut-off age prescribed for application of the Juvenile Justice Act. The issue of age determination is of utmost importance as very few children subjected to the provisions of the Juvenile Justice Act have a birth certificate. As juvenile in conflict with law usually do not have any documentary evidence, age determination, cannot be easily ascertained, specially in borderline cases. Medical examination leaves a margin of about two years on either side even if ossification test of multiple joints is conducted.

11. Time and again, the questions arise: How to determine age in the absence of birth certificate? Should documentary evidence be preferred over medical evidence? How to use the medical evidence? Is the standard of proof, a proof beyond reasonable doubt or can the age be determined by preponderance of evidence? Should the person whose age cannot be determined exactly, be given the benefit of doubt and be treated as a child? In the absence of a birth certificate issued soon after birth by the concerned authority, determination of age becomes a very difficult task providing a lot of discretion to the Judges to pick and choose evidence. In different cases, different evidence has been used to determine the age of the accused.

12. This Court inArnit Das v. State of Bihar(2000) 5 SCC 488, clarified that the review of judicial opinion shows that the Court should not take a hyper-technical approach while appreciating evidence for determination of age of the accused. If two views are possible, the Court should lean in favour of holding the accused to be a juvenile in borderline cases. This approach was further reiterated by this Court in Rajindra Chandra v. State of Chhatisgarh and Another (2002) 2 SCC 287, in which it laid down that the standard of proof for age determination is the degree of probability and not proof beyond reasonable doubt.

15. Summarizing the legal position as to the claim of juvenility and observing that such plea can be raised at any stage and after referring to various decisions, three-Judges Bench of this Court in Abuzar Hossain aliasGulam Hossain v. State of West Bengal(2012) 10 SCC 489 held as under:-

"39. Now, we summarise the position which is as under:

39.1. A claim of juvenility may be raised at any stage even after the final disposal of the case. It may be raised for the first time before this Court as well after the final disposal of the case. The delay in raising the claim of juvenility cannot be a ground for rejection of such claim. The claim of juvenility can be raised in appeal even if not pressed before the trial court and can be raised for the first time before this Court though not pressed before the trial court and in the appeal court.

39.2. For making a claim with regard to juvenility after conviction, the claimant must produce some material which may prima facie satisfy the court that an inquiry into the claim of juvenility is necessary. Initial burden has to be discharged by the person who claims juvenility.

39.3. As to what materials would prima facie satisfy the court and/or are sufficient for discharging the initial burden cannot be catalogued nor can it be laid down as to what weight should be given to a specific piece of evidence which may be sufficient to raise presumption of juvenility but the documents referred to in Rules 12(3)(a)(i) to (iii) shall definitely be sufficient for prima facie satisfaction of the court about the age of the delinquent necessitating further enquiry under Rule 12. The statement recorded underSection

313of the Code is too tentative and may not by itself be sufficient ordinarily to justify or reject the claim of juvenility. The credibility and/or acceptability of the documents like the school leaving certificate or the voters' list, etc. obtained after conviction would depend on the facts and circumstances of each case and no hard-and-fast rule can be prescribed that they must be prima facie accepted or rejected. In Akbar Sheikh (2009) 7 SCC 415 and Pawan (2009) 15 SCC 259 these documents were not found prima facie credible while in Jitendra Singh (2010) 13 SCC 523 the documents viz. school leaving certificate, marksheet and the medical report were treated sufficient for directing an inquiry and verification of the appellant's age. If such documents prima facie inspire confidence of the court, the court may act upon such documents for the purposes ofSection 7-Aand order an enquiry for determination of the age of the delinquent.

39.4. An affidavit of the claimant or any of the parents or a sibling or a relative in support of the claim of juvenility raised for the first time in appeal or revision or before this Court during the pendency of the matter or after disposal of the case shall not be sufficient justifying an enquiry to determine the age of such person unless the circumstances of the case are so glaring that satisfy the judicial conscience of the court to order an enquiry into determination of the age of the delinquent.

39.5. The court where the plea of juvenility is raised for the first time should always be guided by the objectives of the 2000 Act and be alive to the position that the beneficent and salutary provisions contained in the 2000 Act are not defeated by the hypertechnical approach and the persons who are entitled to get benefits of the 2000 Act get such benefits. The courts should not be unnecessarily influenced by any general impression that in schools the parents/guardians understate the age of their wards by one or two years for future benefits or that age determination by medical examination is not very precise. The matter should be considered prima facie on the touchstone of preponderance of probability.

39.6. Claim of juvenility lacking in credibility or frivolous claim of juvenility or patently absurd or inherently improbable claim of juvenility must be rejected by the court at the threshold whenever raised."

18. The question falling for consideration is whether the opinion of the Medical Board of AIIMS determining the age of the appellants between 35-40 years, can be accepted or not.

19. Learned Senior Counsel for the appellants contended that the general rule about age determination is that the age determined by the Medical Board vary plus or minus two years but the Medical Board in this case had fixed the age of the appellants at 35-40 years and going by the general rule, the age of the appellants is to be estimated as 38 years on the date of medical examination and giving additional benefit of one year in lowering the age in terms of Rule 12(3)(b), age of the appellants is to be determined as 37 years as on the date of medical examination on 02.05.2016. It was, therefore, submitted that taking the age of the appellants as 37 years as on 02.05.2016 which means that at the time of commission of the offence in 1994, the appellants would have been only aged about 15 years and, therefore, the benefit of Juvenile Justice Act to be extended to the appellants.

21. Per contra, learned counsel for the State submitted that the ossification test is not the sole criteria for determining the age and that the medical opinion has to be considered alongwith other cogent

evidence. In support of this contention, reliance was placed uponBabloo Pasi v. State of Jharkhand and Anr. (2008) 13 SCC 133.

22. A reading of the above decision in Darga Ram alias Gunga's case shows that courts need to be aware of the fact that age determination of the concerned persons cannot be certainly ascertained in the absence of original and valid documentary proof and there would always lie a possibility that the age of the concerned person may vary plus or minus two years. Even in the presence of medical opinion, the Court showed a tilt towards the juvenility of the accused. However, it is pertinent to note that such an approach in Darga Ram alias Gunga's case was taken in the specific facts and circumstances of that particular case and any attempt of generalising the said approach could not be justifiably entertained.

23. It is well-accepted fact that age determination using ossification test does not yield accurate and precise conclusions after the examinee crosses the age of 30 years, which is true in the present case. After referring to Bhola Bhagat's case and other decisions, in Babloo Pasi's case, this Court held as under:-

"18. Nevertheless, inJitendra Ram v. State of Jharkhand(2006) 9 SCC 428 the Court sounded a note of caution that the aforestated observations in Bhola Bhagat (1997) 8 SCC 720 would not mean that a person who is not entitled to the benefit of the said Act would be dealt with leniently only because such a plea is raised. Each plea must be judged on its own merit and each case has to be considered on the basis of the materials brought on record.

22. It is well settled that it is neither feasible nor desirable to lay down an abstract formula to determine the age of a person. The date of birth is to be determined on the basis of material on record and on appreciation of evidence adduced by the parties. The medical evidence as to the age of a person, though a very useful guiding factor, is not conclusive and has to be considered along with other cogent evidence.

23. It is true that inArnit Das v. State of Bihar(2000) 5 SCC 428 this Court has, on a review of judicial opinion, observed that while dealing with a question of determination of the age of an accused, for the purpose of finding out whether he is a juvenile or not, a hyper-technical approach should not be adopted while appreciating the evidence adduced on behalf of the accused in support of the plea that he was a juvenile and if two views may be possible on the same evidence, the court should lean in favour of holding the accused to be a juvenile in borderline cases. We are also not oblivious of the fact that being a welfare legislation, the courts should be zealous to see that a juvenile derives full benefits of the provisions of the Act but at the same time it is also imperative for the courts to ensure that the protection and privileges under the Act are not misused by unscrupulous persons to escape punishments for having committed serious offences."

24. In Criminal Appeal No. 486 of 2016 dated 12.05.2016, Parag Bhati (Juvenile) through Legal Guardian-Mother-Smt. Rajni Bhati v. State of Uttar Pradesh and Anr., after referring to Abuzar Hossain case and other decisions of this Court, this Court held as under:-

"34. It is no doubt true that if there is a clear and unambiguous case in favour of the juvenile accused that he was a minor below the age of 18 years on the date of the incident and the documentary evidence at least prima facie proves the

same, he would be entitled to the special protection under the JJ Act. But when an accused commits a grave and heinous offence and thereafter attempts to take statutory shelter under the guise of being a minor, a casual or cavalier approach while recording as to whether an accused is a juvenile or not cannot be permitted as the courts are enjoined upon to perform their duties with the object of protecting the confidence of common man in the institution entrusted with the administration of justice.

35. The benefit of the principle of benevolent legislation attached to the JJ Act would thus apply to only such cases wherein the accused is held to be a juvenile on the basis of at least prima facie evidence regarding his minority as the benefit of the possibilities of two views in regard to the age of the alleged accused who is involved in grave and serious offence which he committed and gave effect to it in a well-planned manner reflecting his maturity of mind rather than innocence indicating that his plea of juvenility is more in the nature of a shield to dodge or dupe the arms of law, cannot be allowed to come to his rescue." [Emphasis added] From the above decision, it is clear that the purpose of Juvenile Justice Act, 2000 is not to give shelter to the accused of grave and heinous offences.

25. Keeping in view the above principles, let us consider the medical opinion of the Medical Board determining the age of the appellants as between 35-40 years on the date of examination that is on 02.05.2016. This wide variation in the age, even as per medical opinion is because of the reason that it was now too late, because of the advanced age of the appellants to have precise determination of his age. As noted earlier, such a plea of juvenility is raised for the first time in this Court and the same has to be considered on the material brought on record before this Court. On the basis of the age of the appellants (Mukarrab and Arshad) determined between 35-40 years in May, 2016, giving a variation of two years in upper age limit i.e. age of the appellants would be 38 years. Giving additional benefit of lowering their age by one year in terms of Rule 12(3)(b) would bring their age as 37 years as on May, 2016. That means the appellants are supposed to be born in 1979 and at the time of occurrence in 1994, the appellants would have been of around 15 years of age.

26. Having regard to the circumstances of this case, a blind and mechanical view regarding the age of a person cannot be adopted solely on the basis of the medical opinion by the radiological examination. At page 31 of Modi's Text Book of Medical Jurisprudence and Toxicology, 20th Edn., it has been stated as follows:

"In ascertaining the age of young persons radiograms of any of the main joints of the upper or the lower extremity of both sides of the body should be taken, an opinion should be given according to the following table, but it must be remembered that too much reliance should not be placed on this table as it merely indicates an average and is likely to vary in individual cases even of the same province owing to the eccentricities of development.

Courts have taken judicial notice of this fact and have always held that the evidence afforded by radiological examination is no doubt a useful guiding factor for determining the age of a person but the evidence is not of a conclusive and incontrovertible nature and it is subject to a margin of error. Medical evidence as to the age of a person though a very useful guiding factor is not conclusive and has to

be considered along with other circumstances.

27. In a recent judgment,State of Madhya Pradesh v. Anoop Singh(2015) 7 SCC 773, it was held that the ossification test is not the sole criteria for age determination. Following Babloo Pasi and Anoop Singh's cases, we hold that ossification test cannot be regarded as conclusive when it comes to ascertaining the age of a person. More so, the appellants herein have certainly crossed the age of thirty years which is an important factor to be taken into account as age cannot be determined with precision. In fact in the medical report of the appellants, it is stated that there was no indication for dental x-rays since both the accused were beyond 25 years of age.

28. At this juncture, we may usefully refer to an article "A study of wrist ossification for age estimation in pediatric group in central Rajasthan", which reads as under:-

"There are various criteria for age determination of an individual, of which eruption of teeth and ossification activities of bones are important. Nevertheless age can usually be assessed more accurately in younger age group by dentition and ossification alongwith epiphyseal fusion.

[Ref: Gray H. Gray's Anatomy. 37th ed. Churchill Livingstone Edinburgh London Melbourne and New York: 1996; 341-342];

A careful examination of teeth and ossification at wrist joint provide valuable data for age estimation in children.

[Ref: Parikh CK. Parikh's Textbook of Medical Jurisprudence and Toxicology. 5th edn.: Mumbai Medico-Legal Centre Colaba:1990;44-45];

Variations in the appearance of center of ossification at wrist joint shows influence of race, climate, diet and regional factors. Ossification centres for the distal ends of radius and ulna consistent with present study vide article "A study of Wrist Ossification for age estimation in pediatric group in Central Rajasthan" by Dr. Ashutosh Srivastav, Senior Demonstrator and a team of other doctors, Journal of Indian Academy of Forensic Medicine (JIAFM), 2004; 26(4). ISSN 0971-0973]."

31. On the pleadings of parties and the law as noted above, two issues arise for determination in this application. Firstly, whether issue of juvenility raised by accused-appellant-2 Ram Vijai Singh that he was a juvenile on the date of occurrence i.e. 20.7.1982 has to be decided as per the provisions of Act, 2000 as applications for claiming juvenility was filed by him in this Court in the year 2015 or Act, 2015 which is now in force and Act, 2000 stands repealed. Secondly, whether on the material available on record, accused-appellant-2 Ram Vijai Singh can be declared to be a juvenile on the date of occurrence i.e. on 20.7.1982 within the parameters circumferenced by Section 49 of Act, 2015.

Issue No.1

32. It transpires from record that the occurrence giving rise to present criminal proceedings took place on 20.7.1982 The application for claiming juvenility was filed by accused-appellant-2 Ram Vijai Singh on 28.10.2015 before this Court i.e. after he had been convicted by Court below vide judgement and order dated 3.9.1983. The application claiming juvenility was filed in the year 2015. At this point of time, Act 2000 was in force. Act, 2000 came to be repealed by Act 2015 which came into

force on 1.1.2016. The application for claiming juvenility by accused-appellant-2 Ram Vijai Sigh remained pending, but no order was passed on the same. Unfortunately, the appeal was dismissed vide judgement and order dated 22.4.2020, but the application dated 28.10.2015 was not decided. Against order dated 22.4.2020, accused-appellant-2 Ram Vijai Singh preferred Special Leave to Appeal (Criminal) No. 2898 of 2020 (Ram Vijai Singh vs. State of U.P), wherein an order dated 28.7.2020 was passed, directing this Court to decide the application filed by accused-appellant-2 Ram Vijai Singh claiming juvenility. On date, the provisions of Act, 2015 are in force. Thus the issue required to be determined by us is that once the application claiming juvenility was filed by accused appellant-2 Ram Vijai Singh in the year 2015, the same has to be decided as per Act, 2000 or Act, 2015.

33. Section 111 of Act, 2015 which deals with repeal and saving of Act, 2000 reads as under:

*"**111. Repeal and Savings.-** (1) The Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000) is hereby repealed.*

(2) Notwithstanding such repeal, anything done or any action taken under the said Acts shall be deemed to have been done or taken under the corresponding provisions of this Act."

34. A similar issue arose in respect of Act, 1986 and Act, 2000. The same was considered by a learned Single Judge of this Court in **Manoj Vs. State of U.P., 2014 (8) ADJ 293,** wherein following has been observed as follows in paragraph 17:-

"17. In the case of Dharambir Vs. State (NCT of Delhi and another) (2010) 5 SCC 344, the Apex Court in case where accused was 16 years 9 months old on date of occurrence 25.8.1991, has held that. "In a claim for juvenility, Juvenile Justice Act, 2000 has a retrospective application to pending case and all persons who were below of age of 18 years on the date of crime, even prior to 1.4.2001, held can claim benefit of juvenility under 2000 Act, even if claim of juvenility is raised after they have attained the age of 18 yeas on or before the age of commencement of 2000 Act and were undergoing sentence upon being convicted." Observing that appellant had undergone sentence of imprisonment of 2 years 4 months and 4 days and is now 35 years old, sustaining the convictions the sentence was quashed with directions for release forthwith."

35. Similar is the position in the present case. By virtue of Section 111 of Act, 2015, the provisions of this very Act alone shall apply. Accordingly, we hold that the issue of juvenility raised by accused-appellant-2 Ram Vijai Singh claiming himself to be a juvenile on the date of occurrence i.e. 20.7.1982 has to be decided as per the mandate of law contained in Section 94 of Act, 2015 alone.

Issue No.2

36. Issue No.2 involved in this application is to the following effect:- Whether on the material available on record, accused-appellant-2 Ram Vijai Singh can be declared to be a juvenile on the date of occurrence within the parameters circumferenced by Section 49 of Act, 2015.

37. Section 94 of Act, 2015 contemplates that in order to determine the age of a child who is in conflict with law, attempt should be made to obtain the birth certificate from school, or the matriculation or equivalent certificate from the concerned examination Board. Only in the absence of above, reliance can belaced upon the birth certificate given by a corporation or a municipal authority or a panchayat. It is only when either of certificates are not available, only then the age of a child can be referred for determination by conducting an ossification test or any other latest medical age determination test.

38. Admittedly in the present case, there is no date of birth certificate or matriculation or equivalent certificate of accused-appellant-2. Similarly, there is no birth certificate given by a corporation or a municipal authority or a panchayat of accused-appellant-2 on record. Therefore, of necessity the age of accused-appellant-2 can be determined only by getting conducted an ossification test/radiological test.

39. It was in the light of above that this Court passed the order dated 10.9.2020, in compliance of which, duly constituted medical Board got conducted the radiological test as well as ossification test and on the basis thereof determined the age of accused-appellant-2 Ram Vijai Singh as between 40 to 50 years vide its report dated 18.9.2020. We have already reproduced the medical report dated 18.9.2020 at the relevant place.

40. The material on record has created a conundrum before this Court inasmuch as there are three equally weighing circumstances operating in the same circumstance but contradictory. First is the order dated 22.10.1982, passed by this Court, whereby accused-appellant-2 Ram Viajai Singh was enlarged on bail by this Court during the pendency of trial, primarily on the ground that as per the report of radiologist, his age is between 15 ½ to 17 ½ years. However, the radiological report referred to in the order dated 22.10.1982 is not on record. Apart from above, the recital conatined in aforesaid order dated 20.9.1982 shall be deemed to be correct and in case the same is sought to be disputed, it could have been challenged before the Court which passed the order dated 20.9.1982. Admittedly, this was not done. We, therefore, find force in the submission of Mr, Anoop Trivedi, that once the recital contained in the order dated 20.9.1982, has not been challenged at any point of time, the correctness or otherwise of the recital contained in the order dated 20.9.1982 qua the age of accused-appellant-2 Ram Vijai Singh, cannot be agitated at this stage. Secondly, the accused-appellant-2 Ram Vijai Singh, in his statement under section 313 Cr.P.C, has stated that his age is about 16 years, but there is no document to ascertain the same. Thirdly, accused-appellant-2 has been issued a gun license bearing no. 7580 on 24.7.1982, whereas, the occurrence has taken place on 20.7.1982. Thus, the gun license has been issued to accused-appellant-2 after the occurrence had taken place, but there is nothing on record to show that accused-appellant-2 crossed the age prescribed for a juvenile before 20.7.1982 or after 20.7.1982. We may point out that the State has not filed the copy of gun license issued to accused-appellant-2 or the extract of any register pertaining to grant of gun license maintained by the office of District Magistrate, Kanpur to demonstrate that accused-appellant-2 was a major on the date of occurrence.

41. In the absence of any document in reference to Section 94 (2) (i) & (ii) of Act, 2015, this Court of necessity has to rely upon the medical report dated 18.9.2020, submitted by the Medical Board, K.G.M.U, Lucknow.

42. Mr. Arun Kumar Singh, learned counsel for informant had disputed the above noted medical report and also urged before us that one member of Board should be summoned by this Court for cross-examination as the medical report alone is not sufficient to determine the age and this Court is not denuded of its powers to itself examine the issue.

43. We were impressed by aforesaid submission at the first flush particularly in the light of observations made in **Mukarrab and Others (Supra)** wherein the Court rejected the age determination report prepared by All India Institute of Medical Sciences (AIMS) New Delhi, but upon deeper scrutiny, we do not find any force in this submission. The facts in Mukarrab's case were very clinching which is not the case here. In the present case, excpet for the fact that accused-appellant was issued a gun license on 24.7.1982 which is after the date of occurrence i.e. 20.7.1982, nothing else has been brought on record. The same may create a suspicion. But Suspicion howsoever strong cannot take the place of proof. Perusal of the objections filed by informant does not indicate the grounds on which the member of the Medical Board is sought to be examined and secondly, no such material has been appended along with the objections file by informant on the basis of which prima facie we could feel satisfied to summon a member of Medical Board. We accordingly, negate the submission urged by learned counsel for informant to summon a member of Medical Board for cross-examination.

44. Having dealt with the conflicting claims of the parties, the swinging circumstances of the case and the law as laid down **Mukarrab and Others (Supra)**, we find that the medical report dated 18.9.2020 is worthy of acceptance, wherein the age of accused-appellant-2 Ram Vijai Singh has been determined as 40-55 years on date. The occurrence took place on 20.7.1982 i.e. 38 years ago .When age of accused-appellant-2 Ram Vijai Singh is determined on all hypothetical calculations i.e. (55-38=17 years) (40-38= 2 years) and taking the average of difference between maximum and minimum age i.e. 48-38 = 10 years, then the age of accused-appellant-2 Ram Vijai Singh falls below 17 years.

45. In view of the discussion made above, the inescapable conclusion is that application filed by accused-appellant-2 Ram Vijai Singh, claiming himself to be a juvenile on the date of occurrence i.e. on 20.7.1982 has to be allowed. Accordingly, the same is **allowed**. Accused-appellant-2 Ram Vijai Singh is declared to be a juvenile on the date of occurrence i.e. on 20.7.1982.

46. We make no order as to costs.

(2020)10ILR A34
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.09.2020

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE RAJ BEER SINGH, J.

Criminal Appeal No. 2750 of 2017
Connected with
Criminal Appeal No. 4186 of 2012

Satish Kumar Verma ...Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:

Sri V.P. Srivastava, Sri Lav Srivastava, Sri Rashtrapati Khare, Sri Vishesh Kumar Gupta, Sri G.K. Gupta

Counsel for the Opposite Party:
A.G.A., Sri Braham Singh, Sri Susheel Kr. Tiwari

Evidence Law - Indian Evidence Act, 1872- Section 3- Circumstantial Evidence- No eye witness of the alleged incident of murder of the deceased- In a case based on circumstantial evidence, Court is required to evaluate circumstantial evidence to see that the chain of events have been established clearly and completely to rule out any reasonable likelihood of innocence of the accused.

It is well established that in a case based on circumstantial evidence the prosecution must fully complete the link of circumstances which must lead to the inescapable conclusion of the guilt of the accused.

Evidence Law - Indian Evidence Act, 1872- Conduct- There is absolutely nothing to indicate that the witnesses had tried to catch hold the accused appellants. It appears against natural human conduct that after committing the murder of the deceased, the accused appellants would wait at the door of their house till 6 a.m. and when suddenly these witnesses reached there, they would run away from there and that said witnesses would not try to get them caught. The deceased had three children, who were residing with the deceased at the time of incident. The Investigating Officer did not record any statement of these children. It is one of the settled proposition of law that the prosecution must led its best evidence but in the instant case, it is quite apparent that the prosecution has not examined any of the person residing in the said premises where the incident had taken place.

Where the conduct of the witnesses of the prosecution is unnatural and unlikely and their testimony regarding the conduct of the accused is also unnatural and unbelievable and the prosecution has failed to collect any direct evidence, which would be the best evidence, then the story of the prosecution is rendered artificial and improbable.

Evidence Law - Indian Evidence Act, 1872- Section 8- Motive- The prosecution has succeeded in proving that the accused-appellants have motive to commit the murder of the deceased- In a case based on circumstantial evidence, motive assumes importance and it holds one of the link in chain of circumstances, however, failure to prove motive is not fatal by itself. No doubt prosecution has proved motive but sole evidence of motive would hardly be sufficient to sustain conviction.

Motive is one of the links in the chain of circumstances but where the prosecution proves the motive but fails in establishing the other circumstances, then conviction of the accused cannot be secured only on the basis of motive.

Evidence Law - Indian Evidence Act, 1872- Section 106 Evidence Act- It is not the case that only the appellant Satish and the deceased were residing together when the alleged incident took place. There is no evidence that deceased was last seen alive along with the appellants inside her room. As noticed earlier, Section 106 of the Evidence Act, is not intended to shift the burden of proof on the accused but to take care of situations where a fact is known only to accused.

Where the prosecution has failed to establish that the facts were especially within the knowledge of the accused, then the burden under Section 106 of the Evidence Act cannot be pressed into service.

The circumstances relied upon by the prosecution are not of conclusive nature and chain of circumstances is not complete. The circumstances are not totally inconsistent with the innocence of accused-appellants-If two views are possible on the evidence adduced in the case, one pointing to the guilt of accused and the other to his innocence, the view which is favourable to the accused should be adopted.

Criminal Appeals Allowed.(Para 27. 35, 36, 37, 39, 40, 41, 45) (E-3)

Case Law relied upon:-

1. Hanumant Vs The St. of M.P, [1952] 3 SCR 1091

2. Sharad Birdhichand Sarda Vs St. of Maha, AIR 1984 SC 1622

3. C. Chenga Reddy & ors Vs St. of A.P, AIR 1996 SC 3390

4. St. of U.P. Vs Ashok Kumar Srivastava, [(1992) 2 SCC 86]

5. Varkey Joseph Vs St. of Kerala,AIR 1993 SC 1892

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

7. St. of Raj. Vs Kanshi Ram, JT 2006 (12) SCC 254

8. P. Mani Vs St. of T.N (2006) 3 SCC 161

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

1. The above two criminal appeals have been preferred against the judgment and order dated 4.9.2012 passed by Additional District and Sessions Judge, Court No. 7, Moradabad in S.T. No. 1094 of 2008 convicting and sentencing the appellants Satish Kumar Verma and Rinki Verma @ Poonam Verma under section 302/34 I.P.C. for imprisonment of life and fine of Rs. 10,000/- and in default of payment of fine one year further R.I.

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

3. The prosecution case as emerges out from the F.I.R. is that a written report was given by one Girish Verma (hereinafter referred to as 'the informant') to the concerned police station alleging that his sister, namely, Smt. Manju Verma (hereinafter referred as 'the deceased') was married to appellant Satish Kumar Verma resident of Parsadi Lal Road Chowk, Tadi Khana, police station Civil Line, District Moradabad and from their wedlock two sons an d one daughter were born. One Rinki Verma wife of Sanjay @ Banti resident of Buddhi Vihar, police station Majhola, district Moradabad started visiting his sister's house and gradually illicit relationship was developed between the husband of the deceased, namely, Satish Verma and Rinki Verma. When, his sister objected to the said relationship, his sister's husband had consoled his sister that there is no illicit relationship between them and she was engaged for making silver neckless and, therefore, she may be allowed to stay at their residence. His sister being an innocent lady believed her husband and kept quiet but their illicit relationship did not stop, hence his sister had told about the said illicit relationship of her husband and Rinki Verma to her family members on which her family members made a complaint to the police officials and on interrogation being made about the said fact from Satish Kumar Verma and Rinki Verma both of them denied the illicit relationship and Satish Kumar Verma admitted that from now Rinki would not come to his house nor he would go to her house. After 15 days of the said compromise, Satish Verma disappeared along with Rinki Verma and after two months it was disclosed that both of them were illegally living as husband and wife at Amroha. On pressure being made on the family members of Rinki Verma, the brother of Rinki Verma brought them back at Moradabad. Satish again promised to live with his wife-the deceased. Thereafter Satish kept a condition before his sister whether she wants to live with him or with her family members on which his sister got ready to live with her husband, hence his

sister's husband kept informant's sister and Rinki Verma together at the house situated at Line Par where Rinki Verma used to take all household work from his sister and treat her like a servant and also used to torture her. Four days prior to the incident, Satish Verma at the behest of his sister had left his sister and her children at the house situated at Tadi Khana and after three days when her husband did not come then on 3.5.2008 his sister had gone to the house of Rinki Verma situated at Line Par to call Satish Verma. In the night at 10:30 p.m., Satish Verma and Rinki Verma both came to the house of his sister situated at Tadi Khana and assaulted her. An information about the said fact was received by the informant, hence on 4.5.2008 at 6 a.m. in the morning the informant along with Suraj Gupta resident of Buddhi Vihar, police station Majhola and Chandra Prakash Varshney resident of Jayantipur police station Majhola went to the house of his sister and when he reached there, he met Satish Verma and Rinki Verma at the door and when he asked about his sister then they told him that he can go upstairs to meet his sister and when the informant along with his companions went upstairs, then he saw his sister Manju Verma lying on the double bed and after tilting her he found her to be dead. The informant further stated that Satish Verma and Rinki Verma together in order to eliminate his sister from their way had killed her so that they may not be interrupted in their relationship. In the meanwhile, Satish Verma and Rinki Verma fled away when he went upstairs

4. On the basis of the said written report (Ex. Ka-3) an F.I.R. was registered at police station Civil Line on 4.5.2008 at 7:30 a.m. by the Constable clerk Ghanshyam Rathi and chik F.I.R. was prepared by him in his hand writing and signature marked as Ex. Ka-5, as case crime no. 383 of 2008 under section 302 I.P.C. which was also endorsed in the G.D. which has been proved as Ex. Ka-6. The investigation of the case was entrusted to Inspector Kavindra Narain Mishra of police station Civil Line, who recorded the statement of the Constable clerk Ghanshyam Rathi and the informant Girsih Verma and thereafter he visited the place of occurrence for spot inspection and at the instance of the witnesses he prepared the site plan (Ex. Ka-9) in his hand writing and signature. The inquest on the dead body of the deceased was conducted under the supervision of Station Officer of Manila Thana, namely, Lokesh Sharan, who was called for the said purpose. The inquest report was prepared by Lokesh Sharan in the presence of the family members of the deceased Manju Verma and other persons. She proved the inquest report (Ex. Ka-4) in her hand writing and signature and further prepared the relevant documents with respect to the same such as, letter to R.I. (Ex. Ka-10), letter to C.M.O. (Ex. Ka-11), seal sample (Ex. Ka-12), Photo Nash (Ex. Ka-13, Challan Nash (Ex. Ka-14) which were also proved by her. Thereafter the dead body was sealed and handed over to Constable Manohar Singh and Constable Geeta Chaudhary along with relevant document for being sent to mortuary for conducting post mortem of the deceased. The post mortem of the deceased was conducted on 4.5.2008 at 2:20 p.m. by Dr. Rajendra Singh, who found three ante mortem injuries on the dead body of the deceased and as per the post mortem report, the cause of death is asphyxia as a result of throttling. The Investigating Officer arrested the accused appellants on 4.5.2008 and recorded their statements. He further recorded the statement of the witnesses of inquest and also collected photograph from the informant (material Ex. Ka-1). The said photograph relating to marriage of Rinki Verma and Satish Verma. He also took on

record the compromise entered into on 17.10.2007 between Satish Kumar Verma, Manju Verma and Rinki Verma which also was handed over by the informant to him. He also recorded the statement under section 161 Cr.P.C. of the witnesses, namely, Kamalavati, Vedprakash Verma and Suraj Gupta and thereafter submitted charge-sheet against the accused appellants before the competent court and the same has been marked as Ex. Ka-8.

5. The case was committed to the court of Sessions on 28.8.2008 by the C.J.M. Moradabad.

6. The trial court on 12.9.2008 framed charges against the two appellants Satish Kumar Verma and Rinki Verma under section 302 read with Section 34 I.P.C., who denied the charges and claimed their trial.

7. The prosecution in support of its case has examined P.W. 1-the Informant Girish Verma, P.W.2-Suraj Gupta, P.W. 3-Constable Ghanshyam Rathi, P.W. 4-Chandra Prakash Vashney, P.W. 5-Dr. Rajendra Singh, P.W. 6-Police Inspector Rakesh Vashishtha Investigating Officer, P.W. 7-Police Inspector Kavindra Narain Mishra.

8. Both the appellants were examined under section 313 Cr.P.C., wherein they denied the prosecution evidence. The accused appellant Satish Kumar Verma has taken a plea that the deceased Manju Verma has some land dispute with her brother Girish Verma and her mother and due to the fear of Girish, he had left his house and was not residing at the house situated at Tadikhana.

9. Accused-appellant Rinki Verma has taken the plea that she was not present at the spot.

10. In defence evidence, one Sanjiv Kumar Verma, who is brother of accused-appellant Satish Kumar Verma, has been examined as D.W.-1.

11. After hearing and analyzing the evidence on record, both the accused-appellants were convicted and sentenced by the trial court as stated in opening part of this judgment.

12. Being aggrieved, the accused-appellant Satish Kumar Verma and Rinki Verma @ Poonam Verma have preferred Crl. Appeal Nos. 2750 of 2017 and 4186 of 2012 respectively.

13. Heard Sri G.K. Gupta, learned counsel for the appellant and Km. Meena, learned A.G.A. for the State. No one appeared on behalf of the complainant.

14. In evidence, P.W. 1 Girish Verma, who is brother of the deceased Manju Verma, has stated that the marriage of his sister Manju Verma with accused-appellant Satish Kumar Verma had taken place on 24.6.1994 and out of that wedlock, they were blessed with three children. About seven months prior to incident, appellant Rinki Verma started coming to the house of his sister and meanwhile accused-appellant Satish Kumar Verma developed physical relations with Rinki Verma while the deceased Manju Verma used to object the same. P.W. 1 Girish further stated that regarding the illicit relations of accused persons, a complaint was made to the police and accused Satish had promised that now the accused Rinki Verma would not visit his house. This statement (Ex. Ka-1) was signed by both the accused-appellants as well as by P.W. 1 Girish Verma. After that for some time, accused appellant Satish and deceased Manju Verma stayed together. On the day of Karwachauth, the

accused Satish Kumar Verma had taken Rinki Verma to Amroha and they started residing there at a rental house. P.W. 1 Girish and his family members made pressure on the family members of Rinki Verma and consequently they called back Rinki and Satish Verma again promised that now he reside with the deceased Manju Verma and he has given written undertaking (Ex. Ka-2) to this effect before the police. Thereafter Satish Kumar Verma and the deceased Manju Verma started residing at the house situated at Line Par, Moradabad but later on Rinki Verma also he started living there and both the accused used to beat the deceased. Thereafter, Satish left the deceased at the house situated at Tadi Khana and started residing with Rinki Verma at Line Par house. When Satish Verma did not return at his house at Tadi Khana for several days, the deceased Manju Verma went to the house at Line Par to call him then Satish promised that he would come in the night. On the night of 3/4.5.2008, Satish and Rinki came at the house of deceased at Tadikhana and they did beatings with her. The deceased informed to P.W. 1 Girish about this incident on telephone. On 4.5.2008 at about 6 a.m., when P.W. 1 Girish along with Suraj Gupta (P.W. 2) and Chandra Prakash Varshney (P.W. 4) reached at the house of the deceased situated at Tadi Khana and knocked the door, Satish opened the door and Rinki was also standing near the staircase. When P.W. 1 Girish enquired about the deceased, Satish told him that she is at upstairs and he can meet her there. When P.W. 1 Girish reached there he saw that his sister was lying dead on her bed. P.W. 1 Girish stated that Satish and Rinki had committed the murder of the deceased by strangulating her as they wanted to eliminate her so that there may not be any hindrance in their illicit relationship. P.W. 1 Girish reported the murder to police by submitting Tehrir (Ex. Ka-3) and after that police reached at the spot and prepared the inquest report (Ex. Ka-4).

15. P.W. 2 Suraj Gupta has stated that on 4.5.2008 he along with Girish Verma and Chandra Prakash Varshney had gone at Tadi Khana at the house of sister of Girish Verma. The accused Satish Kumar Verma met at the door whereas Rinki was standing near the staircase and when they enquired about the deceased, Satish told that they could see her at upstairs and when they reached at the room situated at upstairs, they saw that the deceased was lying dead on her bed. When they came back on the ground floor they saw that both the accused Satish and Rinki had fled away.

16. Similarly, P.W. 4 Chandra Prakash Varshney has stated that about quarter to two or two years back he along with Girish Verma and Suraj Gupta had gone at the house of Satish Verma situated at Tadi Khana and when they reached at the door of the house, Satish and Rinki Verma met at the door and when they enquired about Manju, they told that she is at upstairs and they can see her there. When he along with Girish and Suraj reached there, they saw that the deceased was lying dead at her bed and when they came down they saw that both the accused Satish and Rinki had already fled away. P.W. 4 has further stated that the police have conducted the inquest proceeding before him and he has signed the inquest report (Ex. Ka-4).

17. P.W. 3 Constable Ghanshyam Rathi has recorded the F.I.R. (Ex. Ka-5) and G.D. entry (Ex. Ka-6).

18. P.W. 5 Dr. Rajendra Singh has conducted the post mortem on the dead body of the deceased Manju Verma vide

post mortem report (Ex. Ka-7), the deceased has received following injuries.

"1. Lacerated wound 0.5 cm. x 0.5 cm. muscle deep on left side of upper lip.1. cm. medial from angle of mouth.

2. Multiple abrasions, contusions in area 11 cm. x. 4 cm. on both side of neck and front of neck 5.5 cm. below from chin, underneath echymosis present.

3. Contusion 2 x. 1 cm. on front of right forearm, 3 cm. below the elbow joint."

19. The cause of death of death was asphyxia as a result of throttling.

20. P.W.7 Kavindra Narain Mishra has conducted the investigation. He stated that inquest proceedings were conducted and documents Ex. Ka 10 to 14 were prepared. He also prepared the site plan of spot (Ex. Ka-9).

21. P.W. 6 Inspector Rakesh Vashishtha has conducted further investigation and has filed charge-sheet (Ex. Ka-8).

22. D.W. 1 Sanjiv Kumar Verma has stated that his sister-in-law (Bhabhi) Manju Verma has died on 4.5.2008. He stated that he heard some noise at 6 a.m. and when he came on the ground floor, he saw that the deceased was lying in Verandah and many persons were present there. The police have also reached there. D.W. 1 Sanjiv further stated that at the time of incident, his brother Satish Kumar Verma used to reside at the house situated at Line Par whereas the deceased was residing in the room situated in front of his room at upstairs. On the night of 3/4.5.2008, the deceased was not present at her room and that on 3.5.2008, he has seen that the deceased was going with Girish at 7-8 p.m. and she did not return at night. Satish also did not return in the night. He further stated that there was no dispute between Satish and the deceased and when he enquired from the deceased as to why Satish is residing separately, the deceased told him that her father had a house at Rishikesh which was sold by Girish Verma and he had misappropriated the sale proceeds and when Satish demanded the share from Girish he has refused and due to this reason some altercation had taken place between Satish and Girish and due to fear of Girish, Satish started residing at Line Par. D.W. 1 has stated that there was no dispute between Satish and the deceased. He further stated that the deceased was suffering from fits of epilepsy.

23. Learned counsel for the appellants has vehemently argued that there is no eye witness of the incident and that as per the prosecution only circumstance shown against the accused-appellants is that on the morning of 4.5.2008 when P.W. 1, 2 and 4 have gone at the house of deceased, they were seen at the door of the house of the deceased and thereafter both the accused-appellants had fled away, however, this circumstance is not established. It was stated that the version of P.W. 1, 2 and 4 is highly improbable and unreliable and it appears that they have concocted a false story that they have seen both the accused persons at the door of house of the deceased. Thus, this circumstance relied by the prosecution has not been established. It was further submitted that there are material contradictions and inconsistency in the statements of P.W. 1, 2 and 4. P.W. 1 Girish has stated that when he along P.W. 2 and 4 reached at the house of the deceased, he knocked the door on which Satish had opened the door and Rinki was standing

near the staircase whereas P.W. 2 Suraj Gupta and P.W. 4 Chandra Prakash Varshney have stated that when they reached at the house of the deceased, both the accused-appellants Satish and Rinki met at the door and thus P.W. 2 and 4 have not stated that they knocked at the door or the door was opened by accused Satish. It was further stated that from the statement of D.W. 1 Sanjiv Kumar Verma, it is clear that there was no dispute between the deceased and appellant Satish Kumar Verma thus there is no motive on the part of the accused-appellants to commit the murder of the deceased. Learned counsel for the appellants further submitted that the deceased had three children, who were living with the deceased but none of them has been examined and, therefore, the prosecution has not led its best evidence. He submitted that the chain of circumstances is not complete and the prosecution version that both the accused-appellants were seen at the door of the house, is highly improbable and unreliable. Thus, the trial court has not considered the evidence in correct prospective and committed manifest error while convicting and sentencing the accused-appellants.

24. *Per contra*, it has been submitted by learned State counsel that though there is no eye witness of the alleged incident but there is strong circumstantial evidence against the accused-appellants. The deceased was wife of accused-appellant Satish Kumar Verma and there is evidence that on the night of incident, the deceased told P.W. 1 Girish Kumar Verma on telephone that on the intervening night of 3/4.5.2008, both the accused-appellants had come there and assaulted her. There is sufficient and reliable evidence that both the accused-appellants were having illicit relationship which was being objected by the deceased and thus both the accused-appellants had strong motive to commit the murder of the deceased in order to remove the hindrance in their illicit relationship. Learned State Counsel further submitted that the version of P.W. 1 Girish Kumar Verma that when he along with P.W. 2 and 4 reached at the house of the deceased, both the appellants have met there at the door and that Satish told him that the deceased is at upstairs and after that both the accused-appellants fled away, has been amply corroborated by the evidence of P.W. 2 and 4. It was stated that there is strong circumstantial evidence against the appellants and the conviction of the accused-appellants is based on evidence.

25. We have considered the rival submissions and perused the record.

26. In the instant case there is no eye witness of the alleged incident of murder of the deceased. The case is based on circumstantial evidence.

27. It is well settled that conviction can be based on circumstantial evidence alone but for that prosecution must establish chain of circumstances, which consistently points to the accused and accused alone and is inconsistent with his/their innocence. It is further essential for the prosecution to cogently and firmly establish the circumstances from which inference of guilt of accused is to be drawn. These circumstances then have to be taken into consideration cumulatively. They must be complete to conclude that within all human probability, accused and none else have committed the offence.

28. In case of **Hanurnant v. The State of Madhya Pradesh, [1952] 3 SCR 1091** the Hon'ble Apex Court laid down

fundamental and basic principles for appreciating the circumstantial evidence. The Hon'ble Court observed:

"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

29. In a landmark judgment of Supreme Court in **Sharad Birdhichand Sarda Vs. State of Maharashtra, AIR 1984 SC 1622,** Court held as under:-

"152. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be ' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved as was held by this court in Shivaji Sahebaro Bobade V State of Maharashtra 1973 CriLJ1783 where the following observations were made:

Certainly, it is primary principle that the accused must be and not merely may be guilty before a Court can convict, and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accuses, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(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.

153. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence".

30. In **Joseph vs. State of Kerala, [(2000) 5 SCC 197],** the court has explained under what circumstances conviction can be based purely on circumstantial evidence. It observed:-

16. "it is often said that though witnesses may lie, circumstances will not, but at the same time it must cautiously be scrutinized to see that the incriminating circumstances are such as to lead only to a hypothesis of guilt and reasonably exclude every possibility of innocence of the accused. There can also be no hard and fast rule as to the appreciation of evidence

in a case and being always an exercise pertaining to arriving at a finding of fact the same has to be in the manner necessitated or warranted by the peculiar facts and circumstances of each case. The whole effort and endeavor in the case should be to find out whether the crime was committed by the accused and the circumstances proved form themselves into a complete chain unerringly pointing to the guilt of the accused."

31. In **C. Chenga Reddy and others v. State of Andhra Pradesh, AIR 1996 SC 3390,** the Court has held:-

"In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence."

32. The similar principle was reiterated in State of Rajasthan v. Kashi Ram (2006) 12 SCC 254, Ganesh Lal v. State of Rajasthan (2002) 1 SCC 731, State of Maharashtra v. Suresh (2000) 1 SCC 471 and State of Tamil Nadu v. Rajendran (1999) 8 SCC 679, Padala Veera Reddy v. State of Andhra Pradesh, (AIR 1990 SC 79), Vijay Shankar Vs. State of Haryana, reported in (2015) 12 SCC 644, Raja @ Rajinder Vs. State of Haryana, (2015) 11 SCC 43 and State of Himachal Pradesh Vs. Raj Kumar, reported in (2018) 2 SCC 69.

33. In **State of U.P. vs. Ashok Kumar Srivastava, [(1992) 2 SCC 86],** it was pointed out that great care must be taken in evaluating circumstantial evidence and if evidence relied on is reasonably capable of two inferences, the one in favour of accused must be accepted. It was also pointed out that circumstances relied upon must be found to have been fully established and cumulative effect of all the facts so established must be consistent only with the hypothesis of the guilt.

34. In **Varkey Joseph Vs. State of Kerala, reported in AIR 1993 SC 1892,** the Court held that suspicion cannot take place of proof. In Paragraph 12 of the judgment, Court concluded as under:-

"12. Suspicion is not the substitute for proof. There is a long distance between 'may be true' and 'must be true' and the prosecution has to travel all the way to prove its case beyond all reasonable doubt. We have already seen that the prosecution not only has not proved its case but palpably produced false evidence and the prosecution has miserably failed to prove its case against the appellant let alone beyond all reasonable doubt that the appellant and he alone committed the offence. We had already allowed the appeal and acquitted him by our order dated April 12, 1993 and set the appellant at liberty which we have little doubt that it was carried out by date. The appeal is allowed and the appellant stands acquitted of the offence under S. 302, IPC"

35. The principle that emerges from the above discussed decisions is that in a case based on circumstantial evidence, Court is required to evaluate circumstantial evidence to see that the chain of events have been established clearly and completely to rule out any reasonable likelihood of innocence of the accused. Needless to say whether the chain is complete or not would depend on the facts of each case emanating from the evidence

and no universal yardstick should ever be attempted it should be tested on the touchstone of law relating to circumstantial evidence laid down by the Hon'ble Apex Court. It is essential for the prosecution to cogently and firmly establish the circumstances from which inference of guilt of accused is to be drawn. These circumstances then have to be taken into consideration cumulatively. They must be complete to conclude that within all human probability, the accused and none else have committed the offence.

36. Keeping in view the above discussed legal position regarding circumstantial evidence, in the instant case it may be seen that the prosecution has heavily relied on the alleged circumstance that about three four days prior to the alleged incident both the accused-appellants have left the deceased at the house situated at Tadi Khana and both the accused persons started residing at the house situated at Line Par, Moradabad and when the appellant Satish did not visit the house at Tadi Khana for three days, on 3.5.2008, the deceased gone at his house at Line Par to call him and accused Satish Verma told her that he would visit his house at Tadi Khana in the night. Thereafter in the night on 3.5.2008 both the accused-appellants came there and beaten the deceased and in this regard, the deceased had informed her brother-P.W. 1 Girish Kumar Verma on telephone. It is further the case of the prosecution that on 4.5.2008 when P.W. 1, 2 and 4 reached at the house of the deceased at Tadi Khana, both the accused met at the door and when they enquired about the deceased Manju, accused Satish told that she is on the upstairs and when he along with P.W. 2 and 4 reached there, they saw that the deceased was lying dead on her bed. In this regard, it may be seen that the prosecution has not filed any record of call details of telephones in order to show that on the night of 3.5.2008, the deceased had made any telephonic call to P.W. 1 Girish Kumar Verma. Further in his statement, P.W. 1 Girish has stated that after reaching at the house of the deceased, he knocked the door and thereafter the door was opened by accused Satish whereas P.W. 2 and 4 have not stated anything regarding knocking of the door and they simply stated that both the accused-appellants were present at the door. The statement of these witnesses, that when they reached there both the accused persons were standing at the door and after finding the deceased was lying dead at upstairs when the witnesses came down, the accused appellants have fled away from there, appears to be a some what improbable and artificial. There is absolutely nothing to indicate that these witnesses had tried to catch hold the accused appellants. It appears against natural human conduct that after committing the murder of the deceased, the accused appellants would wait at the door of their house till 6 a.m. and when suddenly these witnesses reached there, they would run away from there and that said witnesses would not try to get them caught.

37. One of the important aspect in the matter is that the Investigating Officer-P.W. 6 Rakesh Vashishtha has stated in his cross examination that the deceased had three children, who were residing with the deceased at the time of incident. P.W. 1 Girish had also stated that the deceased had three children. However, surprisingly the Investigating Officer did not record any statement of these children. In the site plan of the spot two rooms have been shown at upstairs, one room has been shown of deceased and another room has been shown

of D.W. 1 Sanjiv Kumar Verma and between these two rooms there is an open space. Doors of both the rooms are opposite to each other. From the site plan it appears that the deceased was residing only in one room and as her children were residing with her, thus naturally they might have also been residing in the same room and, therefore, these children were most important witnesses to state as to how the incident had taken place but surprisingly, the Investigating Officer did not record any statement of these three children. It is not so that the children were infant and due to this reason, their statement could not be recorded and no such fact has been brought on record. P.W. 1 Girish has stated that the elder son of the deceased, namely, Deepu was aged about 10-12 years, second child Gudiya was aged about 8 years and third one was aged about 4 years. Thus, it was incumbent of the Investigating Officer at least to inquire elder son Deepu as to how this incident had taken place. It is also not disputed that D.W. 1 Sanjiv Kumar Verma and his wife were residing in another room in the same premises but it appears that he has also not been examined during investigation. P.W. 7 Inspector Kavindra Nath Mishra has also stated in his cross examination that mother of the accused Satish Kumar Verma and two other families were residing on the ground floor but the Investigating Officer also did not examine any of them. It is one of the settled proposition of law that the prosecution must led its best evidence but in the instant case, it is quite apparent that the prosecution has not examined any of the person residing in the said premises where the incident had taken place. All these facts further raise doubt about the version of P.W. 1, 2 and 4 that when they reached at the house of the deceased, both the accused-appellants were present at the door and they have succeeded in running away from there.

38. In view of the above stated facts, it appears thoroughly doubtful that on 4.5.2008 at around 6 a.m. when P.W. 1, 2 and 4 have reached at the house of the deceased, both the accused-appellants met them at the door and that they have fled away from there. As stated above, it is well settled that each circumstance has to be established by cogent evidence but in the instant case, the alleged circumstance, which has been heavily relied upon by the prosecution, has not been established.

39. So far as the question of motive is concerned, the case of the prosecution is that accused Satish Verma has developed illicit relation with Rinki Verma and this relationship was being objected by his wife Manju Verma (deceased). In this connection, P.W. 1 Girish Verma has stated that regarding the said illicit relationship of accused-appellants Satish and Rinki, a complaint was made to the police and consequently accused-appellant Satish Verma has made a written undertaking stating that Rinki Verma would not visit his home and this statement was signed by both the accused-appellants as well as other family members of accused-appellant Satish and also by P.W. 1 Girish and that document has been proved as Ex. Ka-1. Similarly, when accused-appellant Satish did not adhere to the said undertaking and continued his relationship with accused-appellant Rinki, P.W. 1 Girish has again made a complaint to the police on which again a written undertaking was given by accused-appellant Satish which has been proved as Ex. Ka-2, wherein accused-appellant Satish has stated that he has illicit relations with Rinki but in future, he would not continue any such relation with her and

from now he would reside with his wife Manju at his house. In this connection, it may also be stated that there is evidence that earlier for some days both the accused-appellants Satish and Rinki had started residing at Amroha as husband and wife in a rented premises. All these facts and evidence on record clearly shows that there was illicit relationship between accused-appellant Satish and Rinki and this illicit relationship was being objected by the deceased Manju. It is quite natural that the deceased might have objected such relationship. Thus, the prosecution has succeeded in proving that the accused-appellants have motive to commit the murder of the deceased as she was proving a hurdle in their relationship. It is well settled that the proof of motive is not sine qua nun for conviction and in case there is direct evidence, the motive aspect looses its significance. However, it is also equally well settled that in a case based on circumstantial evidence, motive is considered as an important aspect. In the case of State of ***U.P. vs. Kishanpal and others, (2008) 16 SCC 73,*** it has been held by the Apex Court that the motive may be considered as a circumstance which is relevant for assessing evidence. Similarly in the case of ***Shivaji Genu Mohite vs. State of Maharashtra, AIR 1973 SC 55,*** it was observed by the Apex Court that in case, the prosecution is not able to discover impelling motive, the same would not reflect upon the credibility of a witness, proved to be a reliable eye-witness. However, the evidence as to motive, would go a long way in a case where the case is wholly dependent on circumstantial evidence. Such evidence would form one of the links in the chain of circumstantial evidence. In the case of ***Amitava Banerjee @ Amit @ Bappa vs. State of West Bengal, AIR 2011 SC 2913,*** it was held by the Apex Court that the motive for commission of offence no doubt assumes greater importance in cases resting on circumstantial evidence than those in which direct evidence regarding commission of the offence is available. And yet failure to prove motive in cases resting on circumstantial evidence is not fatal by itself.

40. In view of the aforesaid pronouncements of the Hon'ble Apex Court, it is apparent that in a case based on circumstantial evidence, motive assumes importance and it holds one of the link in chain of circumstances, however, failure to prove motive is not fatal by itself. In the instant case, as stated above, it has been established that accused-appellant Satish was having illicit relationship with accused-appellant Rinki and it was being objected by the deceased Manju and thus, the motive aspect has been established by prosecution.

41. We have also considered the matter from the angle whether the provisions of Section 106 Evidence Act can be pressed into service in the present case as the deceased Manju Verma was wife of accused-appellant Satish Verma. It may be stated that the provisions of Section 106 of the Evidence Act provides that when any fact is specially within the knowledge of any person, the burden of proving that fact is upon that person. The case of the prosecution is that at the time of incident, the deceased was residing at the house situated at Tadi Khana whereas accused-appellant Satish has started living with accused-appellant Rinki at the house situated at Line Par and that when the accused-appellant Satish did not visit his house at Tadi Khana for three days, the deceased had gone at the house at Line Par and accused-appellant Satish had promised that he would return back at the house at Tadi Khana in

night. According to prosecution, in the night of 3/4.5.2008, both the accused-appellants have come at the house of the deceased at Tadi Khana, however, this version is based on hearsay evidence of P.W. 1 Girish Verma as he stated that the deceased told him on telephone that on the night of 3.5.2008, both the accused-appellants came there and they have beaten the deceased but as stated earlier, no cogent evidence was collected in this regard. Prosecution has not produced any call details either telephone of the deceased or of P.W. 1 Girish to show that the deceased had made any call to P.W. 1 Girish. Further this version is not supported by any person residing in the said premises. The brother of the accused-appellant Satish, namely, Sanjiv Kumar Verma (D.W.-1) has stated that on that night accused-appellant Satish did not visit his house at Tadi Khana. The children of the deceased, who at the time of incident were residing with the deceased, were also not examined. The persons residing at the ground floor of that premises were also not been examined. Thus as stated earlier, it could not be established that on the night of incident the appellants have come at the house at Tadi Khana, where deceased was residing. Here it would be pertinent to mention that it is the case of prosecution that appellants have started residing at the Line Par house and appellant Satish has not visited his house at Tadi Khana since last three days prior to incident. In view of these facts, Section 106 of the Evidence Act, cannot be pressed into service so as to show any adverse inference against appellant Satish Verma on the ground that he has failed to explain as to how the deceased has suffered death.

42. In ***Shambhu Nath Mehra v. State of Ajmer 1956 SCR 199,*** Hon'ble Apex Court dealt with the interpretation of Section 106 of the Evidence Act and held that the section is not intended to shift the burden of proof (in respect of a crime) on the accused but to take care of a situation where a fact is known only to the accused and it is well nigh impossible or extremely difficult for the prosecution to prove that fact. It was said:

"This [Section 101] 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."

43. The applicability of Section 106 of the Evidence Act has been lucidly explained by the Hon'ble Apex Court in case of State of Rajasthan v. Kanshi Ram, JT 2006 (12) SCC 254.

"The provisions of Section 106 of the Evidence Act 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 which appears to the Court to be probable and satisfactory. If he does so he must be held to have discharged his burden. Section 106 does not shift the burden of proof in a

criminal trial, which is always upon the prosecution."

44. Similarly in case of P. Mani vs. State of Tamil Nadu 2006 (3) SCC 161, Hon'ble Apex Court held thus:-

"We do not agree with the High Court. In a criminal case, it was for the prosecution to prove the involvement of an accused beyond all reasonable doubt. It was not a case where both, husband and wife, were seen together inside a room but the prosecution itself has brought out evidences to the effect that the children who had been witnessing television were asked to go out by the deceased and then she bolted the room from inside. As they saw smoke coming out from the room, they rushed towards the same and broke open the door. Section 106 of the Evidence Act, to which reference was made by the High Court in the aforementioned situation, cannot be said to have any application whatsoever."

45. Keeping in view the above stated position of law, in the instant case, it could not be proved that on the night of 3/4.5.2008 when the deceased suffered death, the accused-appellants Satish and Rinki were present at the house at Tadi Khana along with the deceased. Further D.W. 1 Sanjiv Kumar Verma was also residing on the same floor in front of the room of the deceased and that some other family members of the accused-appellant Satish as well as other families were residing on ground floor. Thus, it is not the case that only the appellant Satish and the deceased were residing together when the alleged incident took place. There is no evidence that deceased was last seen alive along with the appellants inside her room. As noticed earlier, Section 106 of the Evidence Act, is not intended to shift the burden of proof on the accused but to take care of situations where a fact is known only to accused. In the present case, there is evidence that prior to some days of the incident, accused-appellant Rinki Verma has started residing along with accused-appellant Satish at the house at Line Part and the prosecution version that on the night of incident he visited the house of the deceased at Tadi Khana, is highly doubtful and could not be established. Thus, in the facts and circumstances of the present case, provisions of Section 106 of the Evidence Act are not applicable.

46. No other material circumstance has been alleged or proved by the prosecution. In view of the aforesaid, it is apparent that the sole circumstance relied upon by the prosecution that in the morning of 4.5.2008 at around 6 a.m. both the accused-appellants had met P.W. 1, 2 and 4 at the door of the house when they had gone there and thereafter appellants have fled away from there, could not be established. Similarly, the provisions of Section 106 of the Evidence Act are also of no help to the prosecution. No doubt prosecution has proved motive but sole evidence of motive would hardly be sufficient to sustain conviction. As stated in the case of **Joseph vs. State of Kerala (supra)** suspicion is not a substitute of proof and there is long distance between "may be true" and "must be true" and the prosecution has to travel all the way to prove its case beyond reasonable doubt.

47. Examining the entire evidence carefully, it is manifest that the circumstances relied upon by the prosecution are not of conclusive nature and chain of circumstances is not complete. The circumstances are not totally

inconsistent with the innocence of accused-appellants. The evidence on record does not stand scrutiny to the law laid down by Hon'ble Apex Court through number of pronouncements for sustaining conviction on the basis of circumstantial evidence. It is cardinal principle of criminal jurisprudence that guilt of accused must be proved beyond all reasonable doubt. Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of accused and the other to his innocence, the view which is favourable to the accused should be adopted. [Vide Kaliram vs. State of Himachal Pradesh, (1973) 2 SCC 808, State of Rajasthan vs. Rajaram (2003) 8 SCC 180, Upendra Pradhan vs. State of Orissa (2015) 11 SCC 124 and Golbar Hussain and others vs. State of Assam and another (2015) 11 SCC 242.]

48. In view of the aforesaid, we reach to the conclusion that the prosecution has failed to prove its case beyond doubt and both the accused-appellants deserve benefit of doubt.

49. Accordingly, the conviction and sentence of both the accused-appellants, namely, Satish Kumar Verma and Rinki Verma @ Poonam Verma is set aside and they are acquitted of the charges levelled against them.

50. Both the accused-appellants are stated to be in jail, they shall be released forthwith, if not wanted in any other criminal case.

51. Both the appeals are allowed.

52. It is further directed that the appellants Satish Kumar Verma and Rinki Verma @ Poonam Verma shall furnish bail bonds with sureties to the satisfaction of the court concerned in terms of the provision of Section 437-A Cr.P.C.

53. Let the lower court record along with the present order be transmitted to the trial court concerned for necessary information and compliance.

(2020)10ILR A49
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.09.2020

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE RAJ BEER SINGH, J.

Criminal Appeal No. 2756 of 2011

Boby @ Sushil ...Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri B.L. Yadav, Sri Noor Mohammad, Sri R.C. Srivastava, Sri Ajay Kumar, Sri Mukhtar Alam, Sri Dharmendra Singhal, Sri Narendra Kumar, Sri Shailendra Verma, Sri Sanjeev Kushwaha

Counsel for the Opposite Party:
Ms. Kumari Meena, A.G.A.

Hostile Witnesses – Appreciation of evidence - PW 2 and PW 3 were eyewitness of the incident in question but they did not support prosecution version and turned hostile. Even the evidence of a hostile witness is not washed off from consideration and by now it is settled principle of law, that such part of the evidence of a hostile witness, which is found to be credible, could be taken into

consideration and it is not necessary to discard the entire evidence.

That part of the evidence of a hostile witness which is consistent with the case of the prosecution can be accepted by the Court.

Circumstantial Evidence - The trial court has based conviction of accused-appellant on circumstantial evidence. In a case based on circumstantial evidence, Court is required to evaluate circumstantial evidence to see that the chain of events have been established clearly and completely to rule out any reasonable likelihood of innocence of the accused.

Law is settled that in a case of circumstantial evidence the prosecution has to establish the links of circumstances which lead to the inescapable conclusion of the guilt of the accused.

Evidence Law - Indian Evidence Act, 1872- Section 118- Competency of Witnesses- The deposition of PW-1 constable Naresh Kumar and PW-4 constable Naveen Kumar is found cogent and credible. It is correct that both the witness PW-1 constable Naresh Kumar and PW-4 constable Naveen Kumar are police officials but there is no such law that testimony of such a witness has to be doubted on the ground that he is a police official. A police official is a competent witness and if testimony of such witness is found credible and without any embellishment, it can certainly be acted upon.

If the evidence of police officials is found to be credible and trustworthy then the court may rely upon the same for securing the conviction of the accused.

Evidence Law - Indian Evidence Act- Section 27 – Disclosure- Discovery and Recovery- Both the witness PW-1 and PW-4 have no knowledge or information that there was any fighting between the accused-appellant and the deceased or that deceased has been murdered or that his dead body is lying in house of accused-appellant. These facts were discovered from statement of accused-appellant and thus, the same would be admissible against him in terms of section 27 of the Evidence Act. This discovery of fact is one of the important circumstance against the accused-appellant. Accused-appellant has failed to offer any satisfactory explanation that soon after the incident what he was doing with human blood stained knife- Recovery of knife stained with human blood, soon after the incident, and merely at a distance of 30-35 steps from spot, is a highly incriminating circumstance against him.

The disclosure by the accused, leading to the discovery of a fact and subsequent recovery, distinct and connected with the discovery, would be a relevant fact and an important circumstance against the accused.

Evidence Law - Indian Evidence Act, 1872- Section 8- Motive-It is not necessary to prove motive for each and every case but when the prosecution cases rests entirety upon circumstantial evidence, motive assumes significance. As there was some fight between the accused-appellant and the deceased and thus, the accused-appellant has motive to commit murder of deceased.

In a case of circumstantial evidence motive assumes importance and when proved, it will be one of the circumstances to be considered against the accused.

Indian Evidence Act, 1872- Section 106 – Facts especially within the knowledge of the accused- The burden of proving the guilt of an accused is on the prosecution, but there may be certain facts pertaining to a crime that can be known only to the accused, or are virtually impossible for the prosecution to prove. These facts need to be explained by the accused and if he does not do so, then it is a strong circumstance pointing to his guilt based on those facts. As the explanation offered by accused-appellant is found false and concocted, therefore, in such matters the false explanation can always be taken into consideration to fortify the finding of guilt

already recorded on the basis of other circumstances.

Where the accused fails to discharge the burden of explaining the incriminating facts especially within his knowledge and gives a false explanation about the same, an adverse inference is bound to be taken against him.

All the incriminating circumstances have been cogently and firmly established and these circumstances are of definite tendency unerringly pointing towards guilt of the accused-appellant. When these circumstances taken cumulatively, form a chain so complete that there is no escape from the conclusion that within all human probability, the murder of deceased was committed by the accused-appellant and none else.

Criminal Appeal accordingly rejected. (Para 25, 28, 36, 38, 39, 42, 48, 49, 50, 51, 53, 54, 55) (E-3)

Case law relied upon:-

1. Bhajju Vs St. of M.P., (2012) 4 SCC 327

2. Raja & ors Vs St. of Kar. (2016) 10 SCC 506

3. St. of Guj. Vs Anirudh Singh, (1997) 6 SCC 514

4. Hanumant Vs The St. of M.P, [1952] 3 SCR 1091

5. Sharad Birdhichand Sarda Vs St. of Maha, AIR 1984 SC 1622

6. Joseph Vs St. of Ker., [(2000) 5 SCC 197]

7. C. Chenga Reddy & ors Vs St. of A.P, AIR 1996 SC 3390

8. St. of U.P. Vs Ashok Kumar Srivastava, [(1992) 2 SCC 86]

9. Varkey Joseph Vs St. of Ker., AIR 1993 SC 1892

10. Yakub Abdul Razak Memon Vs St. of Maha. 2013 (13) SCC 1

11. Kulwinder Singh and anr. Vs St. of Punj., (2015) 6 SCC 674

12. Mohmed Inayatullah Vs The St. of Maha., (1976) 1 SCC 828

13. Pulukuri Kotayya Vs King Emperor, AIR 1947 PC 74 IA 65

14. Aftab Ahmad Anasari Vs St. of Uttaranchal 2010 2 SCC 583

15. St. of Maha. Vs Damu AIR 2000 SC 1691

16. St. of Punj. Vs Gurnam Kaur (2009) 11 SCC 225

17. St. of U.P. Vs Kishanpal & Ors., (2008) 16 SCC 73

18. Surinder Pal Jain Vs Del. Admin. JT 1993 (2) SCC 206

19. Tanviben Pankaj Kumar Divetia Vs St. Of Guj. AIR 1997 SC 2193

20. Nathuni Yadav & ors. Vs St. of Bih. (1998) 9 SCC 238

21. Jagdish Vs St. of M.P {(2009) 9 SCC 495} [6]

22. St. of Raj. Vs Thakur Singh, 2014 CriLJ 4047

23. Paramjeet Singh @ Pamma Vs St. of Uk (2010) 10 SCC 439

(Delivered by Hon'ble Raj Beer Singh J.)

1. This criminal appeal has been preferred against judgment and order dated 08.04.2011/11.04.2011 passed by Additional Sessions Judge, Court No. 13, Saharanpur in S.T. No. 705 of 2005 (State vs. Boby @ Sushil), Crime No. 85/435/2005, under Section 302 IPC, P.S. Kotwali Dehat, District Saharanpur and S.T. No. 706 of 2005 (State vs. Boby @ Sushil), Case Crime No. 86/436/2005, under Section 25/4 Arms Act, P.S. Kotwali

Dehat, District Saharanpur, whereby the accused-appellant Boby @ Sushil has been convicted under Section 302 Indian Penal Code (hereinafter referred to as IPC) and under Section 25/4 Arms Act. He was sentenced to imprisonment for life along with fine of Rs. 20,000/- under section 302 IPC and rigorous imprisonment of one year along with fine of Rs. 5000/- under Section 25/4 Arms Act. In default of payment of said fine of Rs. 20,000, he has to undergo one year additional imprisonment and in default of payment of said fine of Rs. 5000/- he has to undergo three months additional imprisonment. Both the substantial sentences were to run concurrently.

2. Accused-appellant Boby @ Sushil is brother of deceased Luxman Singh. Prosecution version is that on 04.09.2015 at around 11:50 PM, accused-appellant Boby @ Sushil committed murder of his brother Luxman Singh by inflicting knife blows at his neck. Soon after the incident, he was apprehended by PW-1 constable Naresh Kumar and PW-4 constable Naveen Kumar at a distance of about 30-35 steps from the spot. According to PW-1 constable Naresh Kumar and PW-4 Naveen Kumar, on 04.09.2005 at around 11:20 PM while they were present on picket duty at Rakhha colony culvert, they heard some noise from other side of 'rajwaha' (sub canal) and when they went there, they saw that accused-appellant Boby @ Shushil was coming there and he was having a knife. These police officials stopped him and meanwhile two persons, namely, Subhash and Ramesh of same locality also came there. Accused Boby @ Sushil told that his brother Luxman was fighting with him since evening and due to this reason he has committed his murder by cutting his neck and that his dead body is lying in courtyard of his house. Thus, the said police officials took him to his house where dead body of deceased was lying in courtyard of house. Accused-appellant along with knife was taken to police station by PW-1 constable Naresh Kumar. The said knife was taken into possession vide recovery memo Exhibit Ka-2/3/5.

3. On oral statement of PW-1 constable Naresh Kumar, case was registered against accused-appellant Boby @ Sushil under Section 302 IPC and Section 25/4 Arms Act on 05.09.2005 at 2:00 AM vide FIR Exhibit Ka-1.

4. Inquest Proceedings were conducted by S.I. Prem Shanker Dwivedi vide inquest report Exhibit Ka-12. The dead body of deceased was sealed and sent for postmortem.

5. Postmortem on the dead body of deceased was conducted on 05.09.2005 by PW-6 Dr. Ved Prakash vide postmortem report Exhibit Ka-7. Deceased Luxman Singh has sustained following injuries on his person:

(i) Incised wound 14 cm x 2.5 cm x cervical spine deep on the front, neck front aspect and lateral aspects trachea and oesophagus found cut both side of neck vessels are cut along with muscles and nerves and other tissues wound. Extend deep from 3 cm below the right angle of jaw to 3 cm below the left angle of jaw under the upper part of neck below the base of chin. Abrasion 2 cm x 2 cm distance upper part of nose underlying nosal bone fractured.

As per Autopsy Surgeon, cause of death of the deceased was shock and hemorrhage as a result of injury over neck.

6. Investigation of the case was conducted by PW-8 Inspector Vijay Kumar Yadav. He inspected the spot and prepared site plan Exhibit Ka-8. During course of investigation, blood stained knife recovered from appellant, was sent to FSL and after its examination, FSL report Exhibit Ka-11 was collected. One pair of slipper of deceased, found at the spot, and two drawing string (nada) were taken into possession vide seizure memo Exhibit Ka-3 and Ka-4. After completion of investigation accused-appellant Bobby @ Sushil was charge-sheeted for the offence under Section 302 IPC vide charge-sheet Exhibit Ka-9. A separate charge-sheet Exhibit Ka-10 was filed for offence under Section 25/4 Arms Act. As both the cases were connected with same incident thus, S.T. No. 706 of 2005, under Section 25/4 Arms Act was consolidated with S.T. No. 705 of 2005 (State vs. Boby @ Sushil) under Section 302 IPC.

7. Accused-appellant was charged for offence under section 302 IPC and section 25 Arms Act.

8. In order to bring home the guilt of accused-appellant Bobby @ Sushil, prosecution has examined eight witnesses.

9. After prosecution evidence, accused-appellant was examined under Section 313 of Cr.P.C., wherein, he has denied the prosecution case and by filing a written statement, he has alleged that there was no motive on his part to commit such incident. On the night of incident he has reached at his house by rickshaw at 1:00 AM after seeing a movie and he saw that door of his house was lying opened and his brother was lying murdered. Theft was also committed in the house and household articles were lying scattered. One knife was also lying near the dead body of deceased. Hearing his cries, his neighbour Subhash and some other persons reached there and they called the police by making a telephonic call. Police came at spot and thereafter he (accused-appellant) and some other persons went to police post for lodging a report and that police took his tahrir and thereafter he was falsely implicated in this case.

However, no evidence was led in defence.

10. After hearing and analyzing the evidence on record, trial Court has convicted the accused-appellant Boby @ Sushil under Section 302 IPC and Section 25/4 Arms Act and sentenced him as stated in opening paragraph of this order.

11. Being aggrieved by the impugned judgment, accused-appellant has preferred the present appeal.

12. Heard Sri Noor Mohammad, learned counsel for the appellant and Ms. Kumari Meena, learned A.G.A for the State and perused the record.

13. In evidence, PW-1 constable Naresh Kumar has stated that on 04.09.2005 he along with constable Naveen Kumar was on picket duty at Rakhha colony culvert vide G.D. No. 19. At around 11:50 PM he heard some noise from other side of 'rajwaha', (sub canal) and when they went there, one person having a knife was seen coming there. He was stopped and he disclosed his name as Boby @ Sushil. Meanwhile two persons, namely, Subhash and Ramesh of locality also came there. Accused-appellant Boby @ Sushil has disclosed that his brother Luxman was fighting with him since evening and due to

that reason he has committed his murder by chopping off his neck with knife and that his dead body is lying in courtyard of his house. The accused-appellant was taken to spot and PW 1 Naresh Kumar and PW 4 Naveen Kumar saw that dead body of Luxman was lying in pool of blood. PW-1 constable Naresh Kumar along with witnesses took the accused-appellant along with knife to police post Hasanpur while PW-4 constable Naveen Kumar was left at the spot. During his statement in Court, PW-1 constable Naresh Kumar has identified accused-appellant Boby @ Sushil as well as the said recovered knife vide material Ex. 1. PW-1 has also stated that he has got lodged the FIR by making an oral statement.

14. PW-2 Subhash was eye-witness of incident but he did not support the prosecution version and turned hostile. He has stated that accused-appellant Bobby @ Sushil Kumar was his neighbour and on day of incident he has come in night by rickshaw after seeing a movie. He (PW-2 Subhash) was also awaken at that time and as accused-appellant went inside his house, he started crying. PW-2 Subhash went there and saw that his household articles were lying scattered and dead body of deceased was lying there and that one knife was also lying near dead body. PW-2 has identified his signature on recovery memo of knife but stated that it was not seized in his presence. He has also stated that he cannot say that who committed murder of deceased. PW-2 Subhash was declared hostile and was cross-examined from the side of prosecution.

15. PW-3 Ramesh was also an eye-witness but he too did not support the prosecution case. PW-3 Ramesh has stated that incident has taken place about two years back but he cannot tell the time of incident. The deceased was not murdered by accused-appellant and neither the accused-appellant was apprehended in his presence nor any knife was recovered from him. He has admitted his signature on recovery memo Exhibit Ka-3 but stated that his signatures were obtained on a paper. PW-3 Ramesh was also declared hostile and he was cross-examined from the side of prosecution.

16. PW-4 constable Naveen Kumar has stated that on 04.05.2005, while he was posted at police post Hsanpur, he along with constable Naresh Kumar was on picket duty at Rakhha colony culvert. At 11:50 PM they heard some noise from other side of 'rajwaha' (sub canal) and when they went there, they saw that accused-appellant Boby @ Sushil, having a knife in his hand, was coming there. He was stopped and he has told that he has committed murder of his brother Luxman Singh. PW-4 constable Naveen Kumar further stated that accused-appellant Boby @ Sushil was taken to his house and dead body of his brother was lying there. Witnesses Ramesh, Subhash, Kallu and Salim have also gone to the spot and blood was lying near dead body. PW-4 Naveen Kumar remained at spot whereas constable Naresh Kumar and witness Ramesh and Subhash took the accused-appellant Boby @ Sushil along with knife to the police post.

17. PW-5 Nagendra Singh has recorded first information report and he has proved the FIR as Exhibit Ka-1 and G.D. Entry Exhibit Ka-4. He has also stated that accused-appellant Boby @ Sushil along with blood stained knife was brought at the police station and the knife was taken into possession vide recovery memo Exhibit Ka-5 and before that it was duly sealed.

PW-5 constable Nagendra Singh has identified the said knife as Exhibit 1. PW-5 has also proved G.D. Entry no.17 regarding departure of constable Naresh as Exhibit Ka-6.

18. PW-6 Dr. Ved Praksh has conducted postmortem on the dead body of deceased.

19. PW-7 constable Harendra Malik has taken dead body of deceased to mortuary for postmortem. PW-7 has also proved inquest report Exhibit Ka-12 and other inquest papers Exhibit Ka-13 to Ka-16, prepared by S.I. Prem Shankar Dwivedi.

20. PW-8 Inspector Vijay Kumar Yadav has conducted investigation.

21. It has been submitted by the learned counsel for the accused-appellant that both the alleged eye-witnesses, namely, PW-2 Subhash and PW-3 Ramesh have not supported the prosecution version and they have clearly stated that deceased Luxman was not murdered by accused-appellant Boby @ Sushil. They have also stated that when accused-appellant had reached at spot deceased was already lying murdered. In his statement under Section 313 Cr.P.C. accused-appellant has also stated that on the night of incident he has reached at his house at around 1:00 PM after seeing a movie and his brother was found lying murdered and theft was committed in his house. There is no other eye-witness of alleged incident. Learned counsel argued that in view of these facts conviction of accused-appellant is against the evidence on record. Learned counsel further submitted that the chain of circumstances is not complete and that nothing has been recovered at the instance of accused-appellant nor there is evidence of "last seen" against the accused-appellant. The alleged recovery of knife from appellant is thoroughly doubtful as both the public witnesses of alleged recovery did not support the prosecution version and they have stated that knife was not recovered from accused-appellant. The circumstances, relied by trial Court, are neither established nor they make any chain. The evidence on record is consistent with innocence of accused-appellant. It was further submitted that there was no motive on the part of the accused-appellant to commit murder of deceased. It was argued that there is no reliable and satisfactory evidence to base conviction of accused-appellant and thus, the trial Court committed error by convicting the accused-appellant Boby @ Sushil.

22. Per contra, it has been submitted by the learned State counsel that though both the eye-witnesses, namely, PW-2 Subhash and PW-3 Ramesh turned hostile but there are strong circumstances against accused-appellant. He was apprehended with blood stained knife soon after the incident at a distance of merely 30-35 feet from spot. The explanation offered by accused-appellant under Section 313 Cr.P.C. is thoroughly false and baseless and it has been concocted with intention to shield himself. Learned counsel submitted that there is absolutely no evidence that any theft was committed in house of accused-appellant or that his household articles were found scattered. It was stated that evidence of PW-1 Naresh Kumar and PW-4 Naveen Kumar is quite clear, consistent and reliable. No such fact could be shown in their cross-examination so as to create any doubt regarding credibility of these witnesses. On the basis of evidence PW-1 constable Naresh Kumar and PW-4 Naveen

Kumar, it is established that soon after the incident accused-appellant was apprehended with blood stained knife near his house and it is apparent that after incident he was trying to flee away from spot. It was further submitted that as per FSL report, it has been found that knife recovered from accused-appellant was stained with human blood. Learned State counsel further submitted that despite hostility of eye-witnesses, there is strong circumstantial evidence, which makes a complete chain and the evidence is of such nature that it clearly indicate that murder of deceased was committed by accused-appellant. Learned A.G.A. submitted that conviction of accused-appellant Boby @ Sushil is based on evidence and thus, it calls for no interference.

23. We have considered rival submissions and perused record.

24. Perusal of record shows that as per prosecution, PW 2 Subhash and PW 3 Ramesh were eye witness of the incident in question but they did not support prosecution version and turned hostile. The trial court has based conviction of accused-appellant Boby @ Sushil on circumstantial evidence. No doubt the conviction can be based on circumstantial evidence inspite of hostility of eye-witnesses, provided such circumstantial evidence stood the well settled test reiterated by the Hon'ble Apex court through various pronouncements time and again for sustaining conviction of accused. In this connection we may refer the case of Paramjeet Singh @ Pamma Vs State of Uttrakhand (2010) SCC 439, wherein all the seven eye witnesses have turned hostile, it was observed by the Hon'ble Apex Court that case is to be decided keeping in mind that as all the eye-witnesses turned hostile, it remained a case of circumstantial evidence.

25. It would be pertinent to mention that the even the evidence of a hostile witness is not washed off from consideration and by now it is settled principle of law, that such part of the evidence of a hostile witness, which is found to be credible, could be taken into consideration and it is not necessary to discard the entire evidence. Reference in this respect could be made to the judgment of the Apex Court in the case of **Bhajju v. State of M.P., (2012) 4 SCC 327,** which reads thus:

"36. It is settled law that the evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. The evidence of such witnesses cannot be treated as washed off the records, it remains admissible in trial and there is no legal bar to base the conviction of the accused upon such testimony, if corroborated by other reliable evidence. Section 154 of the Evidence Act enables the court, in its discretion, to permit the person, who calls a witness, to put any question to him which might be put in cross-examination by the adverse party."

26. Similarly in case **Raja and others Vs. State of Karnataka (2016) 10 SCC 506,** Hon'ble Apex Court has held that the evidence of a hostile witness in all eventualities ought not stand effaced altogether. It was held that the evidence of a hostile witness remains admissible and is open for a Court to rely on the dependable part thereof as found acceptable and duly corroborated by other reliable evidence available on record. In this connection reference may be made to case of State of Rajasthan v. Bhawani & Anr., (2003) 7 SCC 291), Radha Mohan Singh @ Lal Saheb & Ors. v. State of U.P., (2006) 2 SCC 450, Mahesh v. State of Maharashtra, (2008) 13 SCC 271, Rajendra & Anr. v.

State of Uttar Pradesh, (2009) 13 SCC 480, Koli Lakhman Bhai Chanabhai vs. State of Gujarat (1999) 8 SCC 624 and a recent case titled as Sudru Vs. State of Chattisgarh [Criminal Appeal No. 751 of 2010], decided on 22.08.2019 .

27. Before proceeding further we may gainfully refer the case **State of Gujarat v. Anirudh Singh, (1997) 6 SCC 514,** wherein the Hon'ble Apex Court observed as under :

"Every criminal trial is a voyage in quest of truth for public justice to punish the guilty and restore peace, stability and order in the society. Every citizen who has knowledge of the commission of cognizable offence has a duty to lay information before the police and cooperate with the investigating officer who is enjoined to collect the evidence and if necessary summon the witnesses to give evidence. He is further enjoined to adopt scientific and all fair means to unearth the real offender, lay the charge-sheet before the court competent to take cognizance of the offence. The charge-sheet needs to contain the facts constituting the offence/s charged. The accused is entitled to a fair trial. Every citizen who assists the investigation is further duty-bound to appear before the Court of Session or competent criminal court, tender his ocular evidence as a dutiful and truthful citizen to unfold the prosecution case as given in his statement. Any betrayal in that behalf is a step to destabilise social peace, order and progress."

28. Keeping the above stated settled position in view, in the instant case as the eye-witnesses have turned hostile thus, it is to be considered whether evidence on record establishes the involvement of accused-appellant Boby @ Sushil in the incident at the touch stone of circumstantial evidence. It is well settled that conviction can be based on circumstantial evidence alone but for that prosecution must establish chain of circumstances, which consistently points to the accused and accused alone and is inconsistent with their innocence. It is further essential for the prosecution to cogently and firmly establish the circumstances from which inference of guilt of accused is to be drawn. These circumstances then have to be taken into consideration cumulatively. They must be complete to conclude that within all human probability, accused and none else have committed the offence.

29. In case of **Hanurnant v. The State of Madhya Pradesh, [1952] 3 SCR 1091** the Hon'ble Apex Court laid down fundamental and basic principles for appreciating the circumstantial evidence. The Hon'ble Court observed:

"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

30. In a landmark judgment of Supreme Court in **Sharad Birdhichand Sarda Vs. State of Maharashtra, AIR 1984 SC 1622,** Court held as under:-

"152. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be ' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved as was held by this court in Shivaji Sahebaro Bobade V State of Maharashtra 1973 CriLJ1783 where the following observations were made:

Certainly, it is primary principle that the accused must be and not merely may be guilty before a Court can convict, and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accuses, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(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.

153. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence".

31. In **Joseph vs. State of Kerala, [(2000) 5 SCC 197],** the court has explained under what circumstances conviction can be based purely on circumstantial evidence. It observed:-

16. "it is often said that though witnesses may lie, circumstances will not, but at the same time it must cautiously be scrutinized to see that the incriminating circumstances are such as to lead only to a hypothesis of guilt and reasonably exclude every possibility of innocence of the accused. There can also be no hard and fast rule as to the appreciation of evidence in a case and being always an exercise pertaining to arriving at a finding of fact the same has to be in the manner necessitated or warranted by the peculiar facts and circumstances of each case. The whole effort and endeavor in the case should be to find out whether the crime was committed by the accused and the circumstances proved form themselves into a complete chain unerringly pointing to the guilt of the accused."

32. In **C. Chenga Reddy and others v. State of Andhra Pradesh, AIR 1996 SC 3390,** Court has held:-

"In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no

gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence."

33. The similar principle was reiterated in State of Rajasthan v. Kashi Ram (2006) 12 SCC 254, Ganesh Lal v. State of Rajasthan (2002) 1 SCC 731, State of Maharashtra v. Suresh (2000) 1 SCC 471 and State of Tamil Nadu v. Rajendran (1999) 8 SCC 679, Padala Veera Reddy v. State of Andhra Pradesh, (AIR 1990 SC 79), Vijay Shankar Vs. State of Haryana, reported in (2015) 12 SCC 644, Raja @ Rajinder Vs. State of Haryana, (2015) 11 SCC 43 and State of Himachal Pradesh Vs. Raj Kumar, reported in (2018) 2 SCC 69.

34. In **State of U.P. vs. Ashok Kumar Srivastava, [(1992) 2 SCC 86],** it was pointed out that great care must be taken in evaluating circumstantial evidence and if evidence relied on is reasonably capable of two inferences, the one in favour of accused must be accepted. It was also pointed out that circumstances relied upon must be found to have been fully established and cumulative effect of all the facts so established must be consistent only with the hypothesis of the guilt.

35. In **Varkey Joseph Vs. State of Kerala, reported in AIR 1993 SC 1892,** the Court held that suspicion cannot take place of proof. In Paragraph 12 of the judgment, Court concluded as under:-

"12. Suspicion is not the substitute for proof. There is a long distance between 'may be true' and 'must be true' and the prosecution has to travel all the way to prove its case beyond all reasonable doubt. We have already seen that the prosecution not only has not proved its case but palpably produced false evidence and the prosecution has miserably failed to prove its case against the appellant let alone beyond all reasonable doubt that the appellant and he alone committed the offence. We had already allowed the appeal and acquitted him by our order dated April 12, 1993 and set the appellant at liberty which we have little doubt that it was carried out by date. The appeal is allowed and the appellant stands acquitted of the offence under S. 302, IPC"

36. The principle that emerges from the above discussed decisions is that in a case based on circumstantial evidence, Court is required to evaluate circumstantial evidence to see that the chain of events have been established clearly and completely to rule out any reasonable likelihood of innocence of the accused. Needless to say whether the chain is complete or not would depend on the facts of each case emanating from the evidence and no universal yardstick should ever be attempted it should be tested on the touchstone of law relating to circumstantial evidence laid down by the Hon'ble Apex Court. It is trite that the conviction can be based on circumstantial evidence alone, but for that the prosecution must establish the chain of circumstances, which consistently points to the accused and accused alone and is inconsistent with his/their innocence. It is further essential for the prosecution to cogently and firmly establish the circumstances from which inference of guilt of accused is to be drawn. These circumstances then have to be taken into consideration cumulatively. They must be complete to conclude that within all human probability, the accused and none else have committed the offence.

37. In the instant case, the version of PW-1 constable Naresh Kumar is that on 04.09.2015 at about 11.50 PM while he along with constable Naveen Kumar (PW 4) was present at culvert of Rakhha colony, they heard some noise from other side of "rajwaha" (sub canal) and when they went there, they saw that accused-appellant was coming with a knife. They stopped and confronted him. Meanwhile two persons namely Subhash (PW 2) and Naresh (PW 3) also reached there. Accused-appellant told that his brother Luxman was fighting with him since evening and due to this reason he has murdered him by cutting his neck with the knife and that his dead body was lying in courtyard of his house. Accused-appellant led them (PW 1 Naresh Kumar and PW 4 constable Navin Kumar) to the spot at his house and they found that dead body of Luxman was lying in pool of blood. Accused-appellant along with said knife was brought to police station and case was lodged on the statement of PW-1 constable Naresh Kumar. This version of PW 1 constable Naresh Kumar is quite consistent and categorical. His version has been amply corroborated by PW-4 constable Navin Kumar. No doubt their version is not supported by PW 2 Subhash and PW-3 Ramesh as they turned hostile but in the peculiar facts and circumstances of the case it can not be a ground to doubt testimony of PW-1 constable Naresh Kumar and PW-4 constable Navin Kumar. The statements of both said constables are quite consistent and cogent. They have been subjected to cross-examination, but nothing adverse could emerge. One of the important factor is that there are absolutely no reasons as to why these witnesses would depose falsely against the accused-appellant. There is absolutely nothing even to remotely indicate that these witnesses have any any enmity or grudge against the accused-appellant. Even there is nothing to show that they knew the accused-appellant since before the incident. Said witness PW-2 Subhash and PW-3 Ramesh are neighbours of accused-appellant and thus, their hostility can be understood, however in these facts and circumstances the deposition of PW-1 constable Naresh Kumar and PW-4 constable Naveen Kumar can not be doubted on the ground of hostility of said public witnesses. Here it may be stated that PW-2 Subhash and PW-3 Ramesh have also stated that on the night of incident, murder of deceased was committed. It is altogether another thing that during their evidence in court these witnesses backtracked from their statements recorded during investigation and denied involvement of accused-appellant in the incident.

38. As observed earlier, the deposition of PW-1 constable Naresh Kumar and PW-4 constable Naveen Kumar is found cogent and credible. It is correct that both the witness PW-1 constable Naresh Kumar and PW-4 constable Naveen Kumar are police officials but there is no such law that testimony of such a witness has to be doubted on the ground that he is a police official. A police official is an competent witness and if testimony of such witness is found credible and without any embellishment, it can certainly be acted upon. In **Yakub Abdul Razak Memon Vs. State of Maharashtra 2013 (13) SCC 1**, reiterating the principle laid down in judgment reported in (1995) 4 SCC 255, the Apex Court has held as under:-

"360. In **Pradeep Narayan Madgaonkar and Ors. vs. State of Maharashtra** this court upheld that:-

"11.....the evidence of the official (police) witnesses cannot be

discarded merely on the ground that they belong to the police force and are either interested in the investigating or the prosecuting agency. But prudence dictates that their evidence needs to be subjected to strict scrutiny and as far as possible a corroboration of their evidence in material particulars should be sought. Their desire to see the success of the case based on their investigation and requires greater care to appreciate their testimony".

Similarly, Hon'ble Supreme Court, in **Kulwinder Singh and another Vs. State of Punjab, (2015) 6 SCC 674** has held that when the evidence of the official witnesses is trustworthy and credible, there is no reason not to rest the conviction on the basis of their evidence. In the instant case, as stated earlier, both these witnesses have stood the test of cross-examination but nothing adverse could emerge. Their presence at spot is established as both the witnesses have stated that they have left the police post Hasanpur for patrolling at about 18.45 hours vide General Diary entry No. 19. This fact has also been corroborated by PW 5 Constable Nagender, who has proved this GD entry as exhibit ka-6. There are absolutely no reasons for deposing falsely against the accused-appellant.

39. Thus, the testimony of PW-1 constable Naresh Kumar and PW 4 constable Navin Kumar, which is found cogent and credible, can not be doubted on the ground that they are police officials, particularly when there are absolutely no reasons to indicate that why they would depose falsely against the accused-appellant. In view of aforesaid facts it is clear that testimony of these witness is credible and inspires confidence and it can safely be acted upon.

40. Here we may consider the case put by accused-appellant. In his statement under section 313 CrPC, the accused-appellant Boby @ Sushil has alleged that no such incident has taken place. On the night of incident, when he returned at his home by a rickshaw after seeing a movie, he saw that door of his house was lying opened and his brother was lying murdered and one knife was lying near the dead body. Accused-appellant has further alleged that he started crying and his neighbour namely Subhash and some other persons also reached there. Police was called at spot by making a telephonic call. He and other persons went at police post to lodge a report but the tahrir was kept by police and he was falsely implicated.

41. Regarding said defence of accused-appellant Bobby @ Sushil, it may be stated that PW-8 Inspector Vijai Kumar Yadav (I.O.), who has reached at spot on the same night, after inspecting the spot he prepared site plan (exhibit ka-8) of spot but no such description like scattering of articles was noticed. He has not stated any such statement that any theft was committed in house of accused-appellant or that house hold articles were lying scattering. No such specific suggestion was made to PW-8 Inspector Vijai Kumar Yadav that he did not depict the position of spot correctly. Similarly there is nothing to support the claim of accused-appellant that knife was recovered from spot. After examining statement of PW-8 Vijai Kumar Yadav, there are no reasons to disbelieve the same. It was alleged by accused-appellant that police was informed by his neighbours by telephone but he failed the explain that who has made the telephonic call to police. Further, accused-appellant has also failed explain that what articles were stolen. In fact the said defence version

stands completely demolished by evidence of PW-1 and PW-4. As stated earlier, their deposition has been found credible and reliable. As per their evidence the accused-appellant was apprehended by near culvert and that he was having a blood stained knife. The recovery of blood stained knife from accused-appellant has been established. Considering entire evidence, the version of accused-appellant appears an afterthought and concocted, accordingly said defence version is discarded.

42. As stated earlier, the evidence of PW 1 and PW 4 has been found fully reliable. Coming to the confession of accused-appellant, it may be observed that both these witness PW-1 constable Naresh Kumar and PW-4 constable Naveen Kumar are police officials and thus, the alleged confession made by accused-appellant admitting his involvement in murder of deceased can not be proved against accused-appellant as the same is hit by provisions of section 27 of Evidence Act, however the other facts like that accused-appellant has disclosed that his brother has been murdered and his dead body is lying in courtyard of his house can certainly be taken in to consideration as one of the circumstance. It is also established from evidence of PW 1 constable Naresh Kumar and PW 4 constable Navin Kumar that in pursuance of said disclosure, accused-appellant has led them to his house, where dead body of deceased was found lying in pool of blood.

43. At this stage we may refer case of **Mohmed Inayatullah v. The State of Maharashtra, (1976) 1 SCC 828**, wherein while dealing with the ambit and scope of section 27 of the Evidence Act, the Court held that:

"11. Although the interpretation and scope of Section 27 has been the subject of several authoritative pronouncements, its application to concrete cases is not always free from difficulty. It will therefore be worthwhile at the outset, to have a short and swift glance at the Section and be reminded of its requirements. The Section says:

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

12. The expression "provided that" together with the phrase "whether it amounts to a confession or not" show that the Section is in the nature of an exception to the preceding provisions particularly Sections 25 and 26. It is not necessary in this case to consider if this Section qualifies, to any extent, Section 24, also. It will be seen that the first condition necessary for bringing this Section into operation is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person Accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the Accused must be in police custody. The last but the most important condition is that only "so much of the information" as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded. The word "distinctly" means "directly", "indubitably", "strictly", "unmistakably". The word has been advisedly used to limit and define the scope of the provable information. The phrase "distinctly relates to the fact thereby discovered" is the linchpin of the provision. This phrase refers to that part of the

information supplied by the Accused which is the direct and immediate cause of the discovery. The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement which' may be indirectly or remotely related to the fact discovered.

13. At one time it was held that the expression "fact discovered" in the Section is restricted to a physical or material fact which can be perceived by the senses, and that it does not include a mental fact (see Sukhan v. Emperor, Ganu Chandra Kashid v. Emperor). Now it is fairly settled that the expression "fact discovered" includes not only the physical object produced, but also the place from which it is produced and the knowledge of the Accused as to this (see Palukuri Kotayya v. Emperor, Udai Bhan v. State of U P)".

44. In this connection we may gainfully refer that the Hon'ble Privy Council in **Pulukuri Kotayya v. King Emperor AIR 1947 PC 74 IA 65,** has held: (IA p.77)

"..it is fallacious to treat the 'fact discovered' within the Section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the Accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A', these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant".

45. In **Aftab Ahmad Anasari v. State of Uttaranchal 2010 2 SCC 583** after referring to the decision of Palukuri Kotayya (supra), the Court adverted to seizure of clothes of the deceased which were concealed by the accused. In that context, the Court opined that:

"40. ...the part of the disclosure statement, namely, that the Appellant was ready to show the place where he had concealed the clothes of the deceased is clearly admissible Under Section 27 of the Evidence Act because the same relates distinctly to the discovery of the clothes of the deceased from that very place. The contention that even if it is assumed for the sake of argument that the clothes of the deceased were recovered from the house of the sister of the Appellant pursuant to the voluntary disclosure statement made by the Appellant, the prosecution has failed to prove that the clothes so recovered belonged to the deceased and therefore, the recovery of the clothes should not be treated as an incriminating circumstance, is devoid of merits."

46. In **State of Maharashtra v. Damu AIR 2000 SC 1691,** Hon'ble Apex Court held:

"35. ...It is now well settled that recovery of an object is not discovery of a fact as envisaged in [Section 27 of the Evidence Act, 1872]. The decision of the

Privy Council in Pulukuri Kotayya v. Emperor AIR 1947 PC 67 is the most quoted authority for supporting the interpretation that the 'fact discovered' envisaged in the Section embraces the place from which the object was produced, the knowledge of the Accused as to it, but the information given must relate distinctly to that effect".

47. In case of **State of Punjab v. Gurnam Kaur (2009) 11 SCC 225**, it has been held laid down that if that if by reason of statements made by an accused some facts have been discovered, the same would be admissible against the person who has made the statement in terms of section 27 of the Evidence Act. The similar principle has been laid down in Charandas Swami V State of Gujarat (2017) 7 SCC 177, Udaibhan Rai V State of UP AIR 1994 SC 1603. State of Maharashtra v. Suresh (2000) 1 SCC 471. Bhagwan Dass v. State (NCT of Delhi) AIR 2011 SC 2352, and Rumi Bora Dutta v. State of Assam (2013) 7 SCC 417.

48. Keeping the aforesaid position of law in mind, in the instant case it may be observed that statements of PW-1 and PW-4 to the extent that accused-appellant has disclosed that his brother Luxman was fighting with him since evening and that he has been murdered and that his dead body is lying in courtyard of his house and that he led the PW-1 constable Naresh Kumar and PW-4 constable Navin Kumar to said spot, where dead body of deceased Luxman was found lying in pool of blood, can be proved against the accused-appellant. These facts are distinct from the alleged confession made by accused-appellant before these witnesses that he has committed murder of deceased. As stated earlier, in this regard statements of both the witness PW-1 and PW-4 are credible and inspire confidence. These witness have no knowledge or information that there was any fighting between the accused-appellant and the deceased or that deceased has been murdered or that his dead body is lying in house of accused-appellant. These facts were discovered from statement of accused-appellant and thus, the same would be admissible against him in terms of section 27 of the Evidence Act. Thus, it stand proved against the accused-appellant that soon after the incident he was apprehended by PW-1 and PW-4 only at a distance of about 30-35 feet from his house while he was coming with a blood stained knife and that it was disclosed by him that his brother Luxman was fighting with him since evening and that deceased Luxman has been murdered and that his dead body is lying in courtyard of his house and that he led the police party to said spot, where dead body of deceased Luxman was lying in pool of blood. This discovery of fact is one of the important circumstance against the accused-appellant.

49. The most clinching evidence against the accused-appellant is recovery of blood stained knife from his possession. From the evidence of PW-1 and PW-4 it is clear when they stopped the accused-appellant Bobby @ Sushil, he was having a blood stained knife in his hand. This knife was taken in to possession vide recovery memo exhibit ka-3. Though the recovery of knife from accused-appellant was denied by PW-2 and PW-3, obviously due to the reason that they turned hostile to prosecution version but in this regard the evidence of PW-1 and PW-4 has been found credible. The knife has been identified by them as material exhibit 1 during their evidence and recovery of blood stained knife from accused-appellant, as

stated by PW 1 and PW 4, has been proved beyond doubt. From FSL report exhibit ka-11, which is admissible in evidence under section 293 CrPC, it is clear that this knife was stained with human blood. Here it would be pertinent to mention that accused-appellant has failed to offer any satisfactory explanation that soon after the incident what he was doing with human blood stained knife. As stated earlier his explanation that knife was not recovered from him or that it was lying near dead body of deceased is found false and concocted. Thus, recovery of knife stained with human blood, soon after the incident, and merely at a distance of 30-35 steps from spot, is a highly incriminating circumstance against him.

50. Further, the conduct of accused-appellant is quite inculpatory. As per accused-appellant, his brother was murdered by some unknown miscreants, but if it was so, he has offered no satisfactory explanation that why he was trying to fled away with a blood stained knife instead of reporting the matter to police. Similarly there is no explanation that how this knife recovered from him was stained with human blood. As stated earlier the story made up by appellant that theft was committed in house and his house hold articles were lying scattered is also found false and concocted. Thus, it is clear that conduct of accused-appellant is highly incriminating. The recovery of blood stained knife, soon after the incident, from accused-appellant and unnatural conduct of accused-appellant are highly incriminating circumstances against the accused.

51. So far as question of motive is concerned, it is well settled that in cases where the case of the prosecution rests purely on circumstantial evidence, motive undoubtedly plays an important part in order to tilt the scale against the accused. While dealing with a similar issue, the Court in **State of U.P. Vs. Kishanpal & Ors., (2008) 16 SCC 73** held as under:

"The motive may be considered as a circumstance which is relevant for assessing the evidence but if the evidence is clear and unambiguous and the circumstances prove the guilt of the accused, the same is not weakened even if the motive is not a very strong one. It is also settled law that the motive loses all its importance in a case where direct evidence of eyewitnesses is available, because even if there may be a very strong motive for the accused persons to commit a particular crime, they cannot be convicted if the evidence of eyewitnesses is not convincing. In the same way, even if there may not be an apparent motive but if the evidence of the eyewitnesses is clear and reliable, the absence or inadequacy of motive cannot stand in the way of conviction."

In **Surinder Pal Jain v. Delhi Admisnitration JT 1993 (2) SCC 206** Hon'ble Supreme Court has held that in a case based on circumstantial evidence, motive assumes pertinent significance as existence of the motive is a an enlightening factor in a process of presumptive reasoning in such a case. The absence of motive, however, puts the court on its guard to scrutinize the circumstances more carefully to ensure that suspicion and conjecture do not take place of legal proof. Similar view has been expressed by Hon'ble Supreme Court in **Tanviben Pankaj Kumar Divetia AIR 1997 SC 2193,** wherein it has been held that motive for murder may not be revealed in many cases but if evidences of murder are very clinching and reliable, conviction can be based even if the motive is not established.

In a case of circumstantial evidence, motive assumes greater importance than in the case where direct evidences for murder are available. In **Nathuni Yadav and Others V State of Bihar 1998 (9) SCC 238,** Hon'ble Supreme Court has held that motive for doing a criminal act is generally a difficult area for prosecution. One cannot normally see into the mind of another. Motive is emotion which impells a man to do a particular act. Such impelling cause need not necessarily be proportionally grave to do grave crimes. Many a murders have been committed without any known or prominent motive.

Thus, it is evident from the above stated judgments of Hon'ble Supreme Court that it is not necessary to prove motive for each and every case but when the prosecution cases rests entirety upon circumstantial evidence, motive assumes significance.

52. Keeping in view the settled legal principle, in this case, as observed earlier, PW 1 and PW 4 have consistently stated that after the accused-appellant was apprehended with blood stained knife, he has stated that his brother Luxman was fighting him since evening. Though as per PW-1 and PW-4, the accused-appellant has also stated that due to that reason he has murdered him but this fact can not be proved against accused-appellant. However, the fact that soon after the incident when accused-appellant was apprehended with blood stained knife, his statement to the effect that his brother Luxman (deceased) was fighting with him since evening is not hit by provisions of section 27 of Evidence Act. Considering this fact in view of attending fact and circumstances, it is established that as there was some fight between the accused-appellant and the deceased and thus, the accused-appellant has motive to commit murder of deceased.

53. At this stage it may be stated that evidence shows that both accused-appellant Boby @ Sushil and deceased Luxman were living in a common house. Evidence on record does not indicate that any other family member was also residing with them. Section 106 of Evidence Act provides, inter alia, that when any fact is especially within the knowledge of any person the burden of proving that fact is upon him. Though this [Section 101] 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 and 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. (Shambhu Nath Mehra v. State of Ajmer AIR 1956 SC 404 [2). In case of **Jagdish v. State of Madhya Pradesh {(2009) 9 SCC 495} [6]** the Hon'ble Apex Court observed as follows:

"It bears repetition that the appellant and the deceased family members were the only occupants of the room and it was therefore incumbent on the appellant to have tendered some explanation in order to avoid any suspicion as to his guilt."

54. The law, therefore, is quite well settled that the burden of proving the guilt of an accused is on the prosecution, but

there may be certain facts pertaining to a crime that can be known only to the accused, or are virtually impossible for the prosecution to prove. These facts need to be explained by the accused and if he does not do so, then it is a strong circumstance pointing to his guilt based on those facts. In this regard reference may be made to the case **State of Rajasthan Vs. Thakur Singh, 2014 CriLJ 4047**. Thus, applying this principle to the facts of the case, it may be stated that as the explanation offered by accused-appellant Boby @ Sushil is found false and concocted, therefore, in such matters the false explanation can always be taken into consideration to fortify the finding of guilt already recorded on the basis of other circumstances.

55. In the instant case, considering entire evidence it has been established that soon after the incident the accused-appellant was apprehended with human blood stained knife and that there was some fight between his brother Luxman and him since evening. It is further established that accused-appellant has disclosed that his brother Luxman has been murdered and his dead body is lying in courtyard of his house and that he led PW 1 and PW 4 to spot, where dead body of deceased was found lying in pool of blood. The knife recovered from accused-appellant was found stained with human blood. The accused-appellant has offered false explanation that when he reached at his house, his brother was found murdered and a knife was lying there. Similarly he concocted false story regarding theft in house. Thus, he could not offer any satisfactory explanation that how his brother suffered homicidal death. Similarly there is no explanation that why, soon after incident, he was having a blood stained knife, how it got to be stained with human blood, why he did not report the matter to police and that why he was trying to fled away from spot leaving the dead of his brother at his house. Once the prosecution established a prima facie case, the appellant was obliged to furnish some explanation under Section 313, Cr.P.C. with regard to the circumstances under which the deceased met an homicidal death inside the house. His failure to offer any satisfactory explanation therefore leaves no doubt for the conclusion of his being the assailant of the deceased.

56. It may be stated here that on material aspects the facts of this case find quite resemblance with the case of **Paramjeet Singh alias Pamma vs. State of Uttarakhand (2010) 10 SCC 439**, wherein the appellant was charged for killing his real brother and his two nephews and injuring his father and nephews Ajit Singh (PW.1) and Baljit Singh (PW.2) in broad day light but during trial eye witnesses have turned hostile. While appreciating the evidence, Hon'ble Apex Court held as under:

"41. The witnesses i.e. Ajit Singh (PW.1) and Baljit Singh (PW.2) in their respective depositions have admitted their presence at the place of incident and admitted to suffering those injuries. In their statements under Section 161 Cr.P.C. they have also admitted that they suffered the aforesaid injuries at the hands of the appellant. It was at a later stage that they have denied any role of the appellant. Their statements to that effect are not trustworthy for the simple reason that they failed to offer any explanation for why they assigned the said role to the appellant in their statements under Section 161 Cr.P.C. and why the appellant had been named by Ajit Singh (PW.1) while lodging the FIR. It is relevant to note that the witnesses, namely,

Ajit Singh (PW.1) and Baljit Singh (PW.2) have also deposed that after the incident, a Panchayat was convened and it pardoned the appellant. The version of convening the Panchayat and grant of pardon to the appellant has duly been supported by Gurmit Singh (PW.3) and Satwant Singh (PW.4).

Gurmit Singh (PW.3) deposed:

".....it is correct that accused is my cousin. The matter had been compromised in the Panchayat". Satwant Singh (PW.4) deposed:

"....matter had been compromised in the Panchayat. Panchayat had pardoned Pamma accused".

It is pertinent to mention here that injured Hardayal Singh could not be examined as he died of cancer during the trial.

42. It is evident from the above that the view taken by the courts below, that the eye-witnesses turned hostile because of the decision taken in the Panchayat, pardoning the appellant, does not require any interference. It is also evident from the above that the said eye-witnesses have no regard for the truth and concealed the material facts from the court only in order to protect the appellant, for the reasons best known to them. Such an unwarranted attitude on the part of the witnesses disentitles any benefit to the appellant, who has committed a heinous crime. The crime had been committed against the society/State and not only against the family and therefore, the pardon accorded by the family and Panchayat has no significance in such a heinous crime.

43. It has been canvassed on behalf of the appellant that the trial Court committed an error relying upon various factors/incriminating materials which were not pointed out to the appellant while recording his statement under Section 313 Cr.P.C. Such material had been in respect of (i) recovery of gun from arms dealer at Rampur; (ii) motive;

(iii) abscondance of the appellant; and (iv) compromise in Panchayat which pardoned the appellant.

44. So far as the circumstance of recovery of gun from the arms dealer at Rampur is concerned, the trial court had put a question to the appellant and he has answered the same. The question and answer read as under:

"Q. It has come in evidence that the Investigating Officer prepared a site plan of the place of occurrence which is Exh.K-26. Your licenced gun 17466/96 was recovered at your instance from Rampur and the Recovery Memo was prepared which is K-39, the site plan of the place of recovery is Exh.K-45. The forensic science laboratory report in respect of the case property is Exh. K-44, what have you to say?

Ans. The gun was not recovered at my instance. This number 17466/96 is the number of my licenced gun. I had deposited this gun with a dealer at Rampur. The police has concocted the story of recovery."

It appears that the number of one of the exhibits had wrongly been pointed out as K-44, though it was Exh. K-46. But it is not a case where no question was put to the accused on the said circumstance.

So far as the issue of motive is concerned, the case is squarely covered by the judgment of this court in Suresh Chandra Bahri (supra). Therefore, it does not require any further elaborate discussion. More so, if motive is proved that would supply a link in the chain of circumstantial evidence but the absence thereof cannot be a ground to reject the prosecution case. (Vide: State of Gujarat v. Anirudhsing [supra])

The third circumstance i.e. the abscondance of the appellant has also been taken into consideration by the courts below. We have clarified that it cannot be a circumstance against the appellant. Thus, not putting a question on this particular circumstance to the appellant remained inconsequential. The courts below had considered that the appellant could not furnish any explanation for his absence for about six days. Appellant failed to raise any positive defence and answered all the questions put to him in an evasive manner. Such a view is permissible being in consonance with the law laid down by this Court in Raj Kumar Prasad Tamarkar v. State of Bihar, (2007) 10 SCC 433; and Amarsingh Munnasingh Suryawanshi v. State of Maharashtra, (2007) 15 SCC 455.

47. So far as the fourth circumstance i.e. the compromise in Panchayat and the pardoning of the appellant is concerned, it cannot be labelled as a circumstance charging the appellant with a crime. By no stretch of the imagination can it be held that the said circumstance involved any accusation towards the appellant. In fact, in cannot be termed as incriminating material, proving the offence against the appellant, rather it had been a circumstance due to which all the seven eye-witnesses turned hostile.

Be that as it may, we are of the considered opinion that not putting questions regarding anyone of the aforesaid circumstances can not be held to be a serious irregularity inasmuch as the same may vitiate the conviction. More so, in the present case, it has not materially prejudiced the appellant nor has it resulted in a miscarriage of justice.

48. If the case is considered in the totality of the circumstances, also taking into consideration the gravity of the charges, the appellant had killed his real brother, Inderjit Singh and his nephews, Surender Singh and Saranjit Singh and injured his father Hardayal Singh and nephews Ajit Singh (PW.1) and Baljit Singh (PW.2) in broad day light. The FIR had been lodged promptly, naming the appellant as the person who committed the offence. All the eye-witnesses, including the injured witnesses, attributed the commission of the offence only to the appellant in their statements under Section 161 Cr.P.C. It is difficult to imagine that the complainant and the eye- witnesses had all falsely named the appellant as being the person responsible for the offence at the initial stage itself. Thus, we do not see any cogent reasons to interfere with the concurrent findings of fact by the courts below. The appeal lacks merit and is hereby dismissed."

57. Applying the ratio of above said pronouncement of Hon'ble Apex in the facts and circumstances of instant case and considering the evidence on record, it clearly emerges that all the incriminating circumstances have been cogently and firmly established and these circumstances are of definite tendency unerringly pointing towards guilt of the accused-appellant. When these circumstances taken cumulatively, form a chain so complete that there is no escape from the conclusion that within all human probability, the murder of deceased Luxman was committed by the accused-appellant Boby @ Sushil and none else. The circumstantial evidence is incapable of explanation of any other hypothesis than that of the guilt of the accused-appellant and it inconsistent with his innocence. In view of evidence on record we reach to the conclusion that conviction of accused-appellant is based on evidence and there are no tangible reasons to interfere with same same. The sentence

awarded to accused-appellant is also appropriate. Thus, the appeal has no merit.

58. Appeal is dismissed.

59. Accused-appellant Boby @ Sushil is stated in judicial custody, hence he shall serve out remaining sentence.

60. A copy of this order as well as the trial court record be sent back to the court concerned.

(2020)10ILR A70
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.09.2020

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE RAJ BEER SINGH, J.

Criminal Appeal No. 5050 of 2006

Ram Ajor ...Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Sheetla Prasad Pandey, Sri S.K. Tiwari, Sri Ravindra Prakash Srivastava

Counsel for the Opposite Party:
Ms. Archana Singh, A.G.A.

Criminal law - Indian Penal Code, 1860- Section 304 –B- Death of wife under unnatural circumstances within seven years of her marriage -Not disputed that deceased died of strangulation within seven years of her marriage. However, there is no evidence that deceased was done to death by the accused-appellant and in view of defence evidence, it appears that she was found hanging on a tree, while she has gone to collect grass. Here it would be pertinent to mention that even death by suicide also falls within the ambit of "death otherwise than under normal circumstances " as contemplated under section 304-B (1) of IPC. It is clear from post-mortem report of deceased that she died of strangulation. Thus it clear that death of deceased was "otherwise than under normal circumstances".

Death of wife, even by suicide, within seven years of her marriage will come within the ambit of Section 304-B of the IPC as the same would constitute an unnatural circumstance.

Evidence Law - Indian Evidence Act, 1872- Section 113-B- Presumption under- Section 113-B of the Evidence Act mandates that the Court has to raise the statutory presumption in a case where it is shown that soon before her death such woman has been subjected to cruelty or harassment for or in connection with any demand of dowry. Once the initial burden of showing that the woman was subject to cruelty or harassment for or in connection with any demand of dowry soon before her death is discharged by the prosecution, the Court has to presume that such person has caused a dowry death unless the accused disproves it. However, it is open to the accused to adduce such evidence for disproving the said compulsory presumption, as the burden is unmistakably on him to do so.

The presumption under section 113-B of the Evidence Act is mandatory and casts the burden of proof upon the accused where the prosecution establishes that the deceased died under unnatural circumstances, within seven years of her marriage and was subjected to cruelty and harassment in pursuance of demand of dowry soon before her death. However, the said presumption is rebuttable and the burden can be discharged by the defence by leading evidence for disproving the said presumption.

Criminal Law - Indian Penal Code, 1860- Section 304 –B – Expression "soon before her death"- It is manifest that there is a proximate connection between the demand of dowry and act of cruelty / harassment and the death of deceased. The interval between cruelty and death of

deceased is not much and such gap has to be examined in the attending facts and circumstances of the matter. In view of evidence there appears a proximate and live link between the effect or cruelty based on dowry demand and the death of deceased. As observed by the Hon'ble Apex Court, the determination of the period which can come within the term "soon before" is to be determined by courts, depending upon facts and circumstances of each case and it normally imply that the interval should not be much between the concerned cruelty or harassment and effect of cruelty based on dowry demand and the concerned death.

The term "Soon before her death" implies that there should be a proximate and live link between the time of death of wife and the cruelty in pursuance of demand of dowry but the determination of the said interval will depend upon the facts and circumstances of each case and no straightjacket formula can be applied.

Quantum of sentence- It is settled legal position that appropriate sentence should be awarded after giving due consideration to the facts and circumstances of each case, nature of offence and the manner in which it was executed or committed. The measure of punishment should be proportionate to gravity of offence. Object of sentencing should be to protect society and to deter the criminal in achieving avowed object of law. Having regard to the totality of facts and circumstances of the instant case including the fact that accused-appellant Ram Ajor in custody since last 16 years, we are of the considered opinion that the ends of justice would meet, if we reduce the sentence of the appellant from life imprisonment to that of already undergone by the accused-appellant.

The quantum of sentence depends upon the nature and gravity of the offence and a balance has to be struck between the extenuating or mitigating circumstances and the commission of the offence. Accordingly sentence reduced to the period undergone.

Appeal partly allowed. (Para 22, 24, 25, 26, 27, 28,30, 33) (E-3)

Case Law relied upon:-

1. Hem Chand Vs. St. of Har.(1994) 6 SCC 727

2. Kashmir Kaur Vs. St. of Punj., AIR 2013 SC 1039

3. Rajender Singh Vs. St. of Punj. Crl. Appeal No. 2321 of 2009

4. Smt. Shanti & anr. Vs. St. of Har. (1991) 1 SCC 371

5. Kans Raj Vs. St. of Punj. & ors.(2000) 5 SCC 207

6. Banshi Lal Vs. St. of Har., AIR 2011 SC 691

7. Mustafa Shahdal Shaikh Vs. St. of Maha., AIR 2013 SC 851

8. Kaliyaperumal Vs. St. of T. N, AIR 2003 SC 3828

9. Prem Kumar Vs. St. of Raj. (2009) 3 SCC 726

10. Yashoda Vs. St. of M.P. (2004) 3 SCC 98

11. Sumer Singh Vs. Surajbhan Singh & ors, (2014) 7 SCC 323

12. Sham Sunder Vs. Puran, (1990) 4 SCC 731

13. M.P. Vs. Saleem, (2005) 5 SCC 554

14. Ravji Vs. St. of Raj. (1996) 2 SCC 175

15. V.K. Mishra & anr. Vs. St. of U.K & Anr., 2015 Law Suit (SC) 665

16. Hem Chand Vs. St. of Har., [(1994) 6 SCC 727

17. G.V. Siddaramesh Vs. St. of Kar., (2010) 3 SCC 152

18. Crl. Appeal No. 724 of 2019 Kashmira Devi Vs. St. of U.K & Ors, decided on 28.01.2020

(Delivered by Hon'ble Raj Beer Singh J.)

1. This Criminal Appeal has been preferred against judgment and order 07.08.2006 / 08.08.2006 passed by learned Additional Sessions Judge / FTC, court No. 3, Basti in Session Trial No. 267 of of 2004 (State Vs. Ram Ajor and another), Police Station Dudhara, District Basti, whereby accused-appellant Ram Ajor has been convicted under sections 498A, 304-B of Indian Penal Code (hereinafter referred as IPC) and Section 4 of Dowry Prohibition Act (hereinafter refered as DP Act) and he was sentenced to three years rigorous imprisonment along with fine of Rs. 2000/- under Section 498-A IPC, life imprisonment under section 304-B IPC and one year rigorous imprisonment along with fine of Rs. 2000/- under Section 4 DP Act. All the sentences were directed to run concurrently.

2. Accused appellant Ram Ajor is husband of deceased Vimla Devi. As per first information report, prosecution version is that marriage of the accused-appellant Ram Ajor was solemnized with deceased Vimla Devi (daughter of informant Daya Ram) about six years prior to the incident and that informant Daya Ram has given dowry like clothes, utensils and and watch etc. in the marriage. After marriage, accused-appellant Ram Ajor and his family members used to harass the deceased on account of dowry. They used to demand a golden chain and colour TV as additional dowry. Meanwhile, accused-appellant has also developed illicit relations with one widow lady namely Kismati Devi. Accused-appellant Ram Ajor used to beat the deceased at instance of said Kismati Devi. When deceased told these facts to her maternal family, her father has given a buffalo and some cash to the appellant but he was still not satisfied and continued to harass the deceased. On 21.06.2004 at around 10:00 AM while the deceased has gone for collecting grass (fodder), she was done to death by accused-appellant and alleged Kismati Devi.

3. Perusal of record shows after alleged incident on 21.06.2004, accused-appellant has given an information to the police vide application exhibit Kha-1 on 21.06.2004 stating that when his wife has gone to collect grass in jungle, she has got herself hanged by neck's noose of her "saari' on a katahal tree. Thereafter, police have reached at the spot. Inquest proceedings were conducted by S.I. Motilal vide inquest report exhibit Ka-8 and dead body of the deceased was sealed and it was sent for post-mortem.

4. Post-mortem on the body of the deceased was conducted by PW-4 Dr. Mohd. Iqbal on 22.06.2004 vide post-mortem report exhibit Ka-2. Deceased Vimla has sustained following injuries:-

(i) Contusion 8 cm x 8 cm over front of left shoulder.

(ii) Contusion 5.6 cm x 5.2 over mid part of left neck.

(iii) Contusion 6.2 cm x 4.8 cm over mid part of right neck.

(iv) Contusion 7.2 cm x 7 cm over left cheek.

The membranes and brain of deceased were congested. Similarly, laryn, trakiya and bronchi, Liver, spleen and kidney were also found congested.

Cause of death was due to asphyxia as a result of strangulation.

5. On 23.06.2004 informant Daya Ram has submitted a tehrir exhibit Ka-1 at the police station alleging facts as mentioned earlier and

on that basis case was registered on 23.06.2004 by 16:30 hours under Section 498A, 304B IPC and ¾ DP Act against accused-appellant Ram Ajor and co-accused Kismati Devi vide FIR exhibit Ka-6.

6. Investigation was conducted by PW-5 Ashok Kumar, Circle Officer, Mehdawal, Basti. During course of the investigation site plan exhibit Ka-3 was prepared and statements of witnesses were recorded. After completion of investigation, charge sheet was filed against accused appellant Ram Ajor and co-accused Kismati Devi.

7. Trial court framed charges under Section 498-A, 304-B IPC and Section 3/4 of DP Act against the accused-appellant and co-accused Kismati Devi. In order to bring home guilt of the accused persons, prosecution has examined six witnesses.

8. Accused persons were examined under section 313 Cr.P.C., wherein accused-appellant Ram Ajor took the plea that his marriage was solemnized with deceased about 7-8 years ago and after death of his wife Vimla Devi, informant Daya Ram was making illicit demand of money from him and when he declined, a false case was lodged against him.

9. In defence evidence, accused-appellant Ram Ajor himself has appeared as DW-1. One constable Devi Sharan Pandey was examined as DW-2.

10. After hearing and analysing evidence on record, accused-appellant was convicted under Section 498-A, 304-B IPC and section of 4 of DP Act and sentenced as stated in opening paragraph of this judgment whereas co-accused Kismati Devi was acquitted.

11. Being aggrieved by the impugned judgment and order, accused-appellant has preferred this criminal appeal.

12. Heard Sri Sheetala Prasad Pandey, learned counsel for appellant and Ms. Archana Singh, learned A.G.A. for the State and perused the record.

13. Learned counsel for the appellant has not disputed the findings of facts and he has confined his arguments only regarding quantum of sentence.

14. Though this appeal is being pressed on behalf of appellant on the quantum of sentence only, however, we have gone through the entire evidence.

15. Informant/PW-2 Daya Ram has deposed that the marriage of his daughter Vimla was solemnized with accused appellant Ram Ajor in month of June, 1998 and he has given dowry articles like bicycle etc.. After some time, his daughter has told him that accused-appellant was making demand of golden chain and colour TV and on that account he used to harass and beat her. When his son Surya Bhan used to visit matrimonial home of deceased, she used to tell him that about torture meted out to her on account of dowry demand. She has also told that accused-appellant Ram Ajor has developed illicit relations with one widow lady Kismati Devi. PW-2 Daya Ram further stated that his daughter Vimla has given birth to three children and at the time of her death, her youngest daughter was aged only 2-3 months. One week prior to the incident, Surya Bhan has visited her matrimonial home and Vimla Devi has told him about harassment on account of dowry. On 21.06.2004 PW-2 Daya Ram was informed by his sister that his daughter Vimla Devi

has been done to death by accused persons. PW-2 Daya Ram and his family members went there and they were informed by the villagers that when Vimla Devi has gone to collect grass, she was murdered by accused persons.

16. PW-1 Surya Bhan, who is brother of deceased, has also made a similar statement and stated that the marriage of deceased was solemnized with accused-appellant on 20.06.1998. After some months of marriage, when she came back to her paternal home, she told about demand of colour TV and golden chain being made by the accused-appellant and also stated that in case the demand is not fulfilled, her husband has threatened to kill her. Deceased has also told that appellant Ram Ajor was having some affair with one Kismati Devi. PW-1 Surya Bhan and his father have tried to make the appellant understand by saying that after some time, they will fulfil his demands and that they have also given one buffalo and Rs.2000/- cash to him but despite that accused-appellant continued to harass the deceased. PW 1 has further stated that he has visited his sister only one week prior to the incident and she told that she was being beaten and harassed by the accused-appellant. He furtherstated that on 21.06.2004 when Vimla has gone to collect grass, she was done to death by the accused persons by pressing her neck.

17. PW-3 Kesra Devi is sister of first informant and she has also deposed that accused appellant used to harass the deceased on account of dowry.

18. PW-4 Dr. Mohd. Iqbal has conducted post mortem.

19. PW-5 Ashok Kumar, Circle Officer has conducted investigation and PW-6 Head Constable Daya Shanker Yadav has recorded FIR and he has also proved inquest report by way of secondary evidence.

20. In defence evidence, accused-appellant Ram Ajor, himself appeared in to witness box as DW-1 and he stated that on day of incident, while he was present at a tea shop, one girl has informed that his wife Vimla has got herself hanged at a Katahal (jackfruit) tree in jungle. He reached at the spot and brought down her dead body from the tree and police was informed by him vide exhibit Kha-1.

21. DW-2 Constable Devi Sharan Pandey has stated that on 21.06.2004 at 16:05 hours Ram Ajor has submitted a tehrir, which was registered in general diary vide entry exhibit Kha-1.

22. Close scrutiny of evidence shows that marriage of deceased with accused appellant has taken place in June, 1998 and alleged incident took place on 21.06.2004 and thus, it is quite apparent that deceased has suffered death otherwise than under normal circumstances within seven years of her marriage. In fact, this fact is not disputed that incident in question took place within seven years of the marriage of deceased. There is clear and consistent evidence that after marriage, accused-appellant used to demand golden chain and colour TV as additional dowry and on that account he harassed the deceased. PW-1 Surya Bhan and PW-2 Daya Ram have made quite clear and cogent statements. They have been subjected to cross-examination but no such adverse fact could emerged so as to affect the substance of their testimony. PW-1 Surya Bhan is brother of deceased and PW-2 Daya Ram is father of deceased and thus, it is quite natural that deceased would tell them about the harassment meted out to her. In dowry

death cases direct ocular testimony is rarely available and in most of such offence direct evidence is hardly available and such cases are usually proved by circumstantial evidence. No material contradiction or inconsistency could be pointed out in their testimony. No doubt the first information report was lodged after two days of incident and it is also evident from defence evidence that after the incident, accused-appellant has informed the police, however the same would not affect the credibility of PW-1 Surya Bhan and PW-2 Daya Ram, whose statements appear quite consistent and cogent. In such matters mere delay of two days in lodging the first information report can not be given much importance, particularly when the statements of material witnesses appear reliable.

23. A reading of Section 304-B I.P.C. would show that when a question arises whether a person has committed the offence of dowry death of a woman that all that is necessary is it should be shown that soon before her unnatural death, which took place within seven years of the marriage and the deceased had been subjected, by such person, to cruelty or harassment for or in connection with demand for dowry. If that is shown then the court shall presume that such a person has caused the dowry death. It can therefore be seen that irrespective of the fact whether such person is directly responsible for the death of the deceased or not by virtue of the presumption, he is deemed to have committed the dowry death if there were such cruelty or harassment and that if the unnatural death has occurred within seven years from the date of marriage. Likewise there is a presumption under Section 113-B of the Evidence Act as to the dowry death. It lays down that the court shall presume that the person who has subjected the deceased wife to cruelty soon before her death shall be presumed to have caused the dowry death if it is shown that before her death, such woman had been subjected, by the accused, to cruelty or harassment in connection with any demand for dowry. It can therefore be seen that irrespective of the fact whether the accused has any direct connection with the death or not, he shall be presumed to have committed the dowry death provided the other requirements mentioned above are satisfied.(Hem Chand v. State of Haryana reported in [(1994) 6 SCC 727])

In case of ***Kashmir Kaur Vs. State of Punjab, AIR 2013 SC 1039,*** Hon'ble Apex Court held that in a case of trial for dowry death the essential ingredients to attract the provisions of section 304-B I.P.C. for establishing offence are (a) that soon before the death of the deceased she was subjected to cruelty and harassment in connection with the demand of dowry, (b) the death of the deceased woman was caused by any burn or bodily injury or some other circumstance, which was not normal, (c) such death occurs within seven years from the date of her marriage, (d) that the victim was subjected to cruelty or harassment by her husband or any relative of her husband, (e) such cruelty or harassment should be for or in connection with demand of dowry, and (f) it should be established that such cruelty and harassment was made soon before her death.

The necessary ingredients to prove the offence of dowry death punishable under section 304-B IPC have been discussed by the Hon'ble Apex Court time and again. In case of ***Rajender Singh Vs State of Punjab Criminal Appeal No. 2321 of 2009,*** the Hon'ble Apex Court held as under (para 9 & 10):

"9, The ingredients of the offence under Section 304-B have been stated and restated in many judgments. There are four such ingredients and they are said to be:

(a) death of a woman must have been caused by any burns or bodily injury or her death must have occurred otherwise than under normal circumstances;

(b) such death must have occurred within seven years of her marriage;

(c) soon before her death, she must have been subjected to cruelty or harassment by her husband or any relative of her husband; and

(d) such cruelty or harassment must be in connection with the demand for dowry.

10, This has been the law stated in the following judgments:

Ashok Kumar v. State of Haryana, (2010) 12 SCC 350 at pages 360-361; Bachni Devi & Anr. v. State of Haryana, (2011) 4 SCC 427 at 431, Pathan Hussain Basha v. State of A.P., (2012) 8 SCC 594 at 599, Kulwant Singh & Ors. v. State of Punjab, (2013) 4 SCC 177 at 184-185, Surinder Singh v. State of Haryana, (2014) 4 SCC 129 at 137, Raminder Singh v. State of Punjab, (2014) 12 SCC 582 at 583, Suresh Singh v. State of Haryana, (2013) 16 SCC 353 at 361, Sher Singh v. State of Haryana, 2015 1 SCALE 250 at 262."

24. Keeping the aforesaid legal position in mind, it may be seen that in the instant case, it is not disputed that deceased died of strangulation within seven years of her marriage. However, there is no evidence that deceased was done to death by the accused-appellant and in view of defence evidence, it appears that she was found hanging on a tree, while she has gone to collect grass. Here it would be pertinent to mention that even death by suicide also falls within the ambit of "death otherwise than under normal circumstances " as contemplated under section 304-B (1) of IPC. In case Smt. Shanti and anr. vs. State of Haryana {1991(1) SCC 371} and in Kans Raj vs. State of Pubjab and ors. {2000(5) SCC 207} the Hon'ble Apex Court has held that suicide is one of the modes of death falling within the ambit of Section 304-B IPC. In the instant case it is clear from post-mortem report of deceased that she died of strangulation. Thus it clear that death of deceased was "otherwise than under normal circumstances". The evidence of PW-1 Surya Bhan and PW-2 Daya Ram, who are brother and father of deceased, make it clear that deceased was being harassed on account of demand of a golden chain and colour TV. In this regard the statement of PW 1 is consistent with FIR and his previous statement and it is amply corroborated by PW 2. There are no reasons to disbelive their evidence. Thus, from the evidence on record, the prosecution has proved that the deceased suffered unnatural death within 7 years of her marriage and that she was treated with cruelty in relation to demand of dowry.

25. At this stage it would be pertinent of mention that Section 113-B of the Evidence Act mandates that the Court has to raise the statutory presumption in a case where it is shown that soon before her death such woman has been subjected to cruelty or harassment for or in connection with any demand of dowry.

In case of ***Banshi Lal Vs. Hate of Haryana, AIR 2011 SC 691*** has held that the court has to analyse the facts and circumstances as leading to death of the victim and decide if there is any proximate connection between the demand of dowry

and act of cruelty or harassment and the death. Meaning thereby cruelty or harassment with regard to demand of dowry soon before death is a crucial ingredient to be proved by prosecution before attracting any provisions of section 304-B I.P.C.

In ***Mustafa Shahdal Shaikh Vs. State of Maharashtra,*** AIR 2013 SC 851 it was observed by the Hon'ble Apex Court that "soon before death" means interval between cruelty and death should not be much. There must be existence of a proximate and live links between the effect or cruelty based on dowry demand and the concerned death. If the alleged incident of cruelty is remote in time and has become stale enough not to disturb the mental equilibrium of the woman concerned, it would be of no consequence.

Similarly in ***Kaliyaperumal Vs. State of Tamil Nadu, AIR 2003 SC 3828*** it was held that that the expression 'Soon before her death" used in the substantive section 304-B I.P.C. and section 113-B of the Evidence Act is present with the idea of proximity text. No definite period has been indicated and the expression "soon before hear death" is not defined. The determination of the period which can come within the term "soon before" is left to be determined by the courts, depending upon facts and circumstances of each case. Suffice, however, to indicate that the expression 'soon before' would normally imply that the interval should not be much between the concerned cruelty or harassment and effect of cruelty based on dowry demand and the concerned death. If alleged incident of cruelty is remote in time and has become stale enough not to disturb mental equilibrium of the woman concerned, it would be of no consequence.

The Hon'ble Supreme Court in ***Prem Kumar vs. State of Rajasthan 2009 (3) SCC 726*** held:-

"Presumption under Section 113-B is a presumption of law. On proof of the essentials mentioned therein, it becomes obligatory on the court to raise a presumption that the accused caused the dowry death. The presumption shall be raised only on proof of the following essentials: (1) The question before the court must be whether the accused has committed the dowry death of a woman. (This means that the presumption can be raised only if the accused is being tried for the offence under Section 304-B IPC.) (2) The woman was subjected to cruelty or harassment by her husband or his relatives. (3) Such cruelty or harassment was for, or in connection with, any demand for dowry. (4) Such cruelty or harassment was soon before her death.

It was held that there must be material to show that soon before her death the victim was subjected to cruelty or harassment. The expression "soon before' is very relevant where Section 113-B of the Evidence Act and Section 304-B IPC are pressed into service. The prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case the aforesaid presumption operates. "Soon before' is a relative term and it would depend upon the circumstances of each case and no straitjacket formula can be laid down as to what would constitute a period of soon before the occurrence. It was further observed that it would be hazardous to indicate any fixed period, and that brings in the importance of a proximity test both for the proof of an offence of dowry death as well as for raising a presumption under Section 113-B of the Evidence Act.

26. In the case in hand, as pointed out earlier, both PW 1 Surya Bhan and PW 2 Daya Ram have made consistent statements that since after some time of marriage, deceased was continuously being harassed on account of dowry demand of golden chain and colour TV. PW 1 Surya Bhan has stated that his father has given a buffalo and cash of Rs 2000/ to accused-appellant for purchasing a TV but despite that he continued to harass the deceased. PW 1 has stated that he often used to visit the matrimonial home of deceased to enquire her well being but she used to tell him that she was being harassed for dowry and that only one week prior to the incident, he has visited the matrimonial home of his sister and she has told she was being beaten for dowry and she has also shown injuries suffered by her. This version is amply supported by PW 2 Dayaram. The accused-appellant has not taken any such specific plea that PW 1 did not visit his house one week prior of incident. Thus it is apparent that there is evidence that till one week prior of the incident, the deceased was continuously being harassed for demand dowry. There is absolutely nothing to indicate that this cruelty and harassment has ever ceased till the incident. Considering entire evidence, it is manifest that there is a proximate connection between the demand of dowry and act of cruelty / harassment and the death of deceased. The interval between cruelty and death of deceased is not much and such gap has to be examined in the attending facts and circumstances of the matter. In view of evidence there appears a proximate and live link between the effect or cruelty based on dowry demand and the death of deceased. As observed by the Hon'ble Apex Court, the determination of the period which can come within the term "soon before" is to be determined by courts, depending upon facts and circumstances of each case and it normally imply that the interval should not be much between the concerned cruelty or harassment and effect of cruelty based on dowry demand and the concerned death. Considering the evidence in light of peculiar facts and circumstances of the instant case as well as the position of law, it is established that the deceased was continuously being harassed on account of dowry demand of golden chain and colour TV and there is evidence that till one week prior of the incident, deceased was continuously being harassed for demand dowry. As noticed earlier there is absolutely nothing to indicate that this cruelty and harassment has ever ceased till the incident. Considering entire evidence, it is manifest that there is a proximate connection between the demand of dowry made by the accused-appellant and act of cruelty or harassment and the death of deceased. There is a live link between the effect or cruelty meted out to the deceased based on dowry demand and the death of deceased. Thus, it established that deceased was subjected to cruelty or harassment by her husband / accused-appellant in connection with demand for dowry and that such cruelty or harassment was soon before her death. In view of the evidence, the presumption enshrined under section 113-B Evidence Act can safely be raised against accused-appellant appellant.

27. Applying the presumption enshrined under section 113-B Evidence Act, once the initial burden of showing that the woman was subject to cruelty or harassment for or in connection with any demand of dowry soon before her death is discharged by the prosecution, the Court has to presume that such person has caused a dowry death. In Yashoda v. State of M.P. (2004) 3 SCC 98, the Hon'ble Apex Court

held that once the ingredients of Section 304-B IPC are fulfilled, the onus shifts to the defence to produce evidence to rebut the statutory presumption and to whom that the death was in the normal course with which the accused were not connected. The Court observed:

"13.....Once the prosecution proves the facts which give rise to the presumption under Section 304-B IPC, the onus shifts to the defence and it is for the defence to produce evidence to rebut that presumption. The defence may adduce evidence in support of its defence or may make suggestions to the prosecution witnesses to elicit facts which may support their defence. The evidence produced by the defence may disclose that the death was not caused by them, or that the death took place in normal course on account of any ailment or disease suffered by the deceased or that the death took place in a manner with which they were not at all connected. In the instant case if the defence wanted to prove that the deceased had suffered from diarrhoea and vomiting and that resulted in her death, it was for the defence to adduce evidence and rebut the presumption that arose under Section 304-B IPC. The defence could have examined the doctor concerned or even summoned the record from the hospital to prove that in fact the deceased has suffered such ailment and had also been treated for such ailment."

28. So once the court raises presumption under section 113-B Evidence Act, the court has no option but to presume that the accused had caused dowry death unless the accused disproves it. It is a statutory compulsion on the Court. However, it is open to the accused to adduce such evidence for disproving the said compulsory presumption, as the burden is unmistakably on him to do so. In the instant case, the accused-appellant has failed to rebut the said presumption. As stated earlier, from evidence on record it is established that deceased Vimla was subjected to cruelty or harassment by her husband / appellant in connection with the demand for dowry and that such cruelty and harassment was soon before her death. It is also established that deceased suffered death otherwise than under normal circumstances within seven years of her marriage. In view of the evidence on record coupled with presumption prescribed under section 113-B Evidence Act, we reach to conclusion that conviction of accused-appellant under section 498-A, 304-B IPC and section 4 DP Act is based on evidence and accordingly conviction of accused-appellant for said charges is hereby affirmed.

29. So far as quantum of sentence is concerned, it was submitted by learned counsel for the appellant that the trial court has awarded maximum sentence ie imprisonment for life, without considering the relevant facts and the sentence awarded to accused-appellant is quite excessive and arbitrary. It was stated that marriage of deceased has taken place six years prior of the incident and that soon after the incident, accused-appellant himself has informed police vide exhibit kha-1. Out of this wedlock, they were blessed with three children and appellant has to take care of them. The accused-appellant has not caused any injury to the deceased and that she committed suicide by hanging on a tree. Lastly it was submitted that accused-appellant is in jail since last 16 years as he was never granted bail. It was submitted

that sentence already under gone by the accused-appellant is more than sufficient and deterent for the crime of accused-appellant.

30. It is settled legal position that appropriate sentence should be awarded after giving due consideration to the facts and circumstances of each case, nature of offence and the manner in which it was executed or committed. It is obligation of Court to constantly remind itself that right of victim, and be it said, on certain occasions persons aggrieved as well as society at large can be victims, never be marginalised. The measure of punishment should be proportionate to gravity of offence. Object of sentencing should be to protect society and to deter the criminal in achieving avowed object of law. Further, it is expected that Courts would operate the sentencing system so as to impose such sentence which reflects conscience of society and sentencing process has to be stern where it should be. The Court will be failing in its duty if appropriate punishment is not awarded for a crime, which has been committed not only against individual victim but also against society to which criminal and victim belong. 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, enormity of crime warranting public abhorrence and it should 'respond to society's cry for justice against the criminal'. [Vice Sumer Singh Vs. Surajbhan Singh and others, (2014) 7 SCC 323, Sham Sunder Vs. Puran, (1990) 4 SCC 731, M.P. Vs. Saleem, (2005) 5 SCC 554, Ravji Vs. State of Rajasthan, (1996) 2 SCC 175].

31. Hon'ble Apex Court in the case of V.K. Mishra & Anr. Vs. State of Uttarakhand & Anr., 2015 Law Suit (SC) 665 in para nos. 40 and 41 of the judgment has held as under:-

"40. For the offence under section 304-B IPC, the punishment is imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life. Section 304B IPC thus prescribes statutory minimum of seven years. In Kulwant Singh & Ors. vs. State of Punjab, (2013) 4 SCC 177, while dealing with dowry death Section 304B and 498A IPC in which death was caused by poisoning within seven years of marriage conviction was affirmed. In the said case, the father-in-law was about eighty years and his legs had been amputated because of severe diabetes and mother-in-law was seventy eight years of age and the Supreme Court held impermissibility of reduction of sentence on the ground of sympathy below the statutory minimum.

41. As per prison records, the accused-Rahul Mishra is in custody for more than five years which includes remission. Bearing in mind the facts and circumstances of the case and the occurrence was of the year 1997 and that the accused Rahul Mishra is in custody for more than five years, interest of justice would be met if life imprisonment awarded to him is reduced to imprisonment for a period of ten years. Appellants V.K. Mishra and Neelima Mishra, each of them have undergone imprisonment of more than one year. Appellants No. 1 and 2 are aged about seventy and sixty four years and are said to be suffering from various ailments. Considering their age and ailments and facts and circumstances of the case, life imprisonment imposed on appellants V.K. Mishra and Neelima Mishra is also reduced to imprisonment of seven years each."

Hon'ble Apex Court in the case of ***Hem Chand Vs. State of Haryana, [(1994) 6 SCC 727]*** in para no. 7 of the judgment has held as under:-

"7. Now coming to the question of sentence, it can be seen thatSection 304-B I.P.C., lays down that "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." The point for consideration is whether the extreme punishment of imprisonment for life is warranted in the instant case. A reading of Section 304-B IPC would show that when a question arises whether a person has committed the offence of dowry death of a woman what all that is necessary is it should be shown that soon before her unnatural death, which took place within seven years of the marriage, the deceased had been subjected, by such person, to cruelty or harassment for or in connection with demand for dowry. If that is shown then the court shall presume that such a person has caused the dowry death. It can therefore be seen that irrespective of the fact whether such person is directly responsible for the death of the deceased or not by virtue of the presumption, he is deemed to have committed the dowry death if there were such cruelty or harassment and that if the unnatural death has occurred within seven years from the date of marriage. Likewise there is a presumption under Section 113-B of the Evidence Act as to the dowry death. It lays down that the court shall presume that the person who has subjected the deceased wife to cruelty before her death shall presume to have caused the dowry death if it is shown that before her death, such woman had been subjected, by the accused, to cruelty or harassment in connection with any demand for dowry. Practically this is the presumption that has been incorporated in Section 304-B I.P.C. also. It can therefore be seen that irrespective of the fact whether the accused has any direct connection With the death or not, he shall be presumed to have committed the dowry death provided the other requirements mentioned above are satisfied. In the instant case no doubt the prosecution has proved that the deceased died an unnatural death namely due to strangulation, but there is no direct evidence connecting the accused. It is also important to note in this context that there is no charge under Section 302 I.P.C. The trial court also noted that there were two sets of medical evidence on the file in respect of the death of the deceased. Dr. Usha Rani, P.W. 6 and Dr. Indu Latit, P.W. 7 gave one opinion. According to them no injury was found on the dead body and that the same was highly decom-posed. On the other hand, Dr. Dalbir Singh, P.W. 13 who also examined the dead body and gave his opinion, deposed that he noticed some injuries at the time of re-post mortem examination. Therefore at the most it can be said that the prosecution proved that it was an unnatural death in which case also Section 304-B I.P.C. would be attracted. But this aspect has certainly to be taken into consideration in balancing the sentence to be awarded to the accused. As a matter of fact, the trial court only found that the death was unnatural and the aspect of cruelty has been established and therefore the offences punishable underSection 304-B and 201 I.P.C. have been established. The High Court in a very short judgment concluded that it was fully proved that the death of the deceased in her matrimonial home was a dowry death otherwise than in normal circumstances as a result of cruelty meted out to her and therefore an offence underSection 304-B I.P.C. was made out.

*Coming to the sentence the High Court pointed out that the accused-appellant was a police employee and instead of checking the crime he himself indulged therein and precipitated in it and that bride killing cases are on the increase and therefore a serious view has to be taken. As mentioned above Section 304-B I.P.C. only raises presumption and lays down that minimum sentence should be seven years but it may extend to imprisonment for life. There*fore awarding extreme punishment for life should be in rare cases and not in every case."

In the case of ***G.V. Siddaramesh Vs. State of Karnataka, 2010 3 SCC 152,*** while allowing the appeal filed by the accused only on the question of sentence, the Court altered the sentence from life term to 10 years on more or less similar facts, Hon'ble Apex Court held as under:

"31. In conclusion, we are satisfied that in the facts and circumstances of the case, the appellant was rightly convicted under section 304-B IPC. However, his sentence of life imprisonment imposed by the courts below appears to us to be excessive. The appellant is a young man and has already undergone 6 years of imprisonment after being convicted by the Additional Sessions Judge and the High Court. We are of the view, in the facts and circumstances of the case, that a sentence of 10 years' rigorous imprisonment would meet the ends of justice. We, accordingly while confirming the conviction of the appellant under section 304-B IPC, reduce the sentence of imprisonment for life to 10 years' rigorous imprisonment. The other conviction and sentence passed against the appellant are confirmed."

Recently in ***Criminal Appeal No. 724 OF 2019 Kashmira Devi Versus State of Uttarakhand & Ors, decided on 28.01.2020***, Hon'ble Apex Court reduced the sentence of life under section 304-B IPC to imprisonment for 7 years. In that case, the marriage of deceased was solemnised four years prior of incident and that deceased died of burn injuries. The Hon'ble Apex Court observed as under:

"Having arrived at the above conclusion the quantum of sentence requires consideration. The High Court has awarded life imprisonment to the appellant on being convicted under Section 304B IPC. The minimum sentence provided is seven years but it may extend to imprisonment for life. In fact, this Court in the case of Hem Chand Vs. State of Haryana (1994) 6 SCC 727 has held that while imposing the sentence, awarding extreme punishment of imprisonment for life under Section 304-B IPC should be in rare cases and not in every case. Though the mitigating factor noticed in the said case was different, in the instant case keeping in view the age of the appellant and also the contribution that would be required by her to the family, while husband is also aged and further taking into consideration all other circumstances, the sentence as awarded by the High Court to the appellant herein is liable to be modified."

32. Applying the principles of law laid down in the aforementioned cases and having regard to the totality of facts and circumstances of the instant case including the fact that accused-appellant Ram Ajor in custody since last 16 years, we are of the considered opinion that the ends of justice would meet, if we reduce the sentence of the appellant from life imprisonment to that of already undergone by the accused-appellant. In our view, this case does not fall in the category of a "rare case" as envisaged by the Apex Court so as to award

maximum sentence of life imprisonment. That apart, it may also be observed that while awarding life imprisonment, the trial court did not assign any reasons.

33. According sentence of life imprisonment awarded by the trial for the offence under section 304-B IPC is reduced and the accused-appellant Ram Ajor is sentenced to the period already undergone by him. The sentences awarded under section 498-A IPC and Section 4 of Dowry Prohibition Act by the trial court, are upheld. As accused-appellant is in custody since last 16 years, thus, accused-appellant Ram Ajor be released forthwith, if not wanted in any other case.

34. Appeal is partly allowed in above terms.

35. It is further directed that the accused appellant shall furnish bail bond with surety to the satisfaction of the court concerned in terms of the provision of Section 437-A of Cr.P.C.

35. Let the lower court record be transmit to the trial court concerned for its information and compliance.

(2020)10ILR A83
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.09.2020

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE RAJ BEER SINGH, J.

Criminal Appeal No. 6896 of 2011

Dharam Das ...Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Ganesh Shanker Srivastava, Sri K.K. Dwivedi, Sri Om Prakash Kannaujia

Counsel for the Opposite Party:
Ms. Archana Singh, A.G.A.

A. Criminal Law - Indian Penal Code (45 of 1860) – Sections 304B. 498A - Evidence Act (1 of 1872) - Section 113B - Dowry death - Deceased dying unnatural death within 7 yrs. of marriage & if shown that soon before her death, she was subjected to cruelty or harassment by her husband or her husband's family or relatives in relation to a demand for dowry - proximate connection - between demand of dowry and act of cruelty meted out to deceased - Presumption - Legal Fiction - by fiction of law, the husband or relative would be presumed to have committed the offence of dowry death rendering them liable for punishment, irrespective of the fact whether such person is directly responsible for the death of the deceased or not (Para 29)

Deceased died due to burn injuries within 9 months of her marriage - evidence of PW-1 (father) & PW-2 (mother) of deceased woman, that deceased was harassed on account of demand of buffalo & cash of Rs.40,000/ - statement of father consistent with FIR & corroborated by PW-2 (mother) - Both witnesses subjected to cross-examination - No material contradiction or inconsistency in their statements - two dying declarations of deceased - First one to her father, while deceased was being taken to hospital and second dying declaration recorded by Magistrate - In both the dying declarations, deceased stated that she was being harassed for dowry and that accused-appellant has set her ablaze by pouring kerosene - no inconsistency or contradiction between the two dying declarations - Interval between cruelty and death of deceased is not much - Presumption u/S. 113-B of Act can safely be raised against accused - Held - No illegality in conviction of accused-appellant based on testimony of PW-1 Veer Singh and PW-2 Krishna Devi, who are parents of

deceased, as well as the dying declaration of deceased - – Conviction, proper

B. Evidence Law - Evidence Act (1 of 1872) – Section 32 - Dying declaration - Absence of certification of doctor - as to fitness of mind of deceased declarant, to make such an statement - medical certification is not a sine qua non for accepting the dying declaration - Certification by a doctor is essentially a rule of caution - voluntary and truthful nature of the declaration can also be established otherwise

Dying declaration recorded on 26.09.2008, deceased died after two months on 26.11.2008 - deceased suffered only 60% burns, which indicate that deceased was in fit state of mind to make such statement. PW-7 doctor who examined the deceased when she was admitted in hospital, also stated that deceased was talking condition - no body's case that during this period of two months she was not in a condition to speak & that she could not have made any statement to the Magistrate - *Held* - from attending facts, quantum of percentage of burns sustained by deceased and statement of PW-7 doctor it appears that deceased was in fit state of mind to make an statement (Para 42, 44, 45, 47)

C. Evidence Law - Evidence Act (1 of 1872)- Section 32 - Dowry Death - Dying declaration - Dying declaration could not be proved, as the Magistrate, who recorded it could not be examined, as he passed away - Held - defence has not put forward any such case that no dying declaration of deceased was recorded at all - considering the fact that the Magistrate, who recorded dying declaration could not be examined, before acting upon this dying declaration, its corroboration would be desirable - to see whether it is reconcilable and consistent with alleged oral dying declaration made by deceased to her father (Para 46)

D. Civil Law - Dowry Prohibition Act (28 of 1961) - Section 3, giving or taking dowry - Section 4, Penalty for demanding dowry - evidence against accused-husband that after marriage he used to demand buffalo & cash from deceased as additional dowry - no evidence to satisfy ingredients of Section 3 D.P. Act rather mischief of accused squarely covered u/s 4 D.P. Act - conviction of accused u/s 4 upheld but conviction u/s 3 set aside (Para 61, 62)

E. Criminal Law - Indian Penal Code (45 of 1860), Section 304B - Dowry death - burning for dowry - Quantum of Sentence - Object of sentencing to protect society, deter criminal - Determination - nature of offence, manner in which offence was executed - Punishment - Punishment awarded must be consistent with the atrocity & brutality with which the crime perpetrated - court must deal with dowry death in most severe & strict manner - so that it operate as a deterrent to other persons from committing such anti- social crimes - Court will be failing in its duty if appropriate punishment is not awarded for a crime, which has been committed not only against individual victim but also against society (Pg 64)

Deceased young lady aged 20 yrs, marriage solemnised 7 months prior to the incident, died of burn injuries within 9 months of her marriage, struggled for life for about 2 months in hospital - ample evidence that accused-appellant set her on fire - specific role of accused-appellant that she was continuously being harassed by him for dowry since after her marriage - Accused in jail for about 11 yrs, never granted bail - *Held* - case of rare category to warrant maximum sentence i.e. life imprisonment (Para 67)

Partly allowed. (E-5)

List of cases cited:-

1. Kashmir Kaur Vs St. of Punj., AIR 2013 SC 1039

2. Paniben (Smt) Vs St. of Gujarat (1992) 2 SCC 474

3. Koli Chunilal Savji Vs St. of Guj. AIR 1999 SC 3695

4. Babulal Vs St. of M.P.(2003) 12 SCC 490

5. Laxman Vs St. of Maharashtra reported in MANU/SC/0707/2002

6. Atbir Vs Government of NCT of Delhi MANU/SC/0576/2010 : (2010) 9 SCC 1

7. Jagbir Singh Vs St. NCT of Delhi (2019) 8 SCC 779

8. Banshi Lal Vs St. of Hary. AIR 2011 SC 691

9. Prem Kumar Vs St. of Raj. (2009) 3 SCC 726

10. Sumer Singh Vs Surajbhan Singh & ors (2014) 7 SCC 323

11. Sham Sunder Vs Puran (1990) 4 SCC 731

12. M.P. Vs Saleem (2005) 5 SCC 554

13. Ravji Vs St. of Raj. (1996) 2 SCC 175

14. Hem Chand Vs St. of Hary. (1994) 6 SCC 727

15. Kashmira Devi Vs St. of Uttr & ors, Criminal Appeal No. 724 OF 2019 28.01.2020

16. Rajesh Bhatnagar Vs St. of Uttr. (2012) 7 SCC 91

(Delivered by Hon'ble Raj Beer Singh J.)

1. This Criminal Appeal has been preferred against judgment and order dated 17.11.2011 passed by Additional Sessions Judge, Court No. 3, Kaushambi in Session Trial No. 61 of 2009, Crime No. 277 of 2008, under Sections 498-A/34, 323/34, 326/34, 304-B/34 of Indian Penal Code (hereinafter referred as IPC) and section ¾ Dowry Prohibition Act (hereinafter referred as D.P. Act), whereby accused-appellant Dharam Das has been convicted under section 498-A, 304-B of IPC and ¾ of DP Act. He was sentenced to imprisonment for life under Section 304-B IPC, imprisonment for five years along with fine of Rs. 15,000/- under Section 3 of DP Act and two years rigorous imprisonment along with the fine of Rs.1,000/- under Section 4 of DP Act. No sentence was awarded under section 498-A IPC. All the above sentences were to run concurrently. However, co-accused Dharam Veer, Kailasha Devi and Phaguhar were acquitted of all the charges.

2. Accused-appellant Dharam Das is husband of deceased Saroj Devi and their marriage was solemnized on 20.02.2008. After marriage, accused-appellant Dharam Das and his family members used to beat and harass Saroj Devi for dowry. They used to demand a buffalo and cash of Rs. 40,000/-. Whenever deceased used to meet her family members, she used to tell them about the dowry demand and harassment. First informant Veer Singh, who is father of deceased Saroj Devi, tried to make accused-appellant understand but in vain. It is alleged that on 25.09.2008 accused-appellant Dharam Das and his other family members put the deceased Saroj Devi ablaze by pouring kerosene over her and resultantly, she has suffered serious burn injuries. After information, PW-1 Veer Singh and his family members reached there and the deceased was taken to Chayal Primary Health Center and from there she was referred to Swaroop Rani Nehru Hospital, Allahabad and accordingly she was admitted there.

3. PW-1 Veer Singh reported the matter to police by submitting a tehrir exhibit Ka-1 and consequently first information report was registered on 26.09.2008 at 23:30 hours under Section 498-A, 326, 323 of IPC and ¾ of DP Act vide exhibit ka-8 .

4. It is also the case of prosecution that on 26.09.2008, while deceased was lying admitted in said SRN hospital, her statement was recorded by Sri Sudhir Kumar Mishra, Additional City Magistrate, Allahabad vide exhibit ka-15 and in that dying declaration deceased has told that her husband Dharam Das used to beat her and that a day before, he beat her severely and set her ablaze after pouring kerosene. She has also stated that before that

incident, he has turned his mother and brother out of the home.

5. During treatment, on 26.11.2008 deceased Saroj Devi succumbed to injuries. Inquest proceedings were conducted by PW-3 Surendra Bahadur Singh, Nayab Tehsildar vide inquest report exhibit Ka-2. Dead body of deceased was sealed and sent for post-mortem. After death of deceased, section 304-B IPC was added during investigation.

6. Post-mortem on dead body of deceased was conducted on 26.11.2008 by PW-5 Dr. T.B. Maurya vide post-mortem report exhibit Ka-10. She has sustained following ante-mortem injuries:

(i) Old healed burn injury present on Rt side face including Rt eye.

(ii) Post burn granulating tissue present on posterior of whole chest including belly axilla & upper part of abdomen.

(iii) Healed burn injury present on front of both upper limbs.

(iv) Bed sore 4 x 3 cm present on back of pus coming out from sore.

Cause of death was stated due to septimic shock as a result of ante mortem injury.

7. Investigation was conducted by PW-6 S.I. Ram Pal Chaudhary. During course of investigation, he prepared site plan exhibit Ka-11, recorded statements of witnesses and after completion of investigation, accused persons were charge sheeted.

8. Accused-appellant Dharam Das and co-accused Dharam Veer, Kailashi Devi and Phaguhar were charged for the offences under Section 498-A, 323/34, 326/34, 304-B,/34 of IPC and 3/4/34 of DP Act. In order to bring home guilt of accused persons, prosecution has examined nine witnesses.

9. Accused-appellant Dharam Das and co-accused persons were examined under section 313 Cr.P.C. wherein accused-appellant Dharam Das has denied the prosecution evidence and stated that he has never made any demand of dowry nor harass the deceased and that on 24.09.2008, she has suffered burn injuries while preparing food. He has tried to save her and in that process, he has also suffered burn injuries. Deceased was admitted by him in Priya hospital on 24.09.2008. On 25.09.2008 her family members came and they forcibly admitted her in Swaroop Rani Nehru Hospital and a false report was lodged.

10. In defence evidence, one Dr. Kaushlesh Dwivedi has been examined as DW-1.

11. After hearing and analysing the evidence on record, accused-appellant Dharam Das was convicted under section 304-B of IPC and 3/4 of DP Act and sentenced as stated in opening part of this judgment.

12. Being aggrieved by the impugned judgment and order, accused-appellant has preferred present criminal appeal.

13. Heard Sri Ganesh Shanker Srivastava learned counsel for appellant and Ms. Archana Singh, learned A.G.A. for the State and perused the record.

14. Learned counsel for the appellant has mainly argued that deceased has suffered burn injuries accidentally while making food and that accused-appellant has tried to save her and that in that process

accused-appellant himself has sustained burn injuries at is hands and thus, the prosecution version is not reliable. Both the material witnesses are family members of deceased and that as the deceased has married with accused-appellant against wishes of her parents, thus due to that reason they have deposed falsely against the accused-appellant. It was submitted that alleged dying declaration (exhibit ka-15) of deceased could not be proved, as much as, the Magistrate, who recorded it could not be examined and that there is no certificate of doctor regarding her capacity to make such an statement. Besides the accused-appellant Dharam Das, his brother Dharam Veer, mother Kailashi Devi and father Phaguhar were also named in first information report and were to put to trial but they have been acquitted by the trial court and thus, the conviction of accused-appellant is not in accordance with law. It was submitted that from the defence evidence, it has been established that accused-appellant has sustained burn injuries at his hands, which indicates that accused-appellant has tried to save the deceased and after incident, he has taken the deceased to hospital which clearly indicates his bonafideness. It was argued that the trial court has not considered evidence in correct perspective and committed error by convicting the accused-appellant.

15. Per-contra, it has been submitted by learned State counsel that accused-appellant is husband of deceased and that deceased has died due to burn injuries within a short span of time i.e. within 9 months of her marriage. There is clear and consistent evidence of PW 1 Veer Singh and PW 2 Krishna Devi that accused-appellant used to harass the deceased on account of dowry. Further, there are two dying declarations of deceased. First one was made to PW 1 Veer Singh, while deceased was being taken to hospital and second dying declaration exhibit ka-15 was recorded by Magistrate. In both the dying declarations, deceased has stated that she was being harassed for dowry and that accused-appellant has set her ablaze by pouring kerosene. Both the dying declarations have been proved in accordance with law. It was submitted that case of accused-appellant is different from rest of accused persons, mainly because said co-accused were not named by the deceased in her dying declaration. Further, accused-appellant is husband of the deceased and it was his duty to protect her. It has been submitted that conviction of accused-appellant is based on evidence and it calls for no interference.

16. We have considered rival contentions and perused the record.

17. In evidence, PW-1 Veer Singh, who is father of the deceased, has stated that the marriage of his daughter Saroj Devi was solemnized on 20.02.2008 with accused-appellant Dharam Das and he has given dowry articles as per his capacity. After 6-7 days of marriage, when Saroj Devi came to her paternal home, she has told that the family members of her in-law's were harassing her on account of dowry and they are not providing her even the necessary basic amenities and food. She has told that accused-appellant and his family members were demanding a buffalo and Rs.40,000/- cash. PW-1 Veer Singh tried to convince her and after one and a half month, she was sent back to her matrimonial house. Whenever PW-1 Veer Singh used to visit her matrimonial home, deceased used to tell that accused persons were continuously harassing her for dowry.

On 25.09.2008 at 05:00 AM he was informed on telephone that his daughter Saroj has been burnt. He reached there and found that his daughter was lying there in burnt condition and all the family members of her in-law's have fled away. PW-1 Veer Singh took the deceased to Chayal Primary Health Center and from there she was admitted in Swaroop Rani Nehru Hopital, Allahabad. PW-1 Veer Singh has further stated that his daughter has told him that her husband Dharam Das and his family members have burnt her by pouring kerosene. On 26.09.2008 PW-1 Veer Singh has reported the matter to police and on 26.11.2008 deceased has succumbed to the burn injuries.

18. PW-2 Smt. Krishna Devi, who is mother of the deceased, has also made a similar statement and stated that marriage of her daughter Saroj Devi was solemnized with Dharam Das on 22.02.2008 and they have given dowry as per their capacity. After marriage when deceased came to her paternal home she has told that accused persons were demanding a buffalo and cash of Rs.40,000/- and on that account they were harassing her. They tried to convince her and sent her back to her matrimonial home but even after that accused persons continued harassing the deceased on account of the said demands. When third time her daughter Saroj Devi came from her matrimonial home, she has told that she was continuously being harassed and that accused persons were not allowing her even to take proper food. Her husband Dharam Das used to beat her after consuming liquor. However, deceased was again sent back to her matrimonial home and thereafter, on day of incident, they were informed that accused persons have burnt the deceased. PW-2 Krishna Devi further stated that her husband went there and while taking the deceased to hospital, in the way, they have stopped at her home and deceased has told her that accused persons were exhorting to kill her by burns. Thereafter, deceased was taken to Chayal Hospital and from there, she was admitted in Swaroop Rani Nehru hospital, where during treatment, she died.

19. PW-3 Surendra Bahadur Singh, Nayab Tehsildar, has conducted inquest proceedings.

20. PW-4 Constable Dharma Chaturvedi, has recorded the FIR.

21. PW-5 Dr. T.B. Maurya has conducted post-mortem of the deceased.

22. PW-6 S.I. Rampal Chaudhary has conducted investigation.

23. PW-7 Dr. R.P. Mishra, has medically examined deceased at Swaroop Rani Nehru Hospital.

24. PW-8 ASP Gyan Prakash Chaturvedi has conducted further investigation and he has filed supplementary charge sheet exhibit Ka-14. He has also stated that on 26.09.2008 statement of deceased was recorded by Sri Sudhir Kumar Mishra, Additional City Magistrate, Allahabad and in that dying declaration deceased has told that her husband, mother-in-law and brother-in-law used to beat her and that a day before, they have burnt her after pouring kerosene.

25. PW-9 Subha Mishra, is wife of late Sudhir Kumar Mishra, who recorded dying declaration of deceased. She has stated that Sudhir Kumar Mishra was posted as Additional City Magistrate,

Allahabad and he has died on 08.01.2009 while he was still working as Additional City Magistrate, Allahabad. Thereafter, she was provided a job in collectorate in dying in harness. She is well conversant with handwriting of her husband Sudhir Kumar Mishra. She has stated that exhibit Ka-15 is in handwriting and under signature of her husband Sudhir Kumar Mishra.

26. In defence evidence, DW-1 Dr. Kaushlesh Dwivedi has stated that on 24.09.2008 at about 11:30 pm Saroj Devi was brought at Priya Hospital Kandhaipur, Dhoomanganj, Allahabad in burnt condition. Dharam Das was also suffering from some burn injuries. DW-1 has asked the family members of injured Saroj Devi (deceased) to get her admitted in Government Hospital. DW-1 has provided first aid to her, however, Dharam Das was admitted her in hospital. On the next day, Saroj Devi was taken away by her family members from his hospital but Dharam Das remained admitted there for two days and he was discharged on 26.09.2008. He has proved the entry of admission of Dharam Das in Hospital as exhibit 65 Kha-1 and prescription paper as exhibit 65 Kha-2.

27. In this case, the conviction of accused-appellant is based on testimony of PW-1 Veer Singh and PW-2 Krishna Devi, who are parents of deceased, as well as the dying declaration of deceased. It is not disputed that marriage of deceased with accused appellant has taken place on 20.02.2008 and that alleged incident took place on the night of 24/25.09.2008 at the matrimonial home of the deceased and that deceased died of burns on 26.11.2008.

28. Before proceeding further, it will be useful to state the basic ingredients of Section 304-B IPC. The requirement of Section 304-B is that the death of a woman be caused by burns, bodily injury or otherwise than in normal circumstances, within seven years of her marriage. Further, it should be shown that soon before her death, she was subjected to cruelty or harassment by her husband or her husband's family or relatives and thirdly, that such harassment should be in relation to a demand for dowry. Once these three ingredients are satisfied, her death shall be treated as a "dowry death" and once a "dowry death" occurs, such husband or relative shall be presumed to have caused her death. Thus, by fiction of law, the husband or relative would be presumed to have committed the offence of dowry death rendering them liable for punishment unless the presumption is rebutted. It is not only a presumption of law in relation to a death but also a deemed liability fastened upon the husband/relative by operation of law. (vide Rajesh Bhatnagar vs. State of Uttarakhand, (2012) 7 SCC 91).

29. A reading of section 304-B I.P.C. would show that when a question arises whether a person has committed the offence of dowry death of a woman that all that is necessary is it should be shown that soon before her unnatural death, which took place within seven years of the marriage, the deceased had been subjected, by such person, to cruelty or harassment for or in connection with demand for dowry. If that is shown then the court shall presume that such a person has caused the dowry death. It can therefore be seen that irrespective of the fact whether such person is directly responsible for the death of the deceased or not by virtue of the presumption, he is deemed to have committed the dowry death if there were such cruelty or harassment and that if the unnatural death has occurred within seven

years from the date of marriage. Likewise there is a presumption under Section 113-B of the Evidence Act as to the dowry death. It lays down that the court shall presume that the person who has subjected the deceased wife to cruelty before her death to have caused the dowry death if it is shown that soon before her death, such woman had been subjected, by the accused, to cruelty or harassment in connection with any demand for dowry. It can therefore be seen that irrespective of the fact whether the accused has any direct connection with the death or not, he shall be presumed to have committed the dowry death provided the other requirements mentioned above are satisfied.(Hem Chand v. State of Haryana reported in [(1994) 6 SCC 727])

30. In case of ***Kashmir Kaur Vs. State of Punjab, AIR 2013 SC 1039,*** Hon'ble Apex Court held that in a case of trial for dowry death the essential ingredients to attract the provisions of section 304-B I.P.C. for establishing offence are (a) that soon before the death of the deceased she was subjected to cruelty and harassment in connection with the demand of dowry, (b) the death of the deceased woman was caused by any burn or bodily injury or some other circumstance, which was not normal, (c) such death occurs within seven years from the date of her marriage, (d) that the victim was subjected to cruelty or harassment by her husband or any relative of her husband, (e) such cruelty or harassment should be for or in connection with demand of dowry, and (f) it should be established that such cruelty and harassment was made soon before her death.

31. The necessary ingredients to prove the offence of dowry death punishable under section 304-B IPC have been discussed by the Hon'ble Apex Court time and again. In case of Rajender Singh Vs State of Punjab Criminal Appeal No. 2321 of 2009, decided on 26.02.2015, the Hon'ble Apex Court held as under (para 9 & 10):

"9, The ingredients of the offence under Section 304-B have been stated and restated in many judgments. There are four such ingredients and they are said to be:

(a) death of a woman must have been caused by any burns or bodily injury or her death must have occurred otherwise than under normal circumstances;

(b) such death must have occurred within seven years of her marriage;

(c) soon before her death, she must have been subjected to cruelty or harassment by her husband or any relative of her husband; and

(d) such cruelty or harassment must be in connection with the demand for dowry.

10, This has been the law stated in the following judgments:

Ashok Kumar v. State of Haryana, (2010) 12 SCC 350 at pages 360-361; Bachni Devi & Anr. v. State of Haryana, (2011) 4 SCC 427 at 431, Pathan Hussain Basha v. State of A.P., (2012) 8 SCC 594 at 599, Kulwant Singh & Ors. v. State of Punjab, (2013) 4 SCC 177 at 184-185, Surinder Singh v. State of Haryana, (2014) 4 SCC 129 at 137, Raminder Singh v. State of Punjab, (2014) 12 SCC 582 at 583, Suresh Singh v. State of Haryana, (2013) 16 SCC 353 at 361, Sher Singh v. State of Haryana, 2015 1 SCALE 250 at 262."

32. Keeping in view the position of law, as discussed above, it may be stated that in the instant matter, case of

prosecution is that marriage of deceased Saroj Devi with accused-appellant was solemnised only about 7 months prior of incident and that she died of burn injuries after two months of incident. PW-1 Veer Singh and PW 2 Krihna Devi, who father and mother of the deceased, have stated that in the marriage of deceased they have given dowry articles as per their capacity but after 6-7 days of marriage, when deceased Saroj Devi came to her paternal home, she has told that the family members of her in-law's were harassing her on account of dowry and they were demanding a buffalo and Rs.40,000/- cash. The evidence of PW-1 Veer Singh further shows that after her marriage, deceased visited his house for three times and she always told that she was being harassed on account of dowry. Similarly whenever PW-1 Veer Singh used to visit her matrimonial home, she used to tell that accused persons were continuously harassing her for dowry. Both the witnesses have stated that on 25.09.2008 at 05:00 AM the deceased was burnt by accused-appellant and his family members and that after information, when PW 1 Veer Singh reached there, he found that his daughter was lying there in burnt condition and all the family members of her in-law's have fled away. PW-1 Veer Singh took the deceased to Chayal Primary Health Center and from there she died of burn injuries on 26.11.2008. It is also the case of prosecution that while the deceased was being taken to the hospital by PW 1 Veer Singh, the deceased has told him that her husband (accused-appellant) and his family members have burnt her. Further while the deceased was lying admitted in SRN hospital, on 26.09.2008 her statement was recorded by Sri Sudhir Kumar Mishra, Additional City Magistrate, Allahabad, which has been proved by PW-9 Smt Subha Mishra as exhibit ka-15.

33. The trial court has based conviction of accused-appellant Dharam Das on dying declaration (exhibit ka-15) of deceased as well the evidence of PW-1 Veer Singh and PW-2 Krishna Devi. It is not disputed that marriage of deceased with accused-appellant Dharam Das took place on 20.02.2008 and that alleged incident of burning the deceased took place on 25.09.2008 at her matrimonial home. It is also not disputed that deceased succumbed to burn injuries on 26.11.2008 in SRN hospital. Thus deceased died of burn injuries within 7 years of her marriage. As stated earlier the conviction of accused-appellant Dharam Das is based on dying declaration of deceased as well the evidence of PW 1 Veer Singh and PW-2 Krishna Devi.

34. So far dying declaration of deceased is concerned, the case of prosecution is that after the incident, father of deceased (PW-1 Veer Singh) and his family members reached at the matrimonial home of his daughter Saroj Devi, where she was lying in burnt condition and took her to PHC Chayal and from where she was referred to SRN hospital, Allahabad. PW-1 Veer Singh has further stated that when he enquired from his daughter regarding, she has told that her husband Dharam Das and his family members have put her on fire by pouring kerosene. It is further that the case of prosecution that deceased was admitted in SRN hospital and on 26.09.2008 her statement was recorded by Sri Sudhir Kumar Mishra, Additional City Magistrate, Allahabad, which has been proved by PW-9 Smt Shubha Mishra as exhibit ka-15 by way of secondary evidence. As Sri Sudhir Kumar Mishra, the then Additional City Magistrate, Allahabad has passed away, his wife PW-9 Smt Shubha Mishra, who posted in collectorate, Allahabad has proved

exhibit ka-15 by identifying his hand writting and signature. Exhibit ka-15 reads as under:

"बयान सरोज देवी पत्नी धरम दास उम्र 20 वर्ष निवासिनी ;का0फटाद्ध थाना करारी जिला कौशाम्बी।

बयान प्रराम्भ का समय 1.00 PM.

मै सरोज देवी पत्नी धरम दास अपने पूरे होश में बयान दे रही हूॅ कि मेरी शादी को लगभग 5 माह हो चुके है। मेरी कोई संतान नहीं है। मेरी ससुराल में मेरे पति एवं सास है। मेरा पति मुझे बहुत मारता पीटता है। परसो उसने मुझे बहुत मारा एवं मेरे ऊपर मिट्टी का तेल डाल कर मुझे जला दिया। उसके पहले उसने अपनी मां एवं भाई को घर से निकाल दिया था बाहर से उन लोगो के चिल्लाने पर गांव वालों ने घर में घुस कर मेरी आग बुझाई एवं मेरे पिता को सूचना दी तो मुझे अस्पताल लेकर आये।

नि0 अं0

मैंने स्वयं बयान अंकित किया। बयान समाप्त होने का समय 1ण्15 च्ड

ह0 अप0 सुनकर तस्दीक किया

सुधीर कुमार मिश्र

ह0 अप0

अपर नगर मजिस्ट्रेट

26.9.08

इलाहाबाद 1.15 PM"

35. Though the trial court has not discussed the alleged first dying declaration made by deceased to her father PW-1 Veer Singh, however, PW 1 Veer Singh has made a clear statement that deceased has told him that her husband has put her on fire by pouring kerosene and he again stated that family members of accused-appellant were also involved in said incident. Thus, there are two dying declarations, first is oral dying declaration made by deceased to her father (PW-1 Veer Singh) and second was recorded by Sri Sudhir Kumar Mishra, Additional City Magistrate, Allahabad, which has been proved by PW-9 Smt. Shubha Mishra as exhibit ka-15.

36. The admissibility of dying declaration has been explained under Section 32 of Indian Evidence Act which states that such a statement can be proved when it is made by a person as to the cause of his death, or as to any of the circumstances of transaction which resulted in his death. So far as the position of law regarding dying declaration is concerned, it is well settled that if the court is satisfied that the dying declaration is true and made voluntarily by the deceased, conviction can be based solely on it, without any further corroboration. It is neither a rule of law nor of prudence that a dying declaration cannot be relied upon without corroboration. However, when a dying declaration is suspicious, it should not be relied upon without having corroborative evidence. The court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased must be in a fit state of mind to make the declaration and must identify the assailants. The principles relating to dying declaration are no longer res integra and it would be apposite to refer the decision of the Hon'ble Apex Court in **Paniben (Smt) v. State of Gujarat (1992) 2 SCC 474,** wherein the concepts are summed up as follows:

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. Mannu Raja v. State of M.P., [1976] 2 SCR 764.

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. State of M. P. v. Ram Sagar

Yadav, AIR 1985 SC 416; Ramavati Devi v. State of Bihar, AIR 1983 SC 164.

(iii) This Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration. Ram Chandra Reddy v. Public Prosecutor, AIR 1976 S.C. 1994.

(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence. Rasheed Beg v. Sate of Madhya Pradesh, [1974] 4 S.C.C. 264.

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (Kake Singh v. State of M. P.., AIR 1982 S.C. 1021)

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (Ram Manorath v. State of U.P. 1981 SCC (Crl.) 531).

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (State of Maharashtra v.Krishnamurthi Laxmipati Naidu, AIR 1981 SC 617).

(viii) Equally, merely because it is a brief statement, it is not be discarded. On the contrary, the shortness of the statement itself guarantees truth. Surajdeo Oza v. State of Bihar, AIR 1979 SC 1505)

(ix) Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye witness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail. (Nanahau Ram and another v. State, AIR SC912)

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (State U.P. v. Madan Mohan, AIr 1989 S.C. 1519) In the light of the above principles, we will consider the three dying declarations in the instant case and we will ascertain the truth with reference to all dying declaration made by the deceased Bai Kanta. This Court in Mohan Lal v. State of Maharashtra, AIR 1982, S.C. 839 referred to held:

"Where there are more than the statement in the nature of dying declaration, one first in point of time must be preferred".

It was also observed that if the plurality of dying declarations could be held to be trust worthy and reliable, they have to be accepted.

37. In case of **Koli Chunilal Savji V State of Gujrat AIR 1999 SC 3695,** the Hon'ble Apex Court held, that the ultimate test is whether a dying declaration can be held to be truthfully and voluntarily given, and if before recording such dying declaration, the officer concerned has ensured that the declarant was in fact, in a fit condition to make the statement in question, then if both these aforementioned conditions are satisfactorily met, the declaration should be relied upon. (See also: Baburam V State of Punjab, AIR 1998 SC 2808).

38. In case of **Babulal v. State of M.P.(2003) 12 SCC 490,** it has been held as under:-.

"7. ... A person who is facing imminent death, with even a shadow of continuing in this world practically non-existent, every motive of falsehood is obliterated. Then mind gets altered by most powerful ethical reasons to speak only the truth. Great solemnity and sanctity is attached to the words of a dying person

because a person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person. The maxim is "a man will not meet his Maker with a lie in his mouth" (nemo moriturus praesumitur mentiri). Mathew Arnold said, "truth sits on the lips of a dying man". The general principle on which the species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced and mind induced by the most powerful consideration to speak the truth; situation so solemn that law considers the same as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice."

39. Dealing with the relevancy of dying declaration, Hon'ble the Apex Court in the case of **Laxman v. State of Maharashtra reported in MANU/SC/0707/2002** has held as follows:-

"3. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary, although to assure authenticity it is usual to call a Magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a Rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise."

40. In **Atbir v. Government of NCT of Delhi MANU/SC/0576/2010 : (2010) 9 SCC 1,** the Hon'ble Apex Court, after referring its earlier judgments, has laid following guidelines with regard to admissibility of the dying declaration:

"The analysis of the above decisions clearly shows that:

(i) Dying declaration can be the sole basis of conviction if it inspires the full confidence of the court.

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

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

(iv) It cannot be laid down as an absolute Rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The

Rule requiring corroboration is merely a Rule of prudence.

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

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

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

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

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

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

41. Recently in case of **Jagbir Singh V State NCT of Delhi (2019) 8 SCC 779,** after referring to its several earlier judgments, Hon'ble Apex Court summed up the law relating to dying declaration as under:

"30. A survey of the decisions would show that the principles can be culled out as follows:

(a). Conviction of a person can be made solely on the basis of a dying declaration which inspires confidence of the court;

(b). If there is nothing suspicious about the declaration, no corroboration may be necessary;

(c). No doubt, the court must be satisfied that there is no tutoring or prompting;

(d) The court must also analyse and come to the conclusion that imagination of the deceased was not at play in making the declaration. In this regard, the court must look to the entirety of the language of the dying declaration;

(e). Considering material before it, both in the form of oral and documentary evidence, the court must be satisfied that the version is compatible with the reality and the truth as can be gleaned from the facts established;

(f). However, there may be cases where there are more than one dying declaration. If there are more than one dying declaration, the dying declarations may entirely agree with one another. There may be dying declarations where inconsistencies between the declarations emerge. The extent of the inconsistencies would then have to be considered by the court. The inconsistencies may turn out to be reconciliable.

(g). In such cases, where the inconsistencies go to some matter of detail or description but is incriminatory in nature as far as the accused is concerned, the court would look to the material on record to conclude as to which dying declaration is to be relied on unless it be shown that they are unreliable;

(h). The third category of cases is that where there are more than one dying declaration and inconsistencies between the declarations are absolute and the dying declarations are irreconcilable being repugnant to one another. In a dying

declaration, the accused may not be blamed at all and the cause of death may be placed at the doorstep of an unfortunate accident. This may be followed up by another dying declaration which is diametrically opposed to the first dying declaration. In fact, in that scenario, it may not be a question of an inconsistent dying declaration but a dying declaration which is completely opposed to the dying declaration which is given earlier. There may be more than two.

(i). In the third scenario, what is the duty of the court? Should the court, without looking into anything else, conclude that in view of complete inconsistency, the second or the third dying declaration which is relied on by the prosecution is demolished by the earlier dying declaration or dying declarations or is it the duty of the court to carefully attend to not only the dying declarations but examine the rest of the materials in the form of evidence placed before the court and still conclude that the incriminatory dying declaration is capable of being relied upon?"

42. From the above stated pronouncements, it is clear that the law regarding dying declaration is quite well settled that if the court is satisfied that the dying declaration is true and made voluntarily by the deceased, conviction can be based solely on it, without any further corroboration. It is neither a rule of law nor of prudence that a dying declaration cannot be relied upon without corroboration. If the dying declaration is absolutely credible and nothing is brought on record that the deceased was in such a condition, he or she could not have made a dying declaration to a witness, there is no justification to discard the same. However, when a dying declaration is suspicious, it should not be relied upon without having corroborative evidence. The court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. There is no requirement of law stating that a dying declaration must necessarily be made before a Magistrate, and when such statement is recorded by a Magistrate, there is no specified statutory form for such recording. The evidentiary value or weight that has to be attached to such a statement, necessarily depends on the facts and circumstances of each individual case. What is essentially required, is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind, and where the same is proved by the testimony of the Magistrate, to the extent that the declarant was in fact fit to make the statements, then even without examination by the doctor, the said declaration can be relied and acted upon, provided that the court ultimately finds the same to be voluntary and definite. Certification by a doctor is essentially a rule of caution, and therefore, the voluntary and truthful nature of the declaration can also be established otherwise.

A dying declaration made by person on the verge of his death has a special sanctity as at that solemn moment, a person is most unlikely to make any untrue statement. The shadow of impending death is by itself the guarantee of the truth of the statement made by the deceased regarding the causes or circumstances leading to his death. A dying declaration, therefore, enjoys almost a sacrosanct status, as a piece of evidence, coming as it does from the mouth of the deceased victim. Once the statement of the dying person and the evidence of the witnesses testifying to the same passes the test of careful scrutiny of the courts, it becomes a very important and

a reliable piece of evidence and if the court is satisfied that the dying declaration is true and free from any embellishment.

If there are more than one dying declarations then the court has also to scrutinise all the dying declarations to find out if each one of these passes the test of being trustworthy. The Court must further find out whether the different dying declarations are consistent with each other in material particulars before accepting and relying upon the same.

43. Keeping in view the cautions reminded from time to time by the Hon'ble Apex Court in dealing with the evidence of dying declaration, in the present case, it may be seen that the Magistrate, who recorded dying declaration exhibit ka-15, has passed away and thus it was proved by way of secondary evidence by examining his wife Smt Subha Mishra, who was posted in collectorate, Allahabad. Therefore, the prosecution was well within its rights to lead secondary evidence. As PW 9- Smt Subha Mishra is wife of said Additional City Magistrate Sri Sudhir Kumar Mishra, thus her statement that she is well conversant with hand writing and signature of her husband Sri Sudhir Kumar Mishra can not be doubted. The conditions for examining her as witness are duly satisfied and it stand proved that exhibit ka-15 was recorded by Sri Sudhir Kumar Mishra, the then Additional City Magistrate, Allahabad. The version of PW-9 Subha Mishra also finds corroboration from statement of PW-8 ASP Gyan Prakash Chaturvedi, who has also stated that on 26.09.2008 statement of deceased was recorded by Sri Sudhir Kumar Mishra, Additional City Magistrate, Allahabad. PW-7 Dr R.P. Mishra, who examined the deceased after admission in hospital, has also stated that Magistrate was informed.

44. It is correct that there is no certificate of concerned doctor that at the time of recording her statement, deceased was in fit state of mind to make such an statement, however, it may be seen that PW-7 Dr R.P. Mishra has stated that deceased Saroj Devi was admitted in Sawroop Rani Nehru hospital, Allahabad on 25.09.2008 at 03.30 PM and she was examined by him vide medical examination report exhibit ka-13. He has also stated that Magistrate was also informed. In his cross-examination, PW-7 Dr R.P. Mishra has stated that deceased Saroj Devi was in condition of speaking. There is absolutely nothing in his statement, so as to indicate that deceased was not fit to make an statement. Further dying declaration exhibit ka-15 was recorded on 26.09.2008 and deceased died after two months on 26.11.2008. It is no body's case that during this period of two months she was not in a condition to speak.

45. It is correct that the deceased sustained 60% burn injuries, but there is absolutely no circumstance to indicate that she could not have made any statement to the Magistrate. In this regard, we may profitably refer to the decision in Mafabhai Nagarbhai V State of Gujarat (1992) 4 SCC 69 wherein it has been held that a person suffering 99% burn injuries could be deemed capable enough for the purpose of making a dying declaration. The Court in the said case opined that unless there existed some inherent and apparent defect, the trial court should not have substituted its opinion for that of the doctor. In the light of the facts of the case, the dying declaration was found to be worthy of reliance. In State of M.P. Vs. Dal Singh (2013) 14 SCC 159, the court placed reliance on the dying declaration of the deceased who had suffered 100% burn

injuries on the ground that the dying declaration was found to be credible. In the instant case, as per post-mortem report exhibit ka- 10, the deceased has sustained 60% burns over her body. As stated earlier, PW-7 Dr R.P. Mishra has stated that on 25.09.2008 when deceased Saroj Devi was admitted in hospital about 03.30 PM, she was in speaking condition. It would also be pertinent to mention that defence has not even made any such suggestion to PW-7 Dr R.P. Mishra that deceased was not in condition of making such as statement. Accused-appellant has not taken any such specific plea. No doubt there is no certificate of any doctor that at the time of recording of exhibit ka-15, that the deceased was in a condition to make such an statement, however from attending facts and circumstances, quantum of percentage of burns sustained by deceased and statement of PW-7 Dr R.P. Mishra, it appears that deceased was in fit state of mind to make an statement recorded vide exhibit ka-15. As regards the certificate of doctor regarding condition of injured person to an statement, in case of Laxman v. State of Maharashtra, (2002) 6 SCC 710, it held that medical certification is not a sine qua non for accepting the dying declaration. Similar view has been taken in Jagbir Singh V State (NCT of Delhi) (supra).

46. We are not oblivious of the fact that defence could not get an opportunity to cross-examine the Magistrate, who recorded dying declaration exhibit ka-15, as the said Magistrate Sri Sudhir Kumar Mishra has passed away, however, so far the question of recording of dying declaration is concerned, it stand proved by evidence that exhibit ka-15 was recorded by Sri Sudhir Kumar Mishra, the then Additional City Magistarte , Allahabad. As stated earlier in this regard, the statement of PW 9 Subha Mishra finds corroboration from evidence of PW-8 ASP Gyan Prakash Mishra as well as PW-7 Dr R. P. Mishra. Here it would also be pertinent to mention that defence has not put forward any such case that no dying declaration of deceased was recorded at all. In these peculiar facts and circumstances of the case, the dying declaration exhibit ka-15 can not be thrown away merely on the ground that defence could not get opportunity to cross-examine the author of this document. No doubt the statement of concerned Magistrate was desirable, particularly on point whether the deceased was in fit state of mind to make such an statement, but it is not the case that his evidence has been withheld, rather he could not be examined as he has passed away. As stated earlier, it stand proved that the dying declaration exhibit ka-15 was recorded by said Sri Sudhir Kumar Mishra, the then Additional City Magistarte, Allahabad. The entire facts and circumstances indicate that the deceased was in fit state of mind to make such an statement. As stated earlier she has sustained only 60% burns and that she died after two months of the incident and there is evidence of PW 7 that deceased in condition of talking. In view of these facts and circumstances, it could not be said that case of accused-appellant is prejudiced on account of non-examination of Sri Sudhir Kumar Mishra, the then Additional City Magistarte , Allahabad, and thus, the dying declaration exhibit ka-15 can not be doubted merely on the ground that its author could not be examined. However, in these peculiar facts and circumstances, particularly considering the fact that the Magistrate, who recorded this dying declaration could not be examined, before acting upon this dying declaration, its corroboration would be desirable. It would

also be necessary to see whether it is reconcilable and consistent with alleged oral dying declaration made by deceased to PW-1 Veer Singh.

47. As stated earlier, regarding oral dying declaration allegedly made to PW 1 Veer Singh, case of prosecution is that on 25.09.2008 after receipt of information regarding the incident, PW 1 Veer Singh along with his family members reached at her matrimonial home and found that deceased was lying in burned conditions. He took the deceased to Chayal Primary Health Center and from there she was referred to Swaroop Rani Nehru Hopital, Allahabad and accordingly she was admitted in that hospital. PW-1 Veer Singh has further stated that while taking his daughter (deceased) to hospital, she has told him that her husband Dharam Das and his family members have burnt her by pouring kerosene. Though as per PW 1 Veer Singh, besides the accused-appellant, his other family members were also involved in the incident, whereas as per dying declaration exhibit ka-15 only accused-appellant Dharam Das has put the deceased on fire but so far as the involvement of accused-appellant Dharam Das is concerned, there is no inconsistency or contradiction between the two dying declarations. The evidence of PW 1 Veer Singh so far as it relates to involvement of accused-appellant Dharam Das, is quite convincing and cogent. The alleged dying declaration could not be doubted merely on the ground that this fact was not mentioned in the first information report. Here it may be stated that if one finds his daughter in such conditions like in state of suffering such burns, its quite natural for him that he would inquire from her as to how this incident took place. PW-1 Veer Singh has been subjected to cross-examination, but so far the involvement of accused-appellant is concerned, no such fact could be shown so as affect his deposition adversely. So far the involvement of accused-appellant Dharam Das is concerned, no material contradiction or infirmity could be shown in evidence of PW-1 Veer Singh. As the said dying declaration was not made in hospital, thus, it is only the statement of PW-1 Veer Singh, which is material to consider whether she was in a fit state of mind to make such statement. At the cost of repetition it may be stated that deceased has suffered only 60% burns and that she has died after about two months of said incident, which indicate that deceased was in fit state of mind to make such statement. PW-7 Dr. R.P. Mishra, who has examined the deceased when she was admitted in hospital, has also stated that deceased was talking condition. In fact there is absolutely nothing to indicate that deceased was not in fit state of mind to make such statement.

Thus, it may be seen so far the involvement of accused-appellant is concerned the oral dying declaration of deceased made to her father PW-1 Veer Singh is consistent with dying declaration exhibit ka-15.

48. At this stage it may be stated that version of accused-appellant is that on 24.09.2008 deceased has suffered burn injuries while preparing food. It was alleged that he has tried to save her and in that process, he has also suffered burn injuries and thereafter deceased was admitted by him in Priya Hospital on 24.09.2008 but on 25.09.2008 her family members came and they forcibly admitted her in Swaroop Rani Nehru Hospital and a false report was lodged.

49. In this connection it may be stated that PW-3 Surender Bahadur Singh, Naib Tahsildar, who conducted inquest

proceedings, has not spoken about any such fact which may support the alleged version of accused-appellant. Similarly PW-6 S.I. Rampal Chaudhary, the first investigating officer, has inspected the spot but there is nothing to indicate that he did find any such evidence so as to indicate that deceased suffered burns accidentally while preparing food. In site plan the position of kitchen has not been shown. In fact the version of accused-appellant that deceased suffered burns accidentally while preparing food is quite vague. He has not even specified whether the deceased was making food at LPG gas burner or kerosene stove or on some electric heater or on earthen stove. In his statement under section 313 Cr.P.C., accused-appellant has not even stated the time of alleged incident. In fact at the spot, no such circumstance could be shown, which may support the version of accused-appellant. No such tool or equipment could be seized at spot so as to support the claim of accused-appellant. It is correct that DW-1 Dr. Kaushlesh Dwivedi has stated that on 24.09.2008 at about 11:30 pm one Saroj Devi was brought at Priya Hospital Kandhaipur, Dhoomanganj, Allahabad in burnt condition and that Dharam Das was also suffering from some burn injuries and that they were admitted in his hospital but on the next day, Saroj Devi was taken away by her family members from his hospital whereas Dharam Das remained admitted there for two days, but so far the admission of deceased in said hospital is concerned, his statement does not appears convincing and reliable. As per PW-1 Veer Singh, after receipt of information when he along with other family members reached at the house of in-law's of deceased, she was lying there in burned conditions. His evidence further shows that he first took the deceased to PHC Chayal and there as she was referred to SRN Hospital thus he admitted her in SRN hospital. PW-7, who examined the deceased at SRN hospital, has not spoken any such thing that before admission, deceased was provided any treatment at said hospital. Deceased has also not spoken any such fact in her dying declarations. It may also be observed that if the deceased has suffered burns accidentally and accused-appellant has admitted her in said Priya hospital on the night of 24.09.2008, it is not clear that why he did not inform her parents or police. Merely because the accused-appellant has suffered some minor burn injuries, it would not ipso facto show that he suffered burn injuries while saving the deceased from accidental burns. In such cases the offenders of dowry death often try to give an impression that to be a suicidal or accidental death, but it is always the bride who meets with the accident while cooking or doing household work. In the present case the conspicuous absence of any such specific version that at what time and in which manner or specific details as to by which type of burner deceased suffered burns while preparing food, coupled with absence of any seizure of such article, makes version of accused-appellant doubtful. Further, there is clear and cogent statement of PW-1 Veer Singh that on 25.09.2008 when he reached at spot, deceased was lying there in burnt condition and has taken her to hospital. Considering entire evidence, the version of accused-appellant does not inspire confidence and the same has to be discarded.

50. Upon close scrutiny of evidence, so far involvement of accused-appellant is concerned, it appears that the said dying declarations contain the truthful version of the occurrence which narrates the circumstances leading to the death of

deceased Saroj Devi. The fact that deceased herself has given clean chit to other family members of accused-appellant, also indicates dying declaration contains truthful version of occurrence as stated by the deceased. This fact assumes significance in view of the fact that version of PW-1 Veer Singh and PW-2 Krishna Devi, who are parents of deceased, is that all the accused persons including other family members of appellant were involved in the incident, whereas in dying declaration exhibit ka-15 deceased has given clean chit to family members of accused-appellant. As stated earlier, though the trial court has not considered the oral dying declaration made to PW-1 Veer Singh and placed reliance on dying declaration exhibit ka-15, but it is apparent from record that, so far involvement of accused-appellant is concerned, the oral dying declaration made to PW-1 Veer Singh appears reliable. The dying declaration exhibit ka-15 is consistent with said oral dying declaration as both the dying declarations indicate involvement of accused-appellant in incident.

51. Further, it is not so that conviction of accused-appellant is based only on dying declaration of deceased, but there is evidence of PW-1 Veer Singh and PW-2 Krishna Devi. As stated earlier they have made statements to the effect that deceased was being harassed for dowry since after marriage. Here it may be stated that it is not disputed that marriage of deceased with accused-appellant was solemnised on 20.02.2008 i.e. only 7 months prior to the incident and that deceased suffered burn injuries on 25.09.2008 in said incident. It is also not disputed that she died of these burns injuries after two months of incident and thus death of deceased was "otherwise than under normal circumstances" which occurred within 7 years of her marriage.

52. The evidence of PW-1 Veer Singh PW-2 Krishna Devi, makes it clear that deceased was being harassed on account of demand of a buffalo and cash of Rs.40,000/. In this regard the statement of PW-1 Veer Singh is consistent with FIR and his previous statement and it is amply corroborated by PW-2 Krishna Devi. It is correct that these witnesses have also stated that besides the accused-appellant, his family members namely Dharam Veer, Kailasha Devi and Phaguhar were also involved in the incident, whereas deceased in her statement has given clean chit to them, but it is common knowledge that in such cases there is tendency in family members of victim to implicate the family members of husband. However, considering their evidence carefully, it appears that their statements can safely be believed so far as involvement of accused-appellant Dharam Das is concerned. So far the involvement of accused-appellant is concerned, there are no reasons to disbelieve their statements. Both the witnesses have been subjected to cross-examination, but no such fact could emerge so as to create any doubt regarding involvement of accused-appellant in the incident. No material contradiction or inconsistency could be shown in their statements. Thus, from the evidence on record, the prosecution has proved that the deceased was being harassed and treated with cruelty in relation to demand of dowry ie demand of a buffalo and cash of Rs. 40,000/.

53. At this stage it would be pertinent of mention that Section 113-B of the Evidence Act mandates the Court has to

raise the statutory presumption in a case where it is shown that soon before her death such woman has been subjected to cruelty or harassment for or in connection with any demand of dowry.

54. In case of **Banshi Lal Vs. State of Haryana, AIR 2011 SC 691,** it has held that the court has to analyse the facts and circumstances as leading to death of the victim and decide if there is any proximate connection between the demand of dowry and act of cruelty or harassment and the death. Meaning thereby cruelty or harassment with regard to demand of dowry soon before death is a crucial ingredient to be proved by prosecution before attracting any provisions of section 304-B I.P.C.

55. In Mustafa Shahdal Shaikh Vs. State of Maharashtra, AIR 2013 SC 851 it was observed by the Hon'ble Apex Court that "soon before death" means interval between cruelty and death should not be much. There must be existence of a proximate and live links between the effect or cruelty based on dowry demand and the concerned death. If the alleged incident of cruelty is remote in time and has become stale enough not to disturb the mental equilibrium of the woman concerned, it would be of no consequence. Similarly in Kaliyaperumal Vs. State of Tamil Nadu, AIR 2003 SC 3828 it was held that that the expression 'Soon before her death" used in the substantive section 304-B I.P.C. and section 113-B of the Evidence Act is present with the idea of proximity text. No definite period has been indicated and the expression "soon before hear death" is not defined. The determination of the period which can come within the term "soon before" is left to be determined by the courts, depending upon facts and circumstances of each case. Suffice, however, to indicate that the expression 'soon before' would normally imply that the interval should not be much between the concerned cruelty or harassment and effect of cruelty based on dowry demand and the concerned death. If alleged incident of cruelty is remote in time and has become stale enough not to disturb mental equilibrium of the woman concerned, it would be of no consequence.

56. The Hon'ble Supreme Court in **Prem Kumar vs. State of Rajasthan 2009 (3) SCC 726** held:-

"Presumption under Section 113-B is a presumption of law. On proof of the essentials mentioned therein, it becomes obligatory on the court to raise a presumption that the accused caused the dowry death. The presumption shall be raised only on proof of the following essentials: (1) The question before the court must be whether the accused has committed the dowry death of a woman. (This means that the presumption can be raised only if the accused is being tried for the offence under Section 304-B IPC.) (2) The woman was subjected to cruelty or harassment by her husband or his relatives. (3) Such cruelty or harassment was for, or in connection with, any demand for dowry. (4) Such cruelty or harassment was soon before her death.

57. It was further held that there must be material to show that soon before her death the victim was subjected to cruelty or harassment. The expression "soon before' is very relevant where Section 113-B of the Evidence Act and Section 304-B IPC are pressed into service. The prosecution is obliged to show that soon before the occurrence there was cruelty or harassment

and only in that case the aforesaid presumption operates. "Soon before' is a relative term and it would depend upon the circumstances of each case and no straitjacket formula can be laid down as to what would constitute a period of soon before the occurrence. It was further observed that it would be hazardous to indicate any fixed period, and that brings in the importance of a proximity test both for the proof of an offence of dowry death as well as for raising a presumption under Section 113-B of the Evidence Act.

58. In the case in hand, as pointed out earlier, both PW-1 Veer Singh and PW 2 have made consistent statements that after marriage of deceased, she was continuously being harassed on account of dowry demand of a buffalo and cash of Rs.40,000/. PW-1 Veer Singh has stated that after 6-7 days of marriage, deceased visited his house after vidai and told that her husband and his family members were harassing for demand of dowry and they were not allowing her even to take proper food and other necessary apparels. She has told that accused persons were making demand of a buffalo and Rs.40,000/. However, after and a half month, deceased was again sent to her matrimonial home. After that she used to tell on phone that accused persons were harassing for said demand. PW-1 Veer Singh has stated that he also used to visit the matrimonial home of deceased and that she used to complain about the harassment on account of dowry demand. In his cross-examination, PW-1 Veer Singh stated that after her marriage, deceased visited his house for three times and after that on 25.09.2008, he was informed about the incident. The version of PW-1 Veer Singh has been corroborated by PW-2 Smt. Krishna Devi. PW-2 Krishna Devi also stated that even when third time her daughter Saroj Devi came from her matrimonial home, she has told that she was being continuously harassed and that accused persons were not allowing her even to take proper food and that her husband Dharam Das used to beat her after consuming liquor. However, deceased was again sent back to her matrimonial home and thereafter, on day of incident, they were informed that accused persons have burnt the deceased. The evidence indicates that since after her marriage, deceased was continuously being harassed for fulfilment of alleged demand of dowry. The incident took place within about 7 months of marriage and during this period of 7 months deceased has visited her paternal home for three times and on every occasion she always told her family members that she was being harassed in connection with said dowry demand. During this period of 7 months, besides the three visits of deceased, PW-1 Veer Singh also used to visit her matrimonial home house. There are no reasons to doubt this evidence. The accused-appellant has also not taken any such specific plea that deceased did not visit her maternal home or that PW-1 Veer Singh did not visit his house. Thus, there is evidence that within a short span of 7 months of matrimonial life of deceased, she visited her parental house for three times and whenever deceased met her father or brother, she used to tell about the harassment being meted out to her on account of demand of buffalo and cash of Rs. 40,000/ by the accused-appellant. All these facts clearly imply that the deceased was continuously being harassed for demand dowry and there is absolutely nothing to indicate that this cruelty and harassment has ever ceased till the incident. One important aspect of the matter is that there is evidence in the form of dying declaration of deceased that it was the

accused-appellant Dharam Das, who has put the deceased on fire and she died after two months of said incident of burn injuries sustained by her in alleged incident. Though accused-appellant was not charged for offence under section 302 IPC, but the fact that she was set ablaze by the accused-appellant, also goes to show that deceased was being subjected to cruelty till the incident of burning and this cruelty clearly covers "cruelty soon before her death". Considering entire evidence, it is manifest there is a proximate connection between the demand of dowry and act of cruelty / harassment meted out to deceased and the death of deceased. The interval between cruelty and death of deceased is not much and such gap has to be examined in the attending facts and circumstances of the matter. There is a proximate and live link between the effect of cruelty based on dowry demand and the death of deceased. As observed by the Hon'ble Apex Court, the determination of the period which can come within the term "soon before" is to be determined by courts, depending upon facts and circumstances of each case and it normally imply that the interval should not be much between the concerned cruelty or harassment and effect of cruelty based on dowry demand and the concerned death.

59. Considering the evidence in light of peculiar facts and circumstances of the instant case as well as the position of law, it is established that the deceased was continuously being harassed on account of dowry demand of a buffalo and cash of Rs.40,000/ and the accused-appellant continued the harassment and ill treatment to the deceased till the incident of her burning. As noticed earlier there is absolutely nothing to indicate that this cruelty and harassment has ever ceased till the incident. Considering entire evidence, it is clear that there is proximate and live link between the effect or cruelty meted out to the deceased based on dowry demand and the death of deceased. Thus, it established that deceased was subjected to cruelty or harassment by her husband / accused-appellant in connection with demand for dowry and that such cruelty or harassment was soon before her death. In view of this evidence, the presumption enshrined under section 113-B Evidence Act can safely be raised against accused-appellant appellant.

60. Applying the presumption enshrined under section 113-B Evidence Act, once the initial burden of showing that the woman was subject to cruelty or harassment for or in connection with any demand of dowry soon before her death is discharged by the prosecution, the Court has to presume that such person has caused a dowry death. As stated earlier, from evidence on record it is established that deceased Saroj Devi was subjected to cruelty or harassment by her husband/appellant in connection with the demand of dowry and that such cruelty and harassment was soon before her death. It is not disputed that deceased suffered death otherwise than under normal circumstances within seven years of her marriage. Here it may be stated that for sake of argument even if the said dying declarations of deceased are excluded from consideration, the evidence of PW-1 Veer Singh and PW 2 Krishna Devi is sufficient to base conviction of accused-appellant. Thus, we reach to the inescapable conclusion that the conviction of accused-appellant under section 498-A and 304-B IPC is based on evidence and accordingly conviction of accused-appellant for said charges is hereby affirmed.

61. So far conviction of accused-appellant under section 3 and 4 D.P. Act is concerned, the essence of evidence against

accused-appellant is that after his marriage with deceased Saroj Devi, he used to demand a buffalo and cash of Rs 40,000/ from deceased as additional dowry and he continuously harassed the deceased on account of said demand since after the marriage. At this stage it would be appropriate to peruse the provisions of section 3 and 4 of D.P. Act, which read as under:

"**3, Penalty for giving or taking dowry.--**[(1)] If any person, after the commencement of this Act, gives or takes or abets the giving or taking of dowry, he shall be punishable [with imprisonment for a term which shall not be less than [five years, and with fine which shall not be less than fifteen thousand rupees or the amount of the value of such dowry, whichever is more]:

Provided that the Court may, for adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a term of less than [five years]. [(2) Nothing in sub-section (1) shall apply to, or in relation to,-- (a) presents which are given at the time of a marriage to the bride (without any demand having been made in that behalf): Provided that such presents are entered in a list maintained in accordance with the rules made under this Act; (b) presents which are given at the time of a marriage to the bridegroom (without any demand having been made in that behalf): Provided that such presents are entered in a list maintained in accordance with the rules made under this Act:

Provided further that where such presents are made by or on behalf of the bride or any person related to the bride, such presents are of a customary nature and the value thereof is not excessive having regard to the financial status of the person by whom, or on whose behalf, such presents are given.]

Section 4. Penalty for demanding dowry.--If any person demands, directly or indirectly, from the parents or other relatives or guardian of a bride or bridegroom, as the case may be, any dowry, he shall be punishable with imprisonment for a term which shall not be less than six months, but which may extend to two years and with fine which may extend to ten thousand rupees: Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months.]"

62. Perusal of section 3 of the D.P. Act shows that it prohibits giving and taking of dowry. In the instant case there is no categorical evidence to satisfy the ingredients of offence punishable under section 3 D.P. Act, rather the mischief of accused-appellant is squirely covered under section 4 D.P. Act. Thus conviction of accused-appellant under section 4 D.P. Act is upheld but the conviction under section 3 D.P. Act is liable to be set aside.

63. So far as quantum of sentence is concerned, it was submitted by learned counsel for the appellant that the trial court has awarded maximum sentence ie imprisonment for life, without considering the relevant facts and the sentence awarded to accused-appellant is quite excessive and arbitrary. It was stated that marriage of deceased has taken place 7 months prior of the incident and that the accused-appellant is in jail since last about 11 years as he was never granted bail. It was submitted that ends of justice would met if the sentence of life imprisonment is reduced to the period already under gone by the accused-appellant.

64. It is settled legal position that appropriate sentence should be awarded after giving due consideration to the facts and circumstances of each case, nature of offence and the manner in which it was executed or committed. It is obligation of Court to constantly remind itself that right of victim, and be it said, on certain occasions persons aggrieved as well as society at large can be victims, never be marginalised. The measure of punishment should be proportionate to gravity of offence. Object of sentencing should be to protect society and to deter the criminal in achieving avowed object of law. Further, it is expected that Courts would operate the sentencing system so as to impose such sentence which reflects conscience of society and sentencing process has to be stern where it should be. The Court will be failing in its duty if appropriate punishment is not awarded for a crime, which has been committed not only against individual victim but also against society to which criminal and victim belong. 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, enormity of crime warranting public abhorrence and it should 'respond to society's cry for justice against the criminal'. [Vice Sumer Singh Vs. Surajbhan Singh and others, (2014) 7 SCC 323, Sham Sunder Vs. Puran, (1990) 4 SCC 731, M.P. Vs. Saleem, (2005) 5 SCC 554, Ravji Vs. State of Rajasthan, (1996) 2 SCC 175].

65. Hon'ble Apex Court in the case of Hem Chand Vs. State of Haryana, [(1994) 6 SCC 727] in para no. 7 of the judgment has held as under:-

"7. Now coming to the question of sentence, it can be seen that Section 304-B I.P.C., lays down that "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." The point for consideration is whether the extreme punishment of imprisonment for life is warranted in the instant case. A reading of Section 304-B IPC would show that when a question arises whether a person has committed the offence of dowry death of a woman what all that is necessary is it should be shown that soon before her unnatural death, which took place within seven years of the marriage, the deceased had been subjected, by such person, to cruelty or harassment for or in connection with demand for dowry. If that is shown then the court shall presume that such a person has caused the dowry death. It can therefore be seen that irrespective of the fact whether such person is directly responsible for the death of the deceased or not by virtue of the presumption, he is deemed to have committed the dowry death if there were such cruelty or harassment and that if the unnatural death has occurred within seven years from the date of marriage. Likewise there is a presumption under Section 113-B of the Evidence Act as to the dowry death. It lays down that the court shall presume that the person who has subjected the deceased wife to cruelty before her death shall presume to have caused the dowry death if it is shown that before her death, such woman had been subjected, by the accused, to cruelty or harassment in connection with any demand for dowry. Practically this is the presumption that has been incorporated in Section 304-B I.P.C. also. It can therefore be seen that irrespective of the fact whether the accused has any direct connection With the death or not, he shall be presumed to have committed the dowry

death provided the other requirements mentioned above are satisfied. In the instant case no doubt the prosecution has proved that the deceased died an unnatural death namely due to strangulation, but there is no direct evidence connecting the accused. It is also important to note in this context that there is no charge under Section 302 I.P.C. The trial court also noted that there were two sets of medical evidence on the file in respect of the death of the deceased. Dr. Usha Rani, P.W. 6 and Dr. Indu Latit, P.W. 7 gave one opinion. According to them no injury was found on the dead body and that the same was highly decom-posed. On the other hand, Dr. Dalbir Singh, P.W. 13 who also examined the dead body and gave his opinion, deposed that he noticed some injuries at the time of re-post mortem examination. Therefore at the most it can be said that the prosecution proved that it was an unnatural death in which case also Section 304-B I.P.C. would be attracted. But this aspect has certainly to be taken into consideration in balancing the sentence to be awarded to the accused. As a matter of fact, the trial court only found that the death was unnatural and the aspect of cruelty has been established and therefore the offences punishable underSection 304-B and 201 I.P.C. have been established. The High Court in a very short judgment concluded that it was fully proved that the death of the deceased in her matrimonial home was a dowry death otherwise than in normal circumstances as a result of cruelty meted out to her and therefore an offence underSection 304-B I.P.C. was made out. Coming to the sentence the High Court pointed out that the accused-appellant was a police employee and instead of checking the crime he himself indulged therein and precipitated in it and that bride killing cases are on the increase and therefore a serious view has to be taken. As mentioned above Section 304-B I.P.C. only raises presumption and lays down that minimum sentence should be seven years but it may extend to imprisonment for life. Therefore awarding extreme punishment for life should be in rare cases and not in every case."

66. Recently in **Criminal Appeal No. 724 OF 2019 Kashmira Devi Versus State of Uttarakhand & Ors, decided on 28.01.2020,** Hon'ble Apex Court observed as under:

"Having arrived at the above conclusion the quantum of sentence requires consideration. The High Court has awarded life imprisonment to the appellant on being convicted under Section 304B IPC. The minimum sentence provided is seven years but it may extend to imprisonment for life. In fact, this Court in the case of Hem Chand Vs. State of Haryana (1994) 6 SCC 727 has held that while imposing the sentence, awarding extreme punishment of imprisonment for life under Section 304-B IPC should be in rare cases and not in every case.Though the mitigating factor noticed in the said case was different, in the instant case keeping in view the age of the appellant and also the contribution that would be required by her to the family, while husband is also aged and further taking into consideration all other circumstances, the sentence as awarded by the High Court to the appellant herein is liable to be modified."

67. Keeping in view the principles of law laid down in the afore mentioned cases, in the instant case it may be observed that deceased was a young lady aged 20 years and her marriage was solemnised only

seven months prior to the incident and that she died of burn injuries within 9 months of her marriage. There is evidence that it was the accused-appellant, who put her on fire and deceased suffered severe burn injuries. Though the trial court did not frame charge under section 302 IPC but the specific role of accused-appellant cannot be ignored. In case of Kailash Kaur Vs State of Punjab (1987) 2 SCC 631, the prosecution case was that the sister-in-law caught hold of the deceased and the mother-in-law poured kerosene oil on her and set her on fire. The Supreme Court observed that "whenever such cases come before the court and offence is brought home to the accused beyond reasonable doubt, it is the duty of the court to deal with it in most severe and strict manner and award the maximum penalty prescribed by the law in order that it may operate as a deterrent to other persons from committing such anti- social crimes. In the present case deceased Saroj Devi suffered incident of burning only 7 months after her marriage. After suffering severe burn injuries, deceased struggled for life for about two months in hospital. It is also established that she was continuously being harassed for dowry since after her marriage and she continued to face this trauma till the incident. It may also be noticed that accused-appellant was also convicted under section 498-A IPC but in its wisdom the learned trial court did not choose to award any sentence on that count. Having regard to the totality of facts and circumstances of the instant case, it appears a case of rare category so as to warrant the maximum sentence i.e. life imprisonment and thus, we find no good reasons to interfere with the sentence awarded to the accused appellant.

68. In view of aforesaid conviction of accused-appellant Dharam Das for offences under section 498-A, 304-B IPC and section 4 D.P. Act is upheld. The sentences awarded under section 304-B IPC and section 4 D.P. Act are also upheld. However, conviction and sentence of accused-appellant under Section 3 D.P. Act is set aside. Accused-appellant is stated in custody and he shall serve out the remaining sentence.

69. Appeal partly allowed in above terms.

70. Let the lower court record be transmitted to the trial Court concerned for its information and compliance.

(2020)10ILR A108
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.09.2020

BEFORE

THE HON'BLE J.J. MUNIR, J.

Criminal Revision No. 1139 of 2019

Raju ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Alakh Mishra

Counsel for the Opposite Parties:
A.G.A., Sri Ram Nath

Juvenile Justice (Care and Protection of Children) Act, 2015- Section 12(1)- Denial of bail to juvenile- The third postulate under Section 12(1) of the Act , where bail may be denied to a juvenile, somewhere touches upon the merits of the case in the totality of circumstances that must receive consideration. A heinous crime , where the juvenile's involvement is apparent prima facie, would certainly work as a set back to the society's

conscience, if the juvenile were permitted to go free on bail- Merits of the of the prosecution prima facie- is not altogether irrelevant under Section 12(1) of the Act. The gravity of the offence, the prima facie connection of the minor with the offence and its impact on the society must enter judgement while considering a bail plea advanced on behalf of a child in conflict with the law - The circumstances here are such that if the revisionist were to be released on bail, it would be revolting to the society's conscience.

The merits of the case would be one of the relevant factors to be considered by the Court where the offence committed by the juvenile is grave and he would be disentitled to be released on bail if his released would defeat the ends of justice. (Para 9, 11)

Criminal Revision Rejected. (E-3)

Case law/ Judgements relied upon:-

1. Mangesh Rajbhar Vs St. Of U.P & anr., 2018 (2) ACR 1941

2. Om Prakash Vs St. Of Raj. & anr., (2012) 5 SCC 201: 2012 (2) ACR 1825

(Delivered by Hon'ble J.J. Munir, J.)

1. This Criminal Revision, under Section 102 of the Juvenile Justice (Care and Protection of Children) Act, 2015 is directed against an order of the learned Second Additional Sessions Judge/ Special Judge, SC/ST (PA) Act, Etawah, dated 30.01.2019, dismissing Criminal Appeal no.1 of 2019, preferred by the revisionist and affirming an order dated 20.12.2018 passed by the Juvenile Justice Board, Etawah, refusing the revisionist's bail plea in Case Crime no.201 of 2018, under Sections 376, 2(1) IPC, Section 3/4 of the POCSO Act and Section 3(2)(V) of the SC/ST (PA) Act, Police Station Bakewar, District Etawah.

2. Heard Mr. Akash Mishra, learned counsel for the revisionist and the learned AGA appearing on behalf of the State. The name of Mr. Ram Nath, Advocate appears for opposite party no.2 and is shown in the cause list. When the matter was called on, no one has appeared on behalf of the second opposite party.

3. A First Information Report was lodged by the second opposite party with Police Station Bakewar, District Etawah giving rise to the present crime on 09.03.2018 at 49 minutes past 3 p.m., carrying allegations to the effect that she is a native of Ram Nagar Adda, *Mauja* Karaudhi, Police Station Bakewar, District Etawah and a member of the Dohre caste. On 09.03.2018 at about 12 noon while she was conventionally plastering the interiors of her home with clay, her four year old daughter strayed into the field playing along. She was accompanied by other small children. At that time, another native of the village, Raju son of Sughar Singh (the revisionist) took away her minor daughter to a mustard field. The other children informed the complainant that her daughter had been taken away by Raju. The complainant rushed to the mustard field raising alarm. It is alleged in the FIR that the complainant saw the revisionist ravish her daughter. The complainant/ opposite party no.2 has said in the first information that she attempted to apprehend the revisionist, but he escaped her clutches and took to his heals. Other natives of the village also arrived and that with the assistance of those others, she has come over to report the matter to the police. In her statement, under Section 164 Cr.P.C., the young prosecutrix has supported the prosecution.

4. The Juvenile Justice Board by their order dated 12.12.2018 refused bail to the revisionist, pending trial. On Appeal, that

order has been affirmed by the learned Special Judge, SC/ST (PA) Act, Etawah by the order impugned.

5. Aggrieved, this Revision has been preferred.

6. Mr. Akash Mishra, learned Counsel for the revisionist has apparently a very difficult task to persuade this Court that it is a case where the revisionist ought to be released on bail, pending trial. This Court does not have the slightest hesitation to place on record its appreciation for the most remarkable manner in which Mr. Mishra has discharged his difficult brief. His submission is short but formidable in the circumstances. He candidly acknowledges the fact that the prosecutrix is a child of four years, who has spoken inculpatory against the revisionist in her statement, under Section 164 Cr.P.C. before the Magistrate. He submits, however, that circumstances to place his case in that exception to Section 12(1) of the Act, where release on bail of the child in conflict with law would defeat the ends of justice, is not at all discernible here. He points out that the statement of the young prosecutrix is so unnatural that it is hard to believe that she could have ever made it. He has taken this Court through the statement of the prosecutrix made before the Magistrate. This Court on a perusal of the same, read in isolation, would be inclined to agree with Mr. Mishra that the statement is most unnatural. This Court is, indeed, surprised how a child that young could have come out with the kind of graphic description, that makes for the prosecutrix's statement, under Section 164 Cr.P.C. in this case. Read in isolation as said earlier, it would certainly suggest a different authorship than one that can be attributed to the young prosecutrix's mind. But, that is not the end of the matter.

7. Here, the FIR has been lodged by the prosecutrix's mother, who has said in a rather prompt account of the occurrence that she saw the revisionist ravish the child. What is more disconcerting here is the fact that the medico-legal examination report records fresh injuries, indicative of recent forceful penetration suffered by the child. There is no alternative explanation about that kind of an injury. Assuming that someone put words in the young prosecutrix's mouth while the Magistrate recorded her statement under Section 164 Cr.P.C., the fact that her mother claims to be an eye witness to the act in a prompt FIR and the injuries sustained by the child, as young as four years, do not leave much scope *prima facie* for the revisionist to say that he is not the one to be blamed.

8. This Court is mindful of the fact, as pointed out by the learned Counsel for the revisionist, that in a bail plea under the Act, Section 12(1) engrafts a rule for bail to every juvenile, irrespective of his *prima facie* involvement in the crime. It is only in the event, where the juvenile's case *prima facie* showing his complicity, falls into one or the other disentitling categories, postulated under Section 12(1) of the Act, that bail may be denied to a child in conflict with law. Section 12 of the Act is quoted *in extenso*:

"12. Bail of juvenile.--(1) When any person accused of a bailable or non-bailable offence, and apparently a juvenile, is arrested or detained or appears or is 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 institution or fit person but he shall not be so released if there appear reasonable grounds for believing that the release 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.

(2) When such person having been arrested is not released on bail under sub-section (1) by the officer in charge of the police station, such officer shall cause him to be kept only in an observation home in the prescribed manner until he can be brought before a Board.

(3) When such person is not released on bail under sub-section (1) by the Board it shall, instead of committing him to prison, make an order sending him to an observation home or a place of safety for such period during the pendency of the inquiry regarding him as may be specified in the order."

9. This Court is of opinion that it is not a case where releasing the revisionist on bail would bring him into association with any known criminal or would expose him to moral, physical or psychological danger. The moot question is, whether ordering his release on bail would bring his case within the teeth of the third exception, which says that it would lead to ends of justice being defeated. Learned Counsel for the revisionist at this stage has again made a very relevant point, where he says that the revisionist was aged 14 years and 3 months on the relevant date, that is to say, the date of occurrence. He was clearly below the age of 16, where different standards apply under the amended provisions of the Act. This Court is of opinion that the third postulate under Section 12(1) of the Act, where bail may be denied to a juvenile, somewhere touches upon the merits of the case in the totality of circumstances that must receive consideration. A heinous crime, where the juvenile's involvement is apparent *prima facie*, would certainly work as a set back to the society's conscience, if the juvenile were permitted to go free on bail.

10. I had occasion to consider this issue in **Mangesh Rajbhar vs. State of U.P. and another, 2018(2) ACR 1941**, where it was held:

"24. This court from what appears on a furter (sic further) reading of the judgment in Raja (minor) (supra) did not construe the last of the three grounds for the refusal of bail to a juvenile in the proviso to Section 12(1) of the Act ejusdem generis; rather, this court in that case referred to the merits of the case and related the ground for denying bail to the juvenile being released on bail "would defeat the ends of justice" with the merits of the prosecution case. In other words, this Court found in the expression "defeat the ends of justice" a repose for the society to defend itself from the onslaught of a minor in conflict with law by certainly making relevant though not decisive, the inherent character of the offence committed by the minor. In this connection paragraph nos. 11, 12 and 13 of the judgment in Raja (minor) (supra) may be gainfully quoted.

"11. The report of the medical examination of the victim clearly shows that the revisionist had forced himself upon the victim, who was seven years old child and in the statements under sections 161

Cr.P.C. and 164 Cr.P.C., the child had clearly deposed about how she was taken away by the revisionist and later on caught on the spot by the public and he pretended to be taking a bath. In the orders impugned, there is specific mention about the fact that the revisionist was accused by name by the victim, who was studying in class II and the release on bail of the revisionist would defeat the ends of justice.

12. Having gone through the record of the case including statement under section 161 Cr.P.C. and the statement under section 164 Cr.P.C. given by the victim and also the report of the medical examination of the victim, which shows penetration by force and resultant injury, I am of the opinion that there is no legal infirmity in the orders impugned as the release on bail of the revisionist would indeed defeat the ends of justice.

13. No doubt, the Juvenile Justice Act is a beneficial legislation intended for reform of the juvenile/child in conflict with the law, but the law also demands that justice should be done not only to the accused, but also to the accuser."

25. It is not that this aspect of the gravity of the offence has been considered irrelevant to the issue of grant or refusal of bail to a minor in the past and before the present Act of 2015 came into force. In a decision of this Court under the Juvenile Justice Act, 2000 where the interest of the society were placed seemingly not on a level of playing field with the juvenile, this Court in construing the provisions of Section 12 in that Act that were pari materia to Section 12 of the Act in the matter of grant of bail to a minor held in the case of **Monu @ Moni @ Rahul @ Rohit v. State of U.P., 2011 (74) ACC 353** in paragraph Nos. 14 and 15 of the report as under:

"14. Aforesaid section no where ordains that bail to a juvenile is a must in all cases as it can be denied for the reasons".....if there appears reasonable grounds for believing that the release 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."

15. In the light of above statutory provision bail prayer of the juvenile revisionist has to be considered on the surrounding facts and circumstances. Merely by declaration of being a juvenile does not entitle a juvenile in conflict with law to be released on bail as a matter of right. The Act has a solemn purpose to achieve betterment of juvenile offenders but it is not a shelter home for those juvenile offenders who have got criminal proclivities and a criminal psychology. It has a reformative approach but does not completely shun retributive theory. Legislature has preserved larger interest of society even in cases of bail to a juvenile. The Act seeks to achieve moral physical and psychological betterment of juvenile offender and therefore if, it is found that the ends of justice will be defeated or that goal desired by the legislature can be achieved by detaining a juvenile offender in a juvenile home, bail can be denied to him. This is perceptible from phraseology of section 12 itself. Legislature in its wisdom has therefore carved out exceptions to the rule of bail to a juvenile."

26. The Hon'ble Supreme Court in the case of **Om Prakash vs. State of Rajasthan and another, (2012) 5 SCC 201: 2012 (2) ACR 1825** (SC) has brought in due concern in matters relating to juveniles where the offences are heinous like rape, murder, gang-rape and the like etc., and, has indicated that in such matters, the nature and gravity of the offence would be relevant; the minor cannot get away by shielding himself behind veil of minority. It has been held in Om Prakash (supra) by their Lordships thus:

"3. Juvenile Justice Act was enacted with a laudable object of providing

a separate forum or a special court for holding trial of children/juvenile by the juvenile court as it was felt that children become delinquent by force of circumstance and not by choice and hence they need to be treated with care and sensitivity while dealing and trying cases involving criminal offence. But when an accused is alleged to have committed a heinous offence like rape and murder or any other grave offence when he ceased to be a child on attaining the age of 18 years, but seeks protection of the Juvenile Justice Act under the ostensible plea of being a minor, should such an accused be allowed to be tried by a juvenile court or should he be referred to a competent court of criminal jurisdiction where the trial of other adult persons are held.

23. ..... Similarly, if the conduct of an accused or the method and manner of commission of the offence indicates an evil and a well planned design of the accused committing the offence which indicates more towards the matured skill of an accused than that of an innocent child, then in the absence of reliable documentary evidence in support of the age of the accused, medical evidence indicating that the accused was a major cannot be allowed to be ignored taking shelter of the principle of benevolent legislation like the Juvenile Justice Act, subverting the course of justice as statutory protection of the Juvenile Justice Act is meant for minors who are innocent law breakers and not accused of matured mind who uses the plea of minority as a ploy or shield to protect himself from the sentence of the offence committed by him."

27. It seems thus that the suggestion of the learned counsel for the revisionist that bail to a juvenile or more properly called a child in conflict with law can be denied under the last ground of the proviso to Section 12 ejusdem generis with the first two and not with reference to the gravity of the offence, does not appear to be tenable. The gravity of the offence is certainly relevant though not decisive. It is this relevance amongst other factors where gravity of the offence committed works and serves as a guide to grant or refuse bail in conjunction with other relevant factors to refuse bail on the last ground mentioned in the proviso to Section 12 (1) of the Act, that is to say, on ground that release would "defeat the ends of justice".

28. Under the Act, as it now stands there is further guidance much more than what was available under the Act, 2000 carried in the provisions of Section 15 and 18 above extracted and the definition of certain terms used in those sections. A reading of Section 18 of the Act shows that the case of a child below the age of 16 years, who has committed a heinous crime as defined in the Act is made a class apart from cases of petty offence or the serious offence committed by a child in conflict with the law/juvenile of any age, and, it is further provided that various orders that may be made by the Board as spelt out under clause (g) of Section 15 depending on nature of the offences, specifically the need for supervision or intervention based on circumstances as brought out in the social investigation report and past conduct of the child. Though orders under Section 18 are concerned with final orders to be made while dealing with the case of a juvenile, the same certainly can serve as a guide to the exercise of power to grant bail to a juvenile under Section 12(1) of the Act which is to be exercised by the Board in the first instance.

29. Read in the context of the fine classification of juveniles based on age vis-a-vis the nature of the offence committed by them and reference to a specifically

needed supervision or intervention, the circumstances brought out in the social investigation report and past conduct of the child which the Board may take into consideration, while passing final orders under Section 18 of the Act it is, in the opinion of this court, a good guide for the Board while exercising powers to grant bail to go by the same principles though embodied in Section 18 of the Act, when dealing with a case under the last part of the proviso to Section 12 (1) that authorizes the Board to deny bail on ground that release of the juvenile would "defeat the ends of justice."

30. Thus, it is no ultimate rule that a juvenile below the age of 16 years has to be granted bail and can be denied the privilege only on the first two of the grounds mentioned in the proviso, that is to say, likelihood of the juvenile on release being likely to be brought in association with any known criminal or in consequence of being released exposure of the juvenile to moral, physical or psychological danger. It can be equally refused on the ground that releasing a juvenile, that includes a juvenile below 16 years would "defeat the ends of justice." In the opinion of this Court the words "defeat the ends of justice" employed in the proviso to Section 12 of the Act postulate as one of the relevant consideration, the nature and gravity of the offence though not the only consideration in applying the aforesaid part of the disentitling legislative edict. Other factors such as the specific need for supervision or intervention, circumstances as brought out in the social investigation report and past conduct of the child would also be relevant that are spoken of under Section 18 of the Act.

31. In this context Section 12 and 18 and also Section15 (Section 15 not relevant in the case of a child below 16 years) and other relevant provisions all of which find place in Chapter IV of the Act are part of an integrated scheme. The power to grant bail to a juvenile under Section 12(1) cannot be exercised divorced from the other provisions or as the learned counsel for the revisionist argues on the other specific disentitling provisions in the grounds mentioned in the proviso to Section 12(1) of the Act. The submission made based on the rule of ejusdem generis urged by the learned counsel for the revisionist is misplaced, in the opinion of this Court."

11. In the facts of the present case, this Court does not wish to say that merits of the prosecution *prima facie* are decisive to judge the revisionist's plea for bail. However, it is not altogether irrelevant under Section 12(1) of the Act. The gravity of the offence, the *prima facie* connection of the minor with the offence and its impact on the society must enter judgment while considering a bail plea advanced on behalf of a child in conflict with the law. Here, as said earlier, notwithstanding the fact that the revisionist is below 15 years, the offence has been committed *prima facie* with determination, exhibition of maturity and the understanding of its consequences. The child in conflict with law is a boy above 14 years, whereas the victim is a four year old girl. The mother claims to be an eye witness and the medico-legal evidence does *prima facie* strongly support the prosecution. Other natives of the village are claimed to have seen the occurrence. Thus evaluated in its totality, the circumstances here are such that if the revisionist were to be released on bail, it would be revolting to the society's conscience.

12. These remarks or those elsewhere made may not be ever so slightly construed

as expressions of opinion on merits of the charge. It is for the Juvenile Justice Board, holding trial, to determine independently irrespective of anything said here, what is proved by evidence led on behalf of the prosecution. It would always be the prosecution's burden to establish the charges beyond reasonable doubt. What has been said here is in the context of the bail plea, and nothing more.

13. In the result, this revision fails and is **dismissed**. The Juvenile Justice Board, Etawah, considering the period of detention, shall conclude the trial by the 31st of December, 2020.

14. Let a copy of this order be communicated to the Juvenile Justice Board, Etawah through the learned Sessions Judge, Etawah by the Joint Registrar (Compliance).

(2020)10ILR A115
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.09.2019

BEFORE

THE HON'BLE J.J. MUNIR, J.

Criminal Revision No. 1221 of 2019

Abhishek Kumar Yadav
...Revisionist(In Jail)
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Anand Prakash Srivastava, Sri Matiur Rehman Khan, Sri Sugendra Kumar Yadav

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

Juvenile Justice (Care and Protection of Children) Act, 2015- Section 12(1)- Bail of juvenile- Clause that disentitles a child to bail, where his release would defeat the ends of justice - The clause " defeat the ends of justice"- Is to be associated with the ground realities of dispensing justice where the offender is a child in conflict with law, bearing in mind the object of the Act – The legislature has been conscious of the fact that the society too has to be protected against the depredations of juvenile offenders. A juvenile offender, particularly, above the age of 16 years about whom the Act now makes a distinction, is sometimes to be tried as an adult , if he has the ability to understand the consequences of the offence and is capable of committing the offence- Where the statute disentitles a child in conflict with law to bail on the ground that his release would lead to ends of justice being defeated, it requires the Court to take into consideration different factors. One of them is certainly the gravity of the offence. The other is its impact on the society or locale where it is committed. The gravity of the offence committed works and serves as a guide to grant or refuse bail in conjunction with other relevant factors to refuse bail on the ground that release would "defeat the ends of justice".

The disentitling Clause to Section 12(1) of the Act has been consciously used by the legislature to disentitle a juvenile to bail where his offence is grave and his release would have an adverse impact on the society.

Parity- Not applicable in cases of juveniles in conflict with law- It must be remarked that the rule of parity , which normally applies in cases of bail under Sections 437 or 439 Cr.P.C, may not be attracted to the case of a child in conflict with law, where another child in conflict in the same crime is granted the concession of bail, under the Act. This is for the reason that in the case of bail to a juvenile, in matters where the entitlement to bail is not on merits but by virtue of the provisions of Section 12 (1) of the Act, the right is always personal to the accused.

The rule of parity cannot be made applicable in cases of bail of juveniles since the circumstances of every juvenile differ and conclusions may be different in respect of the same offence for a similar role. (Para 11, 12, 16)

Criminal Revision Rejected. (E-3)

Case Law/ Judgements relied upon:-

1. Mangesh Rajbhar Vs St. Of U.P & anr., 2018 (2) ACR 1941.

2. Monu @ Moni @ Rahul @ Rohit Vs St. Of U.P, 2011 (74) ACC 353

3. Om Prakash Vs St. Of Raj & anr. (2012) 5 SCC 201 : 2012 (2) ACR 1825 (SC)

(Delivered by Hon'ble J.J. Munir, J.)

1. This revision is directed against the order of Mr. Gajendra Kumar, First Additional Sessions Judge, Deoria dated 17.01.2019 dismissing Criminal Appeal No. 55 of 2018 and affirming an order of the Juvenile Justice Board, Deoria dated 06.12.2018, declining bail to the revisionist in Case Crime No. 37 of 2018 under Sections 147, 149, 302, 323, 353, 307/34 I.P.C., P.S. Bhatpar Rani, District Deoria.

2. This revision was admitted to hearing on 28.03.2019 and notice to the complainant-opposite party was directed to issue vide order dated 28.03.2019. According to office report dated 18.07.2019, service has been effected personally, evidenced by the report placed at flag "X'. The report marked by flag "X' is a report dated 03.05.2019, submitted by the Chief Judicial Magistrate, Deoria which indicates that the second opposite party, Jitendra Yadav has been personally served. A copy of the notice issued bearing acknowledgment of service is also enclosed. Service upon the second opposite party is, therefore, held sufficient. No one appears on behalf of the second opposite party.

3. The prosecution originates in the FIR dated 20.04.2018, giving rise to Case Crime No. 37 of 2018, last mentioned. This FIR was lodged by the second opposite party at half past nine on 20.04.2018 reporting an incident of the said date, that occurred at 3:00 o'clock in the evening hours. The first informant/opposite party no. 2, Jitendra Yadav, who is the brother of the two deceased, described the occurrence in the FIR thus: The informant, Jitendra Yadav was a native of village Jiraso, P.S. Bhatpar Rani, district Deoria. On 20.04.2018 in the day hours, his younger brothers Rakesh Kumar Yadav, Rajkumar Yadav, sons of Jiut Yadav, Dileep Yadav s/o Jiut Yadav, Durgesh s/o Shree Kant Yadav, all residents of village Jiraso were all ready to depart for a nearby place called Vahoran ka Tola, where at a certain Shambhu's place they were invited to a feast in connection with a *Tilak*. They had proceeded to destination and on way reached a place Bandhe, at about 3:00 p.m. There, the accused Sunil Yadav s/o Nanhoo @ Vreejanand, Vimlesh Yadav s/o Dhurendra Yadav, Kamlesh Yadav s/o Surendra Yadav, Rajesh Yadav s/o Jamuna Yadav, Nand Ji Yadav s/o Jamuna Yadav, Chandrabhan Yadav s/o Mahaveer Yadav, Vikash Yadav s/o Nanhoo @ Vreejanand Yadav, Vijay Yadav s/o Rampravesh Yadav, Abhishek Yadav s/o Amresh Yadav, Jayprakash Yadav s/o Jamuna Yadav, Parbhas Yadav s/o Indrashan Yadav, all natives of village Jiraso, armed with iron rods and pipes, with a common intention to do the informant's brothers to death, surrounded the victim's on all sides and assaulted them. It is alleged that the informant's brother, Rakesh attempted to escape in order to save his life

but was surrounded on all sides. He was cornered in front of one Subhash Yadav's house and battered to death by the accused, employing the iron rods and pipes. The informant's other brother Rajkumar was surrounded by the assailant's at the door of one Mundeerika Gaud and was battered to death on the spot, assaulted by the rods and pipes. The two others Dileep and Durgesh were battered by the assailants, injuring them grievously. Dileep collapsed on the spot and fainted. It is also reported that the other victim, Durgesh had disappeared.

4. The revisionist applied to the Juvenile Justice Board that he be declared a juvenile. The Board, by their order dated 15.11.2018, declared the revisionist a juvenile aged 17 years 9 months and 19 days on the date of occurrence. The revisionist then moved the Juvenile Justice Board for bail but his bail plea was rejected. An appeal was carried to the Sessions Judge, under Section 101 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short, "the Act') which has been dismissed by means of the order impugned, passed by the learned First Additional Sessions Judge, Deoria.

5. Aggrieved, this revision has been preferred.

6. Heard Mr. M.R. Khan, learned counsel for the revisionist and the learned A.G.A. appearing on behalf of the State.

7. It is submitted by Mr. Khan, learned counsel for the revisionist that there is no cavil about the matter that the revisionist is a juvenile, duly adjudicated to be so by the Juvenile Justice Board. He submits that the courts below have committed a manifest error of law in proceeding to refuse bail to the revisionist, looking to the gravity of the offence that is quite irrelevant in the case of a juvenile. So far as a juvenile is concerned, according to Mr. Khan, the rule is that he is entitled to bail. It is only when his case falls under one or the other dis-entitling category under Section 12(1) of the Act that his bail plea may legitimately be refused.

8. Learned A.G.A. on the other hand has resisted the revision and said that it is not a case where the orders impugned ought to be interfered with.

9. This Court has keenly considered the rival submissions and perused the record.

10. It is true that so far as a juvenile is concerned, his plea for bail is to be judged on parameters quite different from that of an adult. Section 12 of the Juvenile Justice Act certainly envisages bail as a rule to every juvenile/child in conflict with law. It is also true that unless the bail plea of a juvenile fails to pass muster under the three dis-entitling conditions postulated under the proviso to Section 12 (1) of the Act, bail ought not to be refused to a child in conflict with the law. Section 12 of the Act is quoted in *extenso*:

"12. Bail to a person who is apparently a child alleged to be in conflict with law.--(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 sub-section (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."

11. Here, the juvenile is aged 17 years 9 months and 19 days. He is clearly above the age of 16 years. Before turning to a consideration of the two dis-entitling categories that speak about the child in conflict, upon release, coming into association with any known criminal or being exposed to moral, physical or psychological danger, this Court thinks that this case is one that requires to be tested first on the anvil of the clause, that dis-entitles a child to bail, where his release would defeat the ends of justice. Now, "defeat the ends of justice" employed in the proviso to section 12(1) of the Act, is not a word of art. It is to be associated with the ground realities of dispensing justice in cases where the offender is a child in conflict with the law, bearing in mind the object of the Act. The statute is no doubt enacted to safeguard the interests of young offenders, who are yet not adults. Still, the legislature has been conscious of the fact that the society too has to be protected against the depredations of juvenile offenders whose misdirected and abounding enthusiasm, replete with energy, enters a wrong channel or pursuit and threatens society.

12. A juvenile offender, particularly, above the age of 16 years about whom the Act now makes distinction, is sometimes to be tried as an adult, if he has the ability to understand the consequences of the offence and is capable of committing the offence. That apart, where the statute disentitles a child in conflict with law to bail on the ground that his release would lead to ends of justice being defeated, it requires the Court to take into consideration different factors. One of them is certainly the gravity of the offence. The other is its impact on society or the locale where it is committed. To illustrate, if the juvenile perpetrator of a gruesome rape or murder is allowed to walk free the day following he commits the offence, the shock it would administer to the society's conscience and the feeling of unrequited justice, it would leave behind, lingering in the minds of the aggrieved or the bereaved family, would certainly lead to ends of justice being defeated. Here, this Court finds, though limited to the purpose of adjudicating the revisionist's bail plea, that it is a case of a double murder committed brazenly without any fear of the authority of law and in association with a number of other accused, whose figure is

indicted to be eleven, nominated. The manner of perpetration of the offence is gruesome. The determination of each of the offenders is so abiding that it has led to two lives being extinguished, one after the other, in the same transaction of crime. *Prima facie* the two murders were not the end of it, as the two surviving victims were also battered and inflicted with grievous injuries. In a crime like this, if the revisionist were allowed to walk free because he is short by two months and an odd number of days of his eighteenth birthday, the ends of justice, in the opinion of this Court, would most certainly be defeated.

13. I had occasion to consider this issue in **Mangesh Rajbhar vs. State of U.P. and another, 2018(2) ACR 1941**, where it was held:

"24. This court from what appears on a furter (sic further) reading of the judgment in Raja (minor) (supra) did not construe the last of the three grounds for the refusal of bail to a juvenile in the proviso to Section 12(1) of the Act ejusdem generis; rather, this court in that case referred to the merits of the case and related the ground for denying bail to the juvenile being released on bail "would defeat the ends of justice" with the merits of the prosecution case. In other words, this Court found in the expression "defeat the ends of justice" a repose for the society to defend itself from the onslaught of a minor in conflict with law by certainly making relevant though not decisive, the inherent character of the offence committed by the minor. In this connection paragraph nos. 11, 12 and 13 of the judgment in Raja (minor) (supra) may be gainfully quoted.

"11. The report of the medical examination of the victim clearly shows that the revisionist had forced himself upon the victim, who was seven years old child and in the statements under sections 161 Cr.P.C. and 164 Cr.P.C., the child had clearly deposed about how she was taken away by the revisionist and later on caught on the spot by the public and he pretended to be taking a bath. In the orders impugned, there is specific mention about the fact that the revisionist was accused by name by the victim, who was studying in class II and the release on bail of the revisionist would defeat the ends of justice.

12. Having gone through the record of the case including statement under section 161 Cr.P.C. and the statement under section 164 Cr.P.C. given by the victim and also the report of the medical examination of the victim, which shows penetration by force and resultant injury, I am of the opinion that there is no legal infirmity in the orders impugned as the release on bail of the revisionist would indeed defeat the ends of justice.

13. No doubt, the Juvenile Justice Act is a beneficial legislation intended for reform of the juvenile/child in conflict with the law, but the law also demands that justice should be done not only to the accused, but also to the accuser."

25. It is not that this aspect of the gravity of the offence has been considered irrelevant to the issue of grant or refusal of bail to a minor in the past and before the present Act of 2015 came into force. In a decision of this Court under the Juvenile Justice Act, 2000 where the interest of the society were placed seemingly not on a level of playing field with the juvenile, this Court in construing the provisions of Section 12 in that Act that were pari materia to Section 12 of the Act in the matter of grant of bail to a minor held in the case of **Monu @ Moni @ Rahul @ Rohit v. State of U.P., 2011 (74) ACC 353**

in paragraph Nos. 14 and 15 of the report as under:

"14. Aforesaid section no where ordains that bail to a juvenile is a must in all cases as it can be denied for the reasons".....if there appears reasonable grounds for believing that the release 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."

15. In the light of above statutory provision bail prayer of the juvenile revisionist has to be considered on the surrounding facts and circumstances. Merely by declaration of being a juvenile does not entitle a juvenile in conflict with law to be released on bail as a matter of right. The Act has a solemn purpose to achieve betterment of juvenile offenders but it is not a shelter home for those juvenile offenders who have got criminal proclivities and a criminal psychology. It has a reformative approach but does not completely shun retributive theory. Legislature has preserved larger interest of society even in cases of bail to a juvenile. The Act seeks to achieve moral physical and psychological betterment of juvenile offender and therefore if, it is found that the ends of justice will be defeated or that goal desired by the legislature can be achieved by detaining a juvenile offender in a juvenile home, bail can be denied to him. This is perceptible from phraseology of section 12 itself. Legislature in its wisdom has therefore carved out exceptions to the rule of bail to a juvenile."

26. The Hon'ble Supreme Court in the case of **Om Prakash vs. State of Rajasthan and another, (2012) 5 SCC 201: 2012 (2) ACR 1825 (SC)** has brought in due concern in matters relating to juveniles where the offences are heinous like rape, murder, gang-rape and the like etc., and, has indicated that in such matters, the nature and gravity of the offence would be relevant; the minor cannot get away by shielding himself behind veil of minority. It has been held in Om Prakash (supra) by their Lordships thus:

"3. Juvenile Justice Act was enacted with a laudable object of providing a separate forum or a special court for holding trial of children/juvenile by the juvenile court as it was felt that children become delinquent by force of circumstance and not by choice and hence they need to be treated with care and sensitivity while dealing and trying cases involving criminal offence. But when an accused is alleged to have committed a heinous offence like rape and murder or any other grave offence when he ceased to be a child on attaining the age of 18 years, but seeks protection of the Juvenile Justice Act under the ostensible plea of being a minor, should such an accused be allowed to be tried by a juvenile court or should he be referred to a competent court of criminal jurisdiction where the trial of other adult persons are held.

23. ..... Similarly, if the conduct of an accused or the method and manner of commission of the offence indicates an evil and a well planned design of the accused committing the offence which indicates more towards the matured skill of an accused than that of an innocent child, then in the absence of reliable documentary evidence in support of the age of the accused, medical evidence indicating that the accused was a major cannot be allowed to be ignored taking shelter of the principle of benevolent legislation like the Juvenile Justice Act, subverting the course of justice as statutory protection of the Juvenile Justice Act is meant for minors who are innocent law breakers and not accused of

matured mind who uses the plea of minority as a ploy or shield to protect himself from the sentence of the offence committed by him."

27. It seems thus that the suggestion of the learned counsel for the revisionist that bail to a juvenile or more properly called a child in conflict with law can be denied under the last ground of the proviso to Section 12 ejusdem generis with the first two and not with reference to the gravity of the offence, does not appear to be tenable. The gravity of the offence is certainly relevant though not decisive. It is this relevance amongst other factors where gravity of the offence committed works and serves as a guide to grant or refuse bail in conjunction with other relevant factors to refuse bail on the last ground mentioned in the proviso to Section 12 (1) of the Act, that is to say, on ground that release would "defeat the ends of justice".

28. Under the Act, as it now stands there is further guidance much more than what was available under the Act, 2000 carried in the provisions of Section 15 and 18 above extracted and the definition of certain terms used in those sections. A reading of Section 18 of the Act shows that the case of a child below the age of 16 years, who has committed a heinous crime as defined in the Act is made a class apart from cases of petty offence or the serious offence committed by a child in conflict with the law/juvenile of any age, and, it is further provided that various orders that may be made by the Board as spelt out under clause (g) of Section 15 depending on nature of the offences, specifically the need for supervision or intervention based on circumstances as brought out in the social investigation report and past conduct of the child. Though orders under Section 18 are concerned with final orders to be made while dealing with the case of a juvenile, the same certainly can serve as a guide to the exercise of power to grant bail to a juvenile under Section 12(1) of the Act which is to be exercised by the Board in the first instance.

29. Read in the context of the fine classification of juveniles based on age vis-a-vis the nature of the offence committed by them and reference to a specifically needed supervision or intervention, the circumstances brought out in the social investigation report and past conduct of the child which the Board may take into consideration, while passing final orders under Section 18 of the Act it is, in the opinion of this court, a good guide for the Board while exercising powers to grant bail to go by the same principles though embodied in Section 18 of the Act, when dealing with a case under the last part of the proviso to Section 12 (1) that authorizes the Board to deny bail on ground that release of the juvenile would "defeat the ends of justice."

30. Thus, it is no ultimate rule that a juvenile below the age of 16 years has to be granted bail and can be denied the privilege only on the first two of the grounds mentioned in the proviso, that is to say, likelihood of the juvenile on release being likely to be brought in association with any known criminal or in consequence of being released exposure of the juvenile to moral, physical or psychological danger. It can be equally refused on the ground that releasing a juvenile, that includes a juvenile below 16 years would "defeat the ends of justice." In the opinion of this Court the words "defeat the ends of justice" employed in the proviso to Section 12 of the Act postulate as one of the relevant consideration, the nature and gravity of the offence though not the only consideration in applying the aforesaid part of the disentitling legislative edict. Other factors

such as the specific need for supervision or intervention, circumstances as brought out in the social investigation report and past conduct of the child would also be relevant that are spoken of under Section 18 of the Act.

31. In this context Section 12 and 18 and also Section15 (Section 15 not relevant in the case of a child below 16 years) and other relevant provisions all of which find place in Chapter IV of the Act are part of an integrated scheme. The power to grant bail to a juvenile under Section 12(1) cannot be exercised divorced from the other provisions or as the learned counsel for the revisionist argues on the other specific disentitling provisions in the grounds mentioned in the proviso to Section 12(1) of the Act. The submission made based on the rule of ejusdem generis urged by the learned counsel for the revisionist is misplaced, in the opinion of this Court."

14. A reading of the Social Investigation Report also leaves an impression on the Court's mind that the revisionist may be dis-entitled on the two other grounds, as well. The learned Additional Sessions Judge has examined that report and concluded against the revisionist. This Court is inclined to agree with the learned Additional Sessions Judge.

15. Mr. Khan invited the attention of the Court to the fact that another co-accused, Vikash Yadav, also a child in conflict with law, with an identical role, had the favour of this Court in Criminal Revision No. 3265 of 2019 decided on 27.07.2020, where orders refusing him bail by the Courts below, were overturned and he was allowed to go free on bail.

16. This Court has carefully perused the judgment and order of His Lordship, Gautam Chowdhary, J. in the Criminal Revision, last mentioned. It must be remarked that the rule of parity, which normally applies in cases of bail under Sections 437 or 439 Cr.P.C., may not be attracted to the case of a child in conflict with law, where another child in conflict in the same crime is granted the concession of bail, under the Act. This is for the reason that in the case of bail to a juvenile, in matters where the entitlement to bail is not on merits but by virtue of the provisions of Section 12(1) of the Act, the right is always personal to the accused. It is not that for an identical role, two children in conflict with law, would both pass muster under the proviso to the Section 12(1) of the Act. In the case of one, the Court may infer based on the Social Investigation Report, the police record and other circumstances that release on bail would not bring the young offender into association with a known criminal or expose him to moral, physical or psychological danger, but in the case of the other, the conclusion may be diametrically the opposite, considering the circumstances of the child. The circumstances that could differ could be the criminal history of a family, the presence of family members in one case, who could be expected to exercise good care and control over the child in future and the absence of such family members in the other case. The varying company of the two children shown in the Social Investigation Report could also lead to different results in case of two children, accused of the same offence, with the same role.

17. Likewise, on the third dis-entitling factor about ends of justice being defeated on account of release, conclusions may be different in respect of the same offence for a similar role. This would again be the personal circumstances of the child.

18. This Court is of opinion that in relation to the last of the three dis-entitling features, the present case is an apt illustration of a very valid distinction between the case of co-accused, Vikash Yadav (minor) and the revisionist here. In the case of Vikash Yadav (minor), the child in conflict with the law was aged 13 years 9 months and 16 days on the date of occurrence, whereas in the present case, he is hardly two and a half month short of majority. More than that, the child in conflict in Vikash Yadav (minor) (supra) was found to be a disabled child with 57% physical disability. These factors, in the opinion of this Court, would work to illustrate the point that in cases of juvenile justice, the rule of parity in bail matters would not operate the way it does, in cases under Section 437 or 439 Cr.P.C.

19. In the result, this Court does not find any good ground to interfere with the impugned orders. This revision fail and is **dismissed.**

20. It is, however, clarified that anything said in this matter will not affect the rights of parties on merits and the Juvenile Justice Board or the Children's Court trying the offence, would be free to reach its conclusions at the trial, based on the evidence led, unaffected by anything said here.

21. However, looking to the period of detention of the revisionist, it is directed that trial pending before the concerned court be concluded expeditiously and preferably within three months from the date of receipt of a copy of this order, in accordance with Section 309 Cr.P.C. and in view of principle laid down in the judgment of the Hon'ble Supreme Court in the case of **Vinod Kumar v. State of Punjab** reported in **2015 (3) SCC 220,** if there is no legal impediment.

22. It is made clear that in case the witnesses are not appearing, the concerned court shall initiate necessary coercive measures for ensuring their presence.

23. Let a copy of the order be certified to the court concerned for strict compliance to the Board or the Court concerned, through the learned Sessions Judge, Deoria by the Joint Registrar (Compliance).

(2020)10ILR A123
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.10.2020

BEFORE

THE HON'BLE J.J. MUNIR, J.

Criminal Revision No. 1944 of 2019

Akash @ Nirmal Mishra
...Revisionist(In Observation Home)
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Babu Lal Ram, Sri Phool Singh Yadav

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

Juvenile Justice (Care and Protection of Children) Act, 2015- Section 12- Bail of Juvenile- Relevant considerations for- Last disentitling clause- " defeat the ends of justice"- About the factum of the incident, there is reasonable assurance at this stage, short of the charge being tested at the trial- It is true that the merits of the case or prima facie tenability of the charge, like an adult, is not entirely decisive to the fate of the bail plea- It is not altogether irrelevant-The gravity of

the charge, manner of its perpetration, circumstances in which the offence is alleged to have been committed, its immediate and not so immediate impact on the society at large and the locality, in particular, besides its impact on the aggrieved family, are all matters to be taken into reckoning while judging a juvenile's bail plea. All these factors are relevant under the last disentitling clause postulated under the proviso to Section 12 (1) of the Act, which says that release of the juvenile would "defeat the ends of justice"- Proviso has been thoughtfully introduced by the legislature to arm the Court with a right to overcome an otherwise absolute right to bail, where in the totality of the circumstances , release on bail would adversely impact the law and order and the equilibrium of an ordered society.

While deciding the bail plea of a juvenile the merits of the case are relevant under the last disentitling Clause of Section 12(1) of the Act which says that release of the juvenile would "Defeat the ends of justice". The gravity of the offence and its impact on the society would be relevant and a juvenile would not be entitled to be released on bail when the offence is grave or heinous and where his release on bail would adversely impact the law and order and the equilibrium of an ordered society. (Para 8,9)

Criminal Revision rejected. (E-3)

Case law/ Judgements relied/ cited:-

1. Crl. Revision No. 915 of 2017, Sumit Kumar Vs St. of U.P & anr. dec. on 13.04.2018.

2. Vinod Kumar Vs St. Of Punj.

(Delivered by Hon'ble J.J. Munir, J.)

1. This revision is directed against an order of Smt. Pooja Singh, Special Judge (POCSO)/ XIth Additional Sessions Judge, Kanpur Nagar dated 30.03.2019 dismissing Criminal Appeal No.30 of 2019 and affirming an order of the Juvenile Justice Board, Kanpur Nagar dated 16.02.2019 refusing bail to the revisionist in Case Crime No.530 of 2018, under Section 376 IPC and Section 3/4 of the POCSO Act, Police Station Panki, District Kanpur Nagar.

2. Notice was issued to opposite party no.2 by this Court vide order dated 14.05.2019. According to the office report dated 31.07.2019, notice has been received back after personal service, detailed in the report, placed at Flag-A. A perusal of the said report shows that the Chief Metropolitan Magistrate, Kanpur Nagar has indicated through his memo dated 26.06.2019 that the notice issued by this Court has been personally served by Head Constable no.787 on opposite party no.2. Service upon opposite party no.2 is, therefore, held sufficient. No on appears on behalf of the said opposite party.

3. Heard Sri P.S. Yadav, learned Counsel for the revisionist and the learned A.G.A. appearing on behalf of the State.

4. A perusal of the First Information Report dated 16.11.2018 shows that it has been lodged by opposite party no.2, Smt. Mohini wife of Akhilesh on 16.11.2018 at 00:31 hours regarding an occurrence dated 15.11.2018, that befell the victim at 6 o'clock in the evening. It is said in the FIR that the informant's minor daughter (for short, "the prosecutrix') aged about six years was playing along with other children of the locality when the revisionist, who is also a resident of the same locality, ravished the prosecutrix. It is mentioned in the FIR that the informant had come to the Station along with a relative of hers, whom she has named in the FIR as also the minor prosecutrix, asking the police to register a case and to take necessary action. It

appears that Case Crime no.530 of 2018, under Section 376 IPC and Section 3/4 of the POCSO Act, Police Station Panki, District Kanpur Nagar, was registered on the basis of the aforesaid information.

5. The revisionist moved the Juvenile Justice Board asking them to declare him a child in conflict with law. The Juvenile Justice Board by their order dated 08.01.2019 adjudged the revisionist a child in conflict with law aged 14 years, 3 months and 15 days on the date of occurrence. The revisionist then asked to be released on bail by an application made under Section 12 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short, "the Act'). The bail application came to be rejected by the Juvenile Justice Board. The revisionist assailed that order in Appeal carried to the learned Sessions Judge. The revisionist's Appeal has since come to be dismissed by means of the impugned order. Assailing both the orders denying bail, the instant Revision has been brought.

6. It is argued by Sri P.S. Yadav, learned Counsel for the revisionist that the revisionist is a child in conflict with law, who is below the age of 16 years. His case regarding bail, therefore, has to be considered strictly on the parameters of Section 12(1) of the Act. He emphasizes that regarding bail plea of a juvenile of the revisionist's age, there can be no reference about the merits of the prosecution case or the gravity of the offence. All that is required to be seen is whether given his right to be released on bail, is he disentitled under any of the three exceptions to the rule of bail postulated under Section 12(1) of the Act. Mr. Yadav submits that there is nothing on record to show that the revisionist's case falls under any of the three disentitling exceptions. He urges that the Courts below have not properly evaluated the social investigation report, which alone could furnish relevant material to form an opinion whether the revisionist ought to be enlarged on bail pending trial. Learned Counsel for the revisionist has placed reliance on a decision of this Court in **Criminal Revision no.915 of 2017, Sumit Kumar vs. State of U.P. and another, decided on 13.04.2018** in support of his submission, noted above.

7. Learned A.G.A. on the other hand urges that it is a heinous crime, where a six years old child has been ravished by the revisionist. In case, the revisionist were released on bail, it would lead to ends of justice being defeated.

8. This Court has considered the rival submissions and perused the record. It may be true that the Courts below have not undertaken a careful exercise by evaluating the social investigation report while forming their opinion on the first of the two disentitling parameters under the proviso to Section 12(1) of the Act, that is to say, the prospect of release bringing the child in conflict into association with some known criminal or exposing him to moral, physical or psychological danger. But, that does not end the matter. It is a case where the revisionist, though below the age of 16, has ravished a very young prosecutrix, who is just six years old. About the factum of the incident, there is reasonable assurance at this stage, short of the charge being tested at the trial. The prosecution is consistent in the FIR lodged by the prosecutrix's mother, the statement of the prosecutrix and her mother, recorded by the police, under Section 161 Cr.P.C. and the statement of the prosecutrix, under Section 164 Cr.P.C. before the Magistrate.

9. This Court has also noticed that the police appear to have recorded the young prosecutrix's statement in some or the other form of electronic record, be it a video or an audio recording, possibly in the presence of her mother. All these remarks may not be understood as the Court's intendment to express any opinion on the merits of the charge. All that this Court wishes to say is that for the present, the Court seized as it is of the bail matter, there is a reasonable assurance about the charge being *prima facie* credible. It is true that the merits of the case or *prima facie* tenability of the charge, like an adult, is not entirely decisive to the fate of the bail plea. At the same time, it is not altogether irrelevant. The gravity of the charge, manner of its perpetration, circumstances in which the offence is alleged to have been committed, its immediate and not so immediate impact on the society at large and the locality, in particular, besides its impact on the aggrieved family, are all matters to be taken into reckoning while judging a juvenile's bail plea. All these factors are relevant under the last disentitling clause postulated under the proviso to Section 12(1) of the Act, which says that release of the juvenile would "defeat the ends of justice'. After all "defeat the ends of justice' is not a word of art. It has been thoughtfully introduced by the legislature to arm the Court with a right to overcome an otherwise absolute right to bail, where in the totality of the circumstances, release on bail would adversely impact the law and order and the equilibrium of an ordered society.

10. The case in hand shows that the revisionist by his action, if true, has put the society and its surroundings on alarm. His actions have led to a situation, where *prima facie* no child of tender years, and more than that the parents or the guardians of a young child, would feel safe during their daily routine, when there is nothing otherwise to call extra caution. In the opinion of this Court, it is a case where release of the child in conflict with law would lead to ends of justice being defeated.

11. In the result, this Court does not find any good ground to interfere with the impugned orders. This revision fails and is **dismissed**.

12. It is, however, clarified that anything said in this matter will not affect the rights of parties on merits and the Juvenile Justice Board or the Children's Court trying the offence, would be free to reach its conclusions at the trial, based on the evidence led, unaffected by anything said here.

13. However, looking to the period of detention of the revisionist, it is directed that trial pending before the concerned Court be concluded expeditiously and preferably within two months from the date of receipt of a copy of this order, in accordance with Section 309 Cr.P.C. and in view of principle laid down in the judgment of the Hon'ble Supreme Court in the case of **Vinod Kumar v. State of Punjab reported in 2015 (3) SCC 220,** if there is no legal impediment.

14. It is made clear that in case the witnesses are not appearing, the concerned Court shall initiate necessary coercive measures for ensuring their presence.

15. Let a copy of the order be certified for strict compliance to the Board or the Court concerned, through the learned Sessions Judge, Kanpur Nagar by the Joint Registrar (Compliance).

(2020)10ILR A127
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.10.2020

BEFORE

THE HON'BLE J.J. MUNIR, J.

Criminal Revision No. 4921 of 2019

Khushabuddin Ali ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Atul Nayak, Sri Rajesh Kumar Mall, Sri Ravi Kumar Srivastava

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

Juvenile Justice (Care and Protection of Children) Act, 2015- Section 12- Bail of Juvenile- The regime about a universal rule of bail to the juvenile and then subjecting it to the three disentitling conditions under the proviso to Section 12 (1) of the Act has application in a case where a juvenile is not entitled to bail on the merits of the case- It does not mean that in a case where a juvenile on the merits of the case is entitled to bail, his bail plea must still pass muster u/s 12 (1) of the Act.

Where a juvenile is entitled to bail on the merits of the case, there is no need for testing his case on the rigors of the three disentitling provisions u/s 12 (1) of the Act.

Juvenile Justice (Care and Protection of Children) Act, 2015- A perusal of the FIR, the statement under Section 161 Cr.PC. and that under Section 164 Cr.P.C casts a grave shadow of doubt on the prosecution story. In the event, the revisionist were an adult, in all probability, he would have been entitled to bail on merits – Nothing in the social investigation report that the revisionist, if released on bail, would come in association with any known criminal or would be exposed to any moral, physical or psychological danger. In the circumstances, there is no basis to infer that the release of the revisionist on bail would lead to ends of justice being defeated.

Since on the merits of the case the story of the prosecution is doubtful and the social investigation report is in favour of the revisionist, hence revisionist is entitled to bail. (Para 10, 13, 14)

Revision accordingly allowed.(E-3)

(Delivered by Hon'ble J.J. Munir, J.)

1. This Revision, under Section 102 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short, "the Act') is directed against a judgment and order passed by Mr. Lakshmi Kant Shukla, learned Special Judge POCSO Act, Kushinagar at Padrauna dated 07.11.2019 dismissing Criminal Appeal no.57 of 2019 and affirming an order passed by the Juvenile Justice Board, Kushinagar at Padrauna, dated 11.09.2019, refusing bail to the revisionist in Case Crime no.315 of 2019, under Sections 363, 366, 376, 506 IPC and Section 3/4 of the POCSO Act, Police Station Kotwali Padrauna, District Kushinagar.

2. Notice was issued to opposite party no.2 vide order dated 20.12.2019. A perusal of the office report dated 27.02.2020 shows that service upon opposite party no.2 has been effected through his daughter. Service report is on record marked with Flag - A. The service report submitted by the Chief Judicial Magistrate, Kushinagar at Padrauna, dated 22.01.2020 shows that opposite party no.2 has been served through his daughter, Sukanya Yadav.

Duplicate of the notice issued bears acknowledgment of receipt by Sukanya Yadav. Service upon opposite party no.2 is, therefore, held sufficient. No one has put in appearance on behalf of the complainant/ opposite party no.2.

3. Heard Sri Rajesh Kumar Mall, learned Counsel for the revisionist and the learned A.G.A. appearing on behalf of the State.

4. The prosecution in this case commenced on an FIR dated 02.07.2019 lodged at 9.14 p.m. by the second opposite party at Police Station Kotwali Padrauna, nominating the revisionist, besides two others. The FIR was registered for offences punishable, under Sections 363, 366 IPC. The occurrence indicated there is said to have taken place on 23.06.2019. It is said in the FIR that the informant's daughter (for short, "the prosecutrix') had headed out to the fields on 23.06.2019 at about 8:00 o'clock in the night, when the revisionist along with Golu son of Faijul Rehman and Imtiyaz son of Samsul Huda took her away by blandishment. It was also reported that they had taken her away in a Maruti (Swift Car) bearing registration no. UP 53 AQ 1181. It is also said that the prosecutrix is aged 13 years and reads in Class-VII. Necessary action by the police was requested.

5. The revisionist is a minor, aged about 17 years, his date of birth according to his High School Examination Certificate being 07.03.2003. The revisionist moved for bail to the Juvenile Justice Board, who proceeded to reject the same. Aggrieved, the revisionist went up in Appeal to the learned Sessions Judge. That Appeal came up before the learned Judge (POCSO Act), who has dismissed the Appeal and affirmed the Juvenile Justice Board.

6. Aggrieved, this Revision has been brought.

7. Learned Counsel for the revisionist has argued that the prosecutrix is not a minor, but a major aged 18 years. She has eloped with the revisionist of her free will. It is upon knowledge of the FIR being lodged by her father, opposite party no.2, that she returned home along with the revisionist. She has lateron implicated the revisionist at the bidding of her parents and the police on patently false charges of rape. In addition, it is submitted by the learned Counsel for the revisionist that under Section 12(1) of the Act, the juvenile has a right to be released on bail unless his case falls in one or the other three disentitling categories postulated under the proviso to Section 12(1) of the Act. It is urged further that the revisionist's case is not one that falls under any of the disentitling categories and, therefore, the Courts below have committed a manifest illegality in refusing bail to the revisionist.

8. Learned A.G.A. has opposed the revisionist's prayer to reverse the two concurrent orders. He submits that it is a case of rape involving a minor, aged 15 - 16 years. In case, the revisionist were released on bail, it would lead to ends of justice being defeated.

9. This Court has carefully considered the submissions advanced on behalf of both parties and perused the record. It is true that in the case of bail to a juvenile, Section 12 of the Act excludes the principles governing bails provided under the Code of Criminal Procedure. It postulates a regime where bail is a matter of right to the juvenile where an adult, circumstanced like him, would not be entitled to it except where the juvenile's case is shown to fall in any of the three disentitling categories under the proviso to Section 12(1) of the Act. Now, Section 12 of the Act may be

quoted, for the facility of ready reference. Section 12 *(supra)* reads:

"12. Bail to a person who is apparently a child alleged to be in conflict with law.--(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 sub-section (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. This regime about a universal rule of bail to the juvenile and then subjecting it to the three disentitling conditions envisaged under the proviso to Section 12(1) of the Act, in the opinion of this Court, has application in a case where a juvenile is not entitled to bail on the merits of the case. All that this Court means is this: in a case where an adult, circumstanced like the juvenile, would not be entitled to bail, the provisions of Section 12(1) of the Act would apply, entitling the juvenile to the determination of his bail plea in accordance with the said provision. A fortiori, it does not mean that in a case where a juvenile on the merits of the case is entitled to bail, his bail plea must still pass muster under Section 12(1) of the Act. If this construction of the provisions of Section 12 of the Act were adopted, the juvenile would be more disadvantaged than the adult, and that clearly is not the purpose or the object of the Act; it is also not the purport of Section 12 thereof.

11. In the present case, this Court notices that in the FIR, the prosecutrix has been mentioned to be 15 years old. She has been subjected to a medico-legal examination, where on the basis of an ossification test, she has been opined by the Chief Medical Officer, Kushinagar, to be aged about 16 years. A copy of this report has been brought on record by the revisionist through a supplementary affidavit dated 22.09.2020, which this Court has perused. Now, going by the usual variation of two years on the medical estimation of age, the prosecutrix would reckon to be 18 years. It has not been brought to this Court's notice that there is

any other higher certification for the prosecutrix's age relevant under Section 94(2) of the Act, that would exclude medical estimation. This implies prima facie that the prosecutrix is of the age of consent.

12. A perusal of the FIR shows that the revisionist has been implicated with an allegation of enticing away a minor from the custody of the lawful guardian, may be for the purpose of marrying her. There is no allegation of rape there. The statement of the prosecutrix, that was recorded by a lady constable on 03.07.2019 after she was recovered, is very important to this Court's understanding. The statement shows that the prosecutrix had known the revisionist some seven months prior to the occurrence and was in love with him. She has said that on 23.06.2019, she was thrashed by her mother, which annoyed her so much, that she went of her own to the revisionist, whom she loved. The revisionist lives in Gujarat. The prosecutrix called the revisionist over to Gorakhpur and without telling anyone at home, she left home of her own for Barhalganj Railway Station. There she boarded a train to Gorakhpur and met the revisionist there. She accompanied the revisionist from Gorakhpur to Gujarat. The revisionist housed the prosecutrix at his employer's home. However, when the two learnt that the prosecutrix's father had reported the matter to the police, both of them proceeded to Gorakhpur by train and from Gorakhpur to Padrauna by bus. The revisionist had made her comfortable somewhere and left to fetch something when the police arrived and took her away. The prosecutrix has said specifically that she was not ravished, expressing it in the words: *''mere saath koi galat kaam nahin hua hai'*. Two days later, on 05.07.2019, the prosecutrix's statement was recorded, under Section 164 Cr.P.C. There, she squarely blamed the revisionist of committing rape.

13. A perusal of the FIR, the statement under Section 161 Cr.P.C. and that under Section 164 Cr.P.C. casts a grave shadow of doubt on the prosecution story. In the event, the revisionist were an adult, in all probability, he would have been entitled to bail on merits. This being the position, it would be very unfair and discriminatory to test the revisionist's case further on the touchstone of Section 12(1) of the Act, and then condemn his claim on one or the other disentitling grounds. The Special Judge in Appeal has looked into the social investigation report and there appears nothing from his remarks in the order impugned, particularly, those carried in paragraphs 6 and 7 of that order, that the revisionist, if released on bail, would come into association with any known criminal or would be exposed to any moral, physical or psychological danger.

14. This Court does not find that in the circumstances, there is basis to infer that release of the revisionist on bail would lead to ends of justice being defeated. In the opinion of this Court, the impugned orders passed by the two Courts below cannot be sustained and deserve to be set aside.

15. In the result, this revision succeeds and is **allowed**. The impugned order dated 07.11.2019 passed by the Special Judge POCSO Act, Kushinagar at Padrauna in Criminal Appeal no.57 of 2019 and the order dated 11.09.2019 passed by the Juvenile Justice Board, Kushinagar at Padrauna in Case Crime no.315 of 2019, under Sections 363, 366, 376, 506 IPC and Section 3/4 of the POCSO Act, Police Station Kotwali Padrauna, District

Kushinagar, are hereby **set aside** and **reversed.** The bail application made on behalf of the revisionist stands **allowed.**

16. Let the revisionist, **Khushabuddin Ali,** through his natural guardian/ father, Diladar Husain, be released on bail in Case Crime no.315 of 2019, under Sections 363, 366, 376, 506 IPC and Section 3/4 of the POCSO Act, Police Station Kotwali Padrauna, District Kushinagar upon his father furnishing a personal bond with two solvent sureties of his relatives each in the like amount to the satisfaction of the Juvenile Justice Board, Kushinagar at Padrauna, subject to the following conditions:

(i) that the natural guardian/ father, Diladar Husain 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 and his father, Diladar Husain will report to the District Probation Officer on the second Monday of every calendar month commencing with the second Monday of October, 2020 and if during any calendar month the second Monday falls on a holiday, then on the 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, Kushinagar at Padrauna 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.

(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.

(2020)10ILR A131
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.02.2018

BEFORE

THE HON'BLE RAKESH SRIVASTAVA, J.

Misc Single No. 1787 of 2018

Arvind Kumar Singh ...Petitioner
Versus
Additional Commissioner (Judicial), Lko. Division Lucknow & Ors. ...Respondents

Counsel for the Petitioner:
Pankaj Gupta

Counsel for the Respondents:
C.S.C., Yogendra Nath Yadav

Civil Suit was filed seeking cancellation of sale deed and said suit was decreed in favour of the Respondent-Respondent also moved an appeal against order declaring transfer void-appeal allowed -Petitioner was not a party to lis nor appeal-no legal right of Petitioner infringed-he heave no locus to file Writ.

Writ Petition dismissed. (E-9)

List of Cases cited:

1. Jasbhai Motibhai Desai Vs Roshan Kumar, Haji Bashir Ahmed, (1976) 1 SCC 671

2. Ravi Yashwant Bhoir Vs Collector, (2012) 4 SCC 407

3. Ayaaubkhan Noorkhan Pathan Vs St. of Mah., (2013) 4 SCC 465

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

1. This petition has been filed challenging the order dated 01.08.2016 passed by the Additional Commissioner (respondent no. 1 herein) in Appeal No. C-20151000001139 (Bitto v. Sub Divisional Officer and others).

2. The circumstances giving rise to this writ petition are as follows:

3. One Shiv Rani, was the recorded tenure holder of the land in Gata Nos. 547/0.202, 548/0.101, 550Ka/0.074, 552/0.018, 579/0.030, 580/.555 and 584/0.051 total 7 plots measuring 0.808 hectare situated in village Muspipri, Tehsil Bakshi Ka Talab, District Lucknow ("disputed land"). On 10.01.2008, Shiv Rani allegedly executed a registered sale deed with respect to the disputed land in favour of Anil Kumar. On the same day she also executed a registered will in favour of her daughter Bitto, the respondent no. 4 herein.

4. On the strength of the sale deed dated 10.01.2008, Anil Kumar moved an application for mutation of his name in the revenue records. The petitioner, it is alleged, opposed the mutation on the ground that sale deed was void as the disputed land was sold by Shiv Rani without prior permission of the Collector in terms of Section 157-A of the Uttar Pradesh Zamindari Abolition & Land Reforms Act, 1950 (for short "the Act'). The application for mutation of Anil Kumar was rejected by the Tehsildar.

5. On the basis of a report submitted by the Naib Tehsildar, proceedings were initiated against Shiv Rani and Anil Kumar under sections 166 and 167 of the Act. The case was registered as Case No. 45/52/69/12-13 (State v. Shiv Rani and others). In the said case, the Sub-divisional Officer (respondent no. 2 herein), vide his order dated 20.02.2013, held that Shiv Rani belonged to a Scheduled Caste while Anil Kumar was of general category and as such, prior approval of the Collector under Section 157-A of the Act was necessary for selling the disputed land. Since the sale deed dated 10.01.2008 was executed without obtaining approval of the Collector, the transfer was void under Section 166 and the land in dispute vested in the State Government under Section 167 of the Act. The application moved by Anil Kumar for recall of the order dated 20.02.2013 was also dismissed.

6. In the meantime, on 16.04.2012, the respondent no. 4 filed a Civil Suit No. 408 of 2012, in the Court of Civil Judge (Jr. Div.), Hawali, Lucknow seeking cancellation of sale deed dated 10.01.2008 submitting, inter alia, that Shiv Rani had died much before 10.01.2008, the date of the alleged sale deed; that the said deed was a sham document which was obtained by Anil Kumar by setting up an imposter in place of the owner, Shiv Rani. The said suit was decreed in favour of respondent no. 4 on 11.09.2013.

7. After the judgment and decree dated 11.09.2013 was passed by the Civil Judge, Hawali, the respondent no. 4, on 06.05.2015, filed an appeal before the Additional Commissioner under Section 333 of the Act against orders dated 20.02.2013 and 23.08.2014 passed by the Sub-divisional Officer. By order dated 01.08.2016 the appeal preferred by the respondent no. 4 has been allowed and the orders dated 20.02.2013 and 23.08.2014 have been set aside. It is only this order

which is under challenge in the present writ petition. The judgment and decree dated 11.09.2013 has not been assailed by the petitioner.

8. Heard Shri Pankaj Gupta, learned counsel for the petitioner, the learned Standing Counsel appearing for respondent nos. 1 and 2 and Shri Yogendra Nath Yadav, learned counsel for respondent no. 3.

9. Admittedly, the petitioner was not a party to the lis. The question is as to whether the petitioner has the locus to invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India in this case.

10. It is well settled that in order to have the locus standi to invoke certiorari jurisdiction, the petitioner should be an "aggrieved person". If the petitioner does not fall in this category, and is a "stranger", the Court will deny him this extraordinary remedy, save in very special circumstances wherein it may exercise its discretion in favour of the petitioner.

11. In *Jasbhai Motibhai Desai v. Roshan Kumar, Haji Bashir Ahmed, (1976) 1 SCC 671*, the Apex Court considered the question as to who can be considered as a "person aggrieved" in order to have the locus to invoke certiorari jurisdiction of a writ court and held as under:

"37. It will be seen that in the context of locus standi to apply for a writ of certiorari, an applicant may ordinarily fall in any of these categories: (i) "person aggrieved"; (ii) "stranger"; (iii) busybody or meddlesome interloper. Persons in the last category are easily distinguishable from those coming under the first two categories. Such persons interfere in things which do not concern them. They masquerade as crusaders for 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. They indulge in the pastime of meddling with the judicial process either by force of habit or from improper motives. Often, they are actuated by a desire to win notoriety or cheap popularity; while the ulterior intent of some applicants in this category, may be no more than spoking the wheels of administration. The High Court should do well to reject the applications of such busybodies at the threshold.

38. *The distinction between the first and second categories of applicants, though real, is not always well-demarcated. The first category has, as it were, two concentric zones; a solid central zone of certainty, and a grey outer circle of lessening certainty in a sliding centrifugal scale, with an outermost nebulous fringe of uncertainty. Applicants falling within the central zone are those whose legal rights have been infringed. Such applicants undoubtedly stand in the category of "persons aggrieved".* In the grey outer circle the bounds which separate the first category from the second, intermix, interfuse and overlap increasingly in a centrifugal direction. All persons in this outer zone may not be "persons aggrieved".

39. *To distinguish such applicants from "strangers", among them, some broad tests may be deduced from the conspectus made above*. These tests are not absolute and ultimate. Their efficacy varies according to the circumstances of the case, including the statutory context in which the matter falls to be considered. These are: Whether the applicant is a person whose

legal right has been infringed? Has he suffered a legal wrong or injury, in the sense, that his interest, recognised by law, has been prejudicially and directly affected by the act or omission of the authority, complained of? Is he a person who has suffered a legal grievance, a person

"against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something, or wrongfully affected his title to something?"

Has he a special and substantial grievance of his own beyond some grievance or inconvenience suffered by him in common with the rest of the public? Was he entitled to object and be heard by the authority before it took the impugned action? If so, was he prejudicially affected in the exercise of that right by the act of usurpation of jurisdiction on the part of the authority? Is the statute, in the context of which the scope of the words "person aggrieved" is being considered, a social welfare measure designed to lay down ethical or professional standards of conduct for the community? Or is it a statute dealing with private rights of particular individuals?

* * *

49. *It is true that in the ultimate analysis, the jurisdiction under Article 226 in general, and certiorari in particular is discretionary. But in a country like India where writ petitions are instituted in the High Courts by the thousand, many of them frivolous, a strict ascertainment, at the outset, of the standing of the petitioner to invoke this extraordinary jurisdiction, must be insisted upon. The broad guidelines indicated by us, coupled with other well-established self-devised rules of practice, such as the availability of an alternative remedy, the conduct of the petitioner etc. can go a long way to help the courts in weeding out a large number of writ petitions at the initial stage with consequent saving of public time and money."*(emphasis supplied)

12. In paragraph 19 of the present writ petition, the petitioner has stated his cause of action as follows:

"That the land in question is a very valuable land of gram sabha and as gram sabha is not coming forward hence present petitioner *(sic petition)* is being *filed through resident of village to save property of gram sabha."*

13. As is evident from the facts narrated above, no legal right of the petitioner has been infringed. He is at the most a complainant.

14. In *Ravi Yashwant Bhoir v. Collector, (2012) 4 SCC 407,* the Apex Court has held that a complainant cannot claim the status of an adversarial litigant and become a party to the lis in the following words:

"58. *Shri Chintaman Raghunath Gharat, ex-President was the complainant, thus, at the most, he could lead evidence as a witness. He could not claim the status of an adversarial litigant. The complainant cannot be the party to the lis.* A legal right is an averment of entitlement arising out of law. In fact, it is a benefit conferred upon a person by the rule of law. *Thus, a person who suffers from legal injury can only challenge the act or omission*. There may be some harm or loss that may not be wrongful in the eye of the law because it may not result in injury to a legal right or legally protected interest of the complainant but juridically harm of this description is called *damnum sine injuria.*

59. *The complainant has to establish that he has been deprived of or denied of a legal right and he has sustained injury to any legally protected interest. In case he has no legal peg for a justiciable claim to hang on, he cannot be heard as a party in a lis.* A fanciful or sentimental grievance may not be sufficient to confer a locus standi to sue upon the individual. There must be injuria or a legal grievance which can be appreciated and not a *stat pro ratione voluntas reasons* i.e. a claim devoid of reasons.

60. *Under the garb of being a necessary party, a person cannot be permitted to make a case as that of general public interest. A person having a remote interest cannot be permitted to become a party in the lis, as the person who wants to become a party in a case, has to establish that he has a proprietary right which has been or is threatened to be violated, for the reason that a legal injury creates a remedial right in the injured person. A person cannot be heard as a party unless he answers the description of aggrieved party."*(emphasis supplied)

15. In *Ayaaubkhan Noorkhan Pathan v. State of Maharashtra, (2013) 4 SCC 465,* the Apex Court has enumerated some of the exceptional circumstances wherein a third person, having no concern with the case, can be heard. Paragraph 23 of the said report being relevant is extracted below:

"23. Thus, from the above it is evident that under ordinary circumstances, a third person, having no concern with the case at hand, cannot claim to have any locus standi to raise any grievance whatsoever. *However, in exceptional circumstances as referred to above, if the actual persons aggrieved, because of ignorance, illiteracy, inarticulation or poverty, are unable to approach the court, and a person, who has no personal agenda, or object, in relation to which, he can grind his own axe, approaches the court, then the court may examine the issue* and in exceptional circumstances, even if his bona fides are doubted, but the issue raised by him, in the opinion of the court, requires consideration, the court may proceed suo motu, in such respect."(emphasis supplied)

16. The petitioner is admittedly espousing the cause of Gaon Sabha. By no stretch of imagination, can it be said that the Gaon Sabha is unable to approach this Court because of the exceptional circumstances mentioned in the case of *Ayaaubkhan Noorkhan Pathan (supra).*

17. For the foregoing reasons, the petitioner has no locus to invoke the extraordinary writ jurisdiction of this Court under Article 226 of the Constitution. Accordingly, without entering into the merits of the case, this writ petition is dismissed. No order as to cost.

(2020)10ILR A135
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.08.2020

BEFORE

THE HON'BLE MANISH KUMAR, J.

Misc Single No. 13987 of 2020

C/M Babu Triloki Singh Inter College ...Petitioner

Versus

State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Som Kartik Shukla

Counsel for the Respondents:
C.S.C.

Civil Law - Payment of Salaries Act, 1971- Section 5 - D.I.O.S. has not mentioned-any dificulty in disbursement of salary or Committee of Management has continuously committed default in disbursement of salary-impugned order passed on ground that term of committee come to an end-whereas, administration scheme extended the term by one month-impugned order passed prior to expiry of term with immediate effect-against s.5 of the Act, 1971-W.P. allowed.

Held, In the present case, the D.I.O.S. has not whispered even a single word in the impugned order that there is difficulty in disbursement of salary or Committee of Management has continuously committed default in disbursement of salary to the teaching and non-teaching staff, but passed the order merely on the ground that the term of Committee of Management had come to an end, without considering that as per the scheme of administration, the term of the Committee of Management would extend by one month thus its term was going to expire on 28.08.2020. The impugned order was passed prior to 28.08.2020 and that too with immediate effect, which is against the statutory provision i.e. Section 5 of the Act 1971, hence the order is bad in law. **(para 12)** (E-9)

List of Cases cited:-

1.Committee of Management of Rajendra Prasad Intermediate College, Bareilly Vs DIOS, Bareilly & anr., 1990(1) UPLBEC, page 189

2. Committee of Management Ramroop Singh Dhanraj Singh Intermediate College, Fatehpur Vs DIOS Fatehpur & ors., 2000 (2) UPLBEC, (Summary) 54

3.Committee of Management Gandhi Smarak Inter College, Jainganj, Agra Vs DIOS Agra, 2001(1) UPLBEC, Page 1347

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

(1) Heard Sri Som Kartik Shukla, learned counsel for the petitioner and learned State Counsel for Opposite parties.

(2) The present writ petition has been filed by the petitioner for quashing of the impugned order dated 10.08.2020 passed by D.I.O.S. (District Inspector of School) under Section 5 (1) of the Payment of Salaries Act, 1971 (hereinafter referred to as "Act 1971"), for single operation of the Account of the College.

(3) Babu Triloki Singh Inter College, Kakori, Lucknow is a recognized college under the Intermediate Education Act, 1921 and regulation framed thereunder. The college is also under Grant-in-Aid Scheme of the State Government and salary of teachers and other employees of the college is paid under the Act, 1971.

(4) As per the amended scheme of administration, which was approved and forwarded by Joint Director of Education, 6th Region, Lucknow, by letter dated 03.12.2009, the term of Committee of Management of the college is for a period of 5 years and office bearers of Committee of Management are to continue for one more month from the date of expiry of term of Committee of Management, if newly elected Committee of Management does not take charge within a month after 5 year.

(5) The last election of Committee of Management was held on 12.07.2015 and the signature of the Manager was attested by the D.I.O.S. vide its letter dated 28.07.2015. The Committee of Management took charge on 28.07.2015 and 5 years term of petitioner Committee of Management was expiring on 28.07.2020. Prior to the expiry of term of Committee of Management, the President of General Body was informed by the Manager to hold the election on 28.07.2020 with a request to take necessary action for the same.

(6) In pursuance of letter of the Manager, the President of Governing Body of the Society submitted a letter dated 14.07.2020 to the D.I.O.S. through Speed Post requesting to send an observer for the election scheduled for 28.07.2020. The letter dated 14.07.2020 was also forwarded to the Deputy District Magistrate, Lucknow informing about the election and in which 41 members of General Body of the Society and other staff, totaling around 60 persons would be present, hence requested that permission may be granted for holding the election meeting.

(7) The Deputy District Magistrate issued a letter dated 20.07.2020 to the Manager informing that due to prevailing pandemic of Covid - 19 situation, permission to hold the election could not be given, hence the application was rejected. The order of the Deputy District Magistrate dated 20.07.2020 has been submitted before the D.I.O.S. vide letter dated 22.07.2020 through speed post and requested the D.I.O.S. to cancel the election as per schedule and to give at least 3 months time for holding fresh election.

(8) The D.I.O.S. without taking any decision on the application of the petitioner dated 22.07.2020 passed the impugned order dated 10.08.2020, feeling aggrieved by the same, the present writ petition has been preferred.

(9) Learned counsel for the petitioner has submitted that the order of single operation passed by the D.I.O.S. under Section 5 of the Act, 1971 is without jurisdiction and not tenable in the eyes of law for the following reasons :-

(i) Section 5 of the Act provides that the D.I.O.S. is empowered to pass an order for single operation, if there is any difficulty in disbursement of the salary to the teaching and non-teaching staff of the institution, whereas, neither any such complaint was before the D.I.O.S. nor any such reason has been indicated in the impugned order.

(ii) The order of the single operation has been passed on the pretext that the term of the Committee of Management has expired in July, 2020, so for the purpose of disbursement of salary of teaching and non-teaching staff of the institution, the order of single operation was passed, whereas, there is no such provision under the Act 1971, which empowers the D.I.O.S. to pass an order of single operation in the eventuality mentioned in the impugned order.

(iii) Neither any show-cause notice was issued, nor any opportunity of hearing was provided prior to the passing of the impugned order.

(iv) The term of Committee of Management was to expire on 28.07.2020 and as per scheme of administration, the Committee of Management continues for a further period of one month which in this case was to expire on 28.08.2020, but the impugned order was passed prior to that i.e. on 10.08.2020.

(v) Due to prevailing Covid 19 pandemic situation, the State Government has banned a gathering of more than 50 persons at one place. The Manager of the petitioner submitted a letter dated 14.07.2020 to the Deputy District Magistrate, Lucknow for grant of permission for holding the election on 28.07.2020 in which 41 members of General Body and other staffs, totaling around 60 persons were to be present. The Deputy District Magistrate rejected the application vide its order dated 20.07.2020 mentioning therein, that due to Covid 19

pandemic situation it was not possible to provide any officer or police force for maintaining law and order situation.

(vi) The President of General Body of the Society submitted a letter dated 22.07.2020 to the D.I.O.S. through speed post informing about order passed by the Deputy District Magistrate dated 20.07.2020 as indicated above, and further that some members of General Body of the society have been found Corona Positive and requested to give at least three months time for holding fresh election by extending the term of the Committee of Management.

(vii) Learned counsel for the petitioner has placed reliance upon the judgments of this Court reported in ***1990(1) UPLBEC, page 189; Committee of Management of Rajendra Prasad Intermediate College, Bareilly Vs. DIOS, Bareilly and another, 2000 (2) UPLBEC, (Summary) 54; Committee of Management Ramroop Singh Dhanraj Singh Intermediate College, Fatehpur Vs. DIOS Fatehpur and others, 2001(1) UPLBEC, Page 1347; Committee of Management Gandhi Smarak Inter College, Jainganj, Agra Vs. DIOS Agra,*** wherein it has been held that an order of single operation of accounts could be passed by the D.I.O.S. under Section 5(1) of the Act, 1971, where the difficulty has arisen in disbursement of salary of the staff of the institution due to any default of the Management. The order for single operation of accounts could not be passed without providing opportunity of hearing to the Committee of Management.

(10) Learned State Counsel has submitted that even the extended term of the Committee of Management has expired today itself and now by efflux of time, the writ petition has thus become infructuous. But learned State Counsel was unable to dispute the submissions made by the learned counsel for the petitioner and as well as applicability of the judgements of this Court referred to above. Therefore, the petition is being finally decided at this stage itself.

(11) After hearing learned counsel for the parties, it is found that as per requirement of Section 5 of the Act 1971, an order of single operation of account could be passed by the D.I.O.S., where the difficulty arises in disbursement of salary of the staff of the institution due to any default of the Management and as per the law settled by this Court the default must not be continued to be committed by the Committee of Management. In para 24 of the writ petition, it has been stated that the petitioner Committee of Management never defaulted in submitting salary bill of the college.

(12) In the present case, the D.I.O.S. has not whispered even a single word in the impugned order that there is difficulty in disbursement of salary or Committee of Management has continuously committed default in disbursement of salary to the teaching and non-teaching staff, but passed the order merely on the ground that the term of Committee of Management had come to an end, without considering that as per the scheme of administration, the term of the Committee of Management would extend by one month thus its term was going to expire on 28.08.2020. The impugned order was passed prior to 28.08.2020 and that too with immediate effect, which is against the statutory provision i.e. Section 5 of the Act 1971, hence the order is bad in law.

(13) The D.I.O.S. passed the order behind the back of the petitioner without affording any opportunity to show cause in view of the decisions referred above.

(14) The D.I.O.S. has failed to consider that there is no fault on the part of Committee of Management for not conducting the election for which purpose, an application was given to the Deputy District Magistrate, which was rejected on the ground that due to Covid -19 Pandemic situation, it was not possible to hold election because the number of persons were about 60 and congregation of such large group is not permissible and, it was very difficult to provide any force or any officer for the purpose of holding the election. The said order of the Deputy District Magistrate dated 20-07.2020 was duly served upon the D.I.O.S., which was much prior to the passing of the impugned order dated 10.08.2020. The D.I.O.S. without considering the order of the Deputy District Magistrate and the request of the petitioner for extension of term of the Committee of Management for three months more, passed the impugned order.

(15) So far the objection raised by learned State Counsel that the petition has become infructuous since the period upto 28.08.2020 has also expired is concerned, it may be noted that in case the invalid order passed violating the principle of natural justice also, is not quashed and it is allowed to remain in operation, it may come in the way of the petitioner in considering and disposing off the application moved by the petitioner requesting the D.I.O.S. to extend the time for another period of 3 months for the purposes of holding the election. The aforesaid application dated 22.07.2020 made to the D.I.O.S. is yet not disposed off and remains pending for its consideration.

(16) It would be worthwhile to observe that any order or direction which is likely to have an adverse effect in future, and there is any apprehension of any kind of injury to be caused, relief cannot be denied on a plea raised on the ground that the petition has become infructuous by efflux of time. The order which is passed against the law continues in operation having all its adverse consequences, which are likely to adversely affect the rights or interest of the petitioner, the plea of petition being infructuous would not be entertainable. An order having potential of likely injury to be caused would ordinarily not be allowed to remain in operation. Since it may deprive a person of his rights and to get justice as due under the law. In this background, it would be necessary to quash the illegal order instead of dismissing the writ petition as infructuous.

(17) In view of above, order dated 10.08.2020 passed by the District Inspector of School being contrary to the provision of Section 5 of the Act 1971 and without providing any opportunity of hearing to the petitioner is arbitrary, illegal and is liable to be set aside.

(18) Accordingly, the writ petition is allowed. The order dated 10.08.2020 passed by the D.I.O.S. is hereby quashed.

(19) No orders as to cost.

(2020)10ILR A139
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.10.2020

BEFORE

THE HON'BLE ALOK MATHUR, J.

Misc Single No. 15298 of 2020

M/S Sahara India & Anr. ...Petitioners
Versus
U.O.I., New Delhi & Anr. ...Respondents

Counsel for the Petitioners:
Piyush Kumar Agarwal

Counsel for the Respondents:
A.S.G., Akhilesh Pratap Singh

Civil Law-Employees Provident Fund and Misc. Provisions Act, 1952- Section A -Notice given to determine liability of Petitioners as an employer-Petitioner alleges-Commission Agents, etc., -never employed-theresfore no liability-impugned orders are routine orders regarding proceedings-for producing certain records-neither records produced neither appear-sought more time-Provident Fund Commissioner-clothed with sufficient powers to direct the Inspector to enter, search and examine-Petitioners not cooperating - deliberately delaying it since last 7 years-impugned order not illegal.

Writ Petition dismissed-cost. (E-9)

List of Cases cited:-

1. Deep Industries Limited Vs ONGC, (2019) SCC online SC 1602

2. Mafatlal Industries Limited Vs U.O.I. (1997) 5 SCC 536

3.: State of Orissa Vs Madan Gopal Rungta, AIR 1952 SC 12

4. Saghir Ahmad & anr. Vs St. of U.P., AIR 1954 SC 728;1044;

5.Rajendra Singh Vs St. of M.P., AIR 1996 SC 2736

6.Tamilnad Mercantile Bank Shareholders Welfare Assc. (2) v. S.C. Sekar & ors., (2009) 2 SCC 784;

7. Shanti Kumar R. Chanji Vs Home Insurance Co. of New York, AIR 1974 SC 1719;

8. State of Rajasthan & ors. Vs U.O.I. & ors., AIR 1977 SC 1361

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

1. Heard Sri Sudeep Seth, Senior Advocate assisted by Sri Piyush Kumar Agarwal, learned counsel for the petitioners, Sri Savitra Vardhan Singh, learned counsel appearing for Union of India and Sri Akhilesh Pratap Singh, learned counsel for respondent no. 2, through video conferencing in view of COVID-19 pandemic.

2. By means of present writ petition the petitioners have assailed the validity of orders dated 16.03.2020, 31.07.2020, 24.08.2020, 31.08.2020 and 03.09.2020, passed by the respondent no. 2 in Case No. UPLKO0013539000/7A/07/2013 in proceedings under Section 7A of the Employees Provident Fund and Misc. Provisions Act, 1952 *(hereinafter referred to as "the Act of 1952").*

3. Sri Sudeep Seth, Senior Advocate has submitted that petitioner no.1 is a Partnership firm which was constituted on 01.04.2010 and subsequently there was change in the partnership deed and the petitioners firm was again re-constituted on 01.04.2012, while petitioner no.2 is a partner of the firm..

4. Counsel for the petitioners submits that the controversy in the present writ petition relates to the various orders passed by the Regional Provident Fund Commissioner - I, Lucknow *(hereinafter referred to as "the Provident Fund Commissioner)* in proceedings under Section 7-A of the Act of 1952, for determining the liability of the petitioners as an employer under the Act of 1952 .

5. The Provident Fund Commissioner has embarked upon the enquiry under Section 7A of the Act of 1952 by giving notice to the petitioner firm for determining the number of persons in employment with the petitioners. It is submitted that there are number of persons termed as "Commission

Agents" "Stringers" and "Motivators" who according to the petitioners do not fall within the definition of "employee" as provided in Section 2(f) of the Act of 1952 and therefore contend that they are not liable to deposit any contribution on their behalf.

6. It is urged by the petitioners that they have deposited the contribution of the Provident Fund with regard to the persons who they consider as their employees, while the Commission Agents, etc. have never been employed/engaged by the petitioners, therefore they have no liability to deposit the contribution on their behalf.

7. The grievance the petitioners is that they are repeatedly being required to submit various documents, despite the fact that they have already submitted all the documents, as required, by the Provident Fund Commissioner, and as such, requiring the petitioners to furnish further information and documents constitutes harassment and therefore, it is vehemently urged that the impugned orders are clearly illegal and arbitrary and are liable to be set aside.

8. Learned Counsels appearing on behalf of Union of India and Provident Fund Commissioner have submitted that the Provident Fund Commissioner has power under Section 7A of the Act of 1952 to hear, inquire into the matter, to determine whether the "Commission Agents" etc. are infact employees of the petitioners or not and for which purpose under Section 7A(2) of the Act of 1952, the Provident Fund Commissioner has sufficient power to enforce attendance, require for production of documents, examine witnesses etc., and perusal of the order sheet would itself indicate that the petitioners have been wholly non cooperative with the Provident Fund Commissioner in as much as they are avoiding producing the record as directed, and are clearly responsible for the pendency of the matter for last more than 7 years. It has been submitted that the petitioners are bound to provide all the documents required by the Provident Fund Commissioner, as the said material is in possession of the petitioners and only on examination of such material can the Provident fund Commissioner determine the status of "Commissioner Agents/Stringers and Motivators" as to whether they fall in the definition of employee" under the Act of 1952 or not.

9. It has further been disclosed in the writ petition that several writ petitions have earlier been filed by the petitioners during the pendency of the proceedings under Section 7-A of the Act of 1952 and some of which are pending consideration and certain interim orders are holding field.

10. Learned counsels for the respondents have further submitted that filing of such repeated writ petitions in a matter where, no order adverse to the petitioners has been passed by the Provident Fund Commissioner, amounts abuse of process of law and as such the present petition is not maintainable under Article 226/227 of the Constitution of India and the writ petition deserves to be dismissed.

11. It is further submitted on behalf of respondents that perusal of the impugned order would indicate that they are routine orders passed during the course of the proceedings under Section 7A of the Act of 1952 and writ jurisdiction could not be invoked in such matters. It is further

submitted that no Fundamental right of the petitioners has been violated nor is there any allegation of violation of statutory provision and therefore present writ petition is not maintainable and deserves to be dismissed at the very threshold.

12. In order to examine the contentions of learned counsel for the parties, it is necessary to peruse the impugned orders passed by the Provident Fund Commissioner.

IMPUGNED ORDERS

12 (A). The first order which has been impugned by the petitioners is of 16th March, 2020 passed by Regional Provident Fund Commissioner-I, Lucknow . In the said order it has been recorded that the learned counsel for the petitioners could not produce attendance register which he was directed to produce by means of earlier order dated 9th March, 2020. The establishment has not submitted the details with respect to contribution of provident fund and other funds and data processing expenses for which the establishment representative seeks time to submit. This order further records that petitioners were directed to clarify certain heads of balance sheet for the year 2010-11 showing withdrawal/transfer amount of Rs.350 Crores reflected therein. Further list of details of Sahara India field workers as sought in point no.4 of the proceedings dated 09.03.2020, have also not been provided. The establishment was therefore directed to submit the same by the next date of hearing.

In the said order , the Provident Fund Commissioner has also observed that from the record it has transpires that the "field workers" have requested the petitioners to keep the accumulation of the fund with them which was later on returned to their Trust after operations of their bank account.

The said impugned order also mentions that one Sanjay Bajpai, Enforcement Officer of the Department raised a point that M/s Sahara India has submitted that they are complying with the directions in respect of 22351 employees and he wants to verify as to how many of such employees are appearing in the details of salary slips provided by the establishment for the period of enquiry. Therefore, he requested that he may be provided specific details of such 22351 employees including their names, employee ID No. of establishment, PF Account No. (if any), date of joining, year wise salary and allowances details since the date of joining or for the period of enquiry which ever is lesser, deduction under various account heads under the Act of 1952.

12 (B). The second order which has been impugned is dated 31.07.2020, wherein it has been recorded by the Provident Fund Commissioner that no one has put in appearance on behalf of Sahara India Field Workers Trust. Certain documents have been filed by the petitioners including a copy of the Trust Deed dated 17.03.2009. With regard to details of Sahara India Field Workers and their respective accumulations which were transferred by the establishment to the Sahara India Field Workers Trust on 02.12.2010. One Kamal Singh, General Manager of establishment had stated that even though these details are available, it is very difficult to retrieve them and at least one month time is required to submit the same. He also submits that it would be his personal responsibility to submit the aforesaid information. He also assured the Provident Fund Commissioner that he would submit a list of individual Field

Workers alongwith respective accumulations of Future Fund as on 30.11.2010, which was transferred as part of Rs.350 crores to Sahara India Field Workers Welfare Trust on 02.12.2010, in one month time. The order further records that the Deputy General Manager of the Establishment has also assured that he would submit the attendance list of the employees alongwith respective Account no., employee ID and PF deduction details as well as ledger Account of Sahara India Field Workers Welfare Trust by the next date of listing.

12 (C). The third order under challenge is dated 24.08.2020, on which date the representative of the petitioners again sought time to submit the documents related to the ledger account of Sahara India Field Workers Welfare Trust. The said order records that certain documents submitted by the petitioners and the Directors of the petitioners had sought exemption from appearance due to COVID-19 pandemic and old age.

The petitioners assured the Provident Fund Commissioner that they would provide details of all the Field Workers alongwith their respective remittance of contribution made by the SHICL and SIRECL to Sahara India Field Workers Welfare Trust by the next date of hearing.

On the said date, the Branch Manager of Kotak Mahindra Bank, Lucknow also appeared and sought time for providing information sought by the Provident Fund Commissioner.

The order in question further records that cognizance has also been taken by the High Court by means of order dated 21.12.2018, passed in Writ Petition No. 37087 (M/S) of 2018, where the Court has observed that the petitioners would cooperate in the enquiry. The High Court has also recorded that the information sought by the Commissioner must be made available to the Provident Fund Commissioner, in the light of directions of the High Court which is necessary for identification of the "Field Workers" as well as any accumulation in their head, so that the controversy may be resolved which is pending for years without any headway, and that the establishment is legally and morally bound by the proceedings initiated under the Act of 1952.

12 (D). The fourth order under challenge in the writ petition is dated 31.08.2020. On the said date Director for SICCL Sri A.A.Zaidi appeared before the Provident Fund Commissioner and was directed to submit the bank statement with respect to the Field Workers from April, 2010 to March, 2012. The General Manager who had assured the Provident Fund Commissioner that he would supply all the documents on the previous date, did not appear and this fact was noted by the Provident Fund Commissioner in the order. It has been noted in the order that it is a common practice of the petitioners that after committing to provide the documents, they do not appear on the date fixed, due to which said proceedings are pending since last seven years.

the Provident Fund Commissioner after giving due details and reasons was constrained to record that to enforce attendance and submission of documents by the concerned persons directed Sri Kamal Singh to appear alongwith record and documents on the next date of hearing failing which suitable action against him as well as establishment would be taken.

the Provident Fund Commissioner also recorded the statement of Director of SICCL A.A. Zaidi, that his Company does not appoint any Agent or

Field Worker and also sought time to ascertain mode of appointment of workers of SICCL. On the said date the representative of the petitioners has also not submitted ledger account of Sahara India Field Workers Welfare Trust. The EO appearing for the Department submitted that as per general ledger account no. 567555 of Sahara India pertaining to Sahara India Field Workers Welfare Trust for the period 01.04.2010 to 31.03.2011 is submitted by them during proceedings dated 11.08.2020 and therefore, the Provident Fund Commissioner directed the establishment to provide copies of the same.

12 (E). The fifth order under challenge in this writ petition is dated 03.09.2020. On the said date Sri A.A. Zaidi, Director SICCL appeared before the Provident Fund Commissioner and at the very outset sought more time to submit the documents which they were required to produce. No one was present on behalf of SIRECL and SHICL, despite assurance on the previous date that relevant documents would be submitted. Even the General Manager of the petitioners Sri Kamal Singh, who appeared did not submit any document in compliance of earlier orders of the Provident Fund Commissioner and again assured that if time is granted he would submit all the other documents. It has also come on record that the petitioners is not cooperating in the proceedings, though their exists clear direction of the High Court to the petitioners to extend whole hearted cooperation in providing information and documents to come to a conclusion with respect to the Field Workers.

In view of the aforesaid the Provident Fund Commissioner was constrained to impose cost/penalty of Rs.5000/- per day till the next date of hearing for submission of details and records of proceedings dated 31.02.2020.

13. It was necessary to cull out details of the impugned orders so as to examine the nature of the orders which are being challenged by the petitioners. From the aforesaid orders impugned in the present writ petition it clearly transpires that the petitioners are avoiding production of documents relevant for the enquiry, which have been directed by the Provident Fund Commissioner to be produced. The said record is necessary so that facts can be ascertained with regard to the status of persons deemed to be employees of the petitioner so that the liability of the petitioners can be fastened in accordance with the provisions of the act of 1952.

14. The perusal of the impugned orders indicate that they only record proceedings of the day and on the respective dates the representatives of the petitioner firm appeared only with a view to seek further time to produce the documents and information as directed by the authority. On certain dates they did not appear on the date fixed and it has been categorically recorded by the Provident Fund Commissioner that the petitioners are not cooperating in the proceedings which is clearly contrary to the directions issued by this Court in Writ Petition No. 37087 (M/S) of 2018. Vide order dated 03.09.2020, a cost of Rs.5000/- was also imposed till the next date of hearing.

15. It is necessary to notice at this stage that the orders impugned by the petitioners in the instant writ petition do not disclose any decision on any point, or any adjudication on an issue, but only disclose routine orders. The learned Counsel the petitioners failed to bring to the notice of

the court any order or direction which may have been passed by the Provident Fund Commissioner by which any rights of the petitioners has been violated, or any other order passed in violation of any of the statutory provisions.

16. The counsel for the petitioners only submitted that the "Commission Agents" etc. are not the "employees" of the petitioner, and the Provident Fund Commissioner by requiring production of such material/documents from the petitioners pertaining to the engagement of "Commission Agents", "Stringers" and "Motivators", amounted to harassment of the petitioners, and have therefore sought indulgence of this court to stay the proceedings and quash the impugned orders by which the documents/material are being demanded.

17. During the pendency of the proceedings under Section 7A of the Act of 1952, several writ petitions have been filed by the petitioners before this Court challenging the orders passed during the course of the proceedings.

18. In the instant writ petition the petitioners have annexed some orders passed by this Court. It would be necessary to go through the said orders as they pertain to the same controversy arising from the same proceedings pending before the Regional Provident Fund Commissioner.

19. **The writ petitions filed by the petitioners so far :**

19 (A). In the year 2013, when the proceedings were at the very inception and the petitioners had received notice for submitting various documents, and subsequently the Provident Fund Commissioner was constrained to pass an order stating that in case the petitioners fails to produce the documents, they have to resort to search of the premises as provided in the Act of 1952. Writ Petition No. 9 (M/B) of 2013 was preferred before the Division Bench of this Court, and by means of order dated 03.01.2013, interim protection was granted to the petitioners to the effect, that in exercise of power under Section 7-A of the Act of 1952, liberty was granted to the respondents to search for the relevant documents, but were restrained from seizing the premises. The said writ petition is still pending. That subsequent order dated 20.2.2020 passed by the Division bench of this court in the said writ petition is relevant and necessary and is being quoted here in below:-

"1. Heard Mr. Sudip Seth, learned Senior Advocate assisted by Mr. Piyush Kumar Agarwal, learned counsel for petitioners and Mr. Shailendra Srivastava, learned counsel for respondents.

2. We are surprised to see that in this case various orders have been passed, like seizure, search ceiling attachment, etc., which were challenged on the ground that power of seizure is not vested with respondents authorities. The seizure and ceiling was stayed but no order was passed restraining competent authority to pass a final order in the matter. Still for the last more than seven years no final order has been passed. We are surprised to see as to why matter has not been finalized till date.

3. Learned counsel for respondents submitted that petitioners is not cooperating and his conduct is very bad but that does not mean that respondents-competent authority cannot pass final order, if petitioners is not cooperating. It appears that respondents-competent authority is wholly ignorant of manner in

which matters are to be decided and finalized and has no minimum knowledge in this respect.

4. Let respondent no. 2 and 3 personally should appear before this Court on 24.3.2020 to explain as to why matter has not been finalized till date and they are keeping it pending for last more than seven years 2 and are only interested in passing orders which are interlocutory, but no final order has been passed."

The said petition is pending consideration.

19 (B). Subsequently, Writ Petition No. 15300 (M/S) of 2017 - Sahara India Vs. Union and India and Others, was preferred. Taking into consideration the fact that the petitioners were not complying with the directions of the Provident Fund Commissioner, orders were passed to seize the bank accounts, aggrieved by which, the petitioners challenged the order dated 30.06.2017, passed by the Provident Fund Commissioner. This Court by means of order dated 21.07.2017 passed an interim order staying the order dated 30.06.2017. The petition is pending consideration.

19 (C). Writ petitioners No. 28970 (M/S) of 2017 was withdrawn with liberty to file fresh writ petition.

19 (D). Writ Petition No. 6267 (M/S) of 2018, preferred by the petitioners was consigned to record by means of order dated 2517 of 2018 as the petition did not conform to order 30 of Code of Civil Procedure .

19 (E). Writ Petition No. 17351 (M/S) of 2018, was consigned to record with liberty to file fresh writ petition by means of order dated 02.07.2018.

19 (F). Further another writ petition was filed being Writ Petition No. 37087 (M/S) of 2018, by which order dated 08.09.2017 was challenged by the petitioners. It was also subject matter of challenge in Writ Petition No. 6267 (M/S) of 2018 and after detailed discussion, an interim order was passed on 21.12.2018, which reads as under :-

"In the end learned counsel for the Provident Commissioner was specifically asked as to what was the amount payable by the petitioners as contribution under the Act of 1952, he submitted that the amount infact is not possible to be calculated. Then he was asked as how the order would be implemented when the amount itself is not clear, he very frankly submitted that at the moment it cannot be enforced, as the petitioners has not disclosed the details. Moreover, he could not at least at this stage satisfactorily answer the question with regard to Section 2(f) and 2(b). In this view of the matter, it is provided that the exercise as ordered to be conducted by this Court in pursuance to the earlier orders dated 06.03.2018 and 27.03.2018, passed in Writ Petition No. 6267 (M/S) of 2018 shall continue to be conducted by the opposite parties and based thereon a counter affidavit shall be filed. The petitioners shall whole heartedly cooperate in the said exercise and any avoidance and non cooperation on their part would be taken seriously by this Court. As no coercive action is being taken by the Regional Provident Fund Commissioner at this stage as stated by Sri Shailendra Srivastava at the Bar and in view of what has been stated by him, as it is not possible to take the same at this stage, therefore, there is no requirement to stay the impugned order at this stage."

20. In the aforesaid writ petition, this Court after going through the entire factual matrix of the case and also referring to various writ petitions preferred by the petitioners, was of the considered view that

the Provident Fund commissioner without recording a finding with regard to the fact as to whether the "Commission Agents" were employees of the petitioners, were being made liable on the basis of prima-facie satisfaction without necessary exercise having been undertaken, and therefore indulgence was shown by this Court to a very limited extent. This Court was of the view that it is not possible for fastening any liability on the petitioners without determination of various issues involved in the case. Primarily, the controversy pertained to whether the "Commission Agents/Stringers" are employees of the petitioners firm or not and only after due determination the question would arise with regard to their contribution and only thereafter the liability of the petitioners firm can be fastened.

21. In the light of the above, this Court was of the view that no amount can be recovered at that stage of the proceedings as the amount is not capable of being quantified. Without determination of the number of employees of the petitioners, the Regional Provident Commissioner was restrained from taking coercive steps against the petitioners, and the statement of the Counsel for the Opposite party, to this effect was recorded. The learned Single Judge further directed the Provident Fund Commissioner to proceeded with the matter, and the petitioners were expected to whole heartedly cooperate in the exercise.

22. A careful reading of the aforesaid judgment would indicate that no specific directions have been issued by this Court, to the manner in which the proceedings are being conducted by the Provident Fund Commissioner, and even otherwise, the challenge was made only to the process of recovery issued by the Provident Fund Commissioner, without recording any finding with regard to the status of "Commissioner Agents, Stringers and Motivators".

23. At this stage it is also interesting to note that the petitioners has repeatedly stated in the said writ petition that proceedings before the Provident Fund Commissioner are to be proceeded only in accordance with the aforesaid order dated 21.12.2018 and have constantly made allegations against the Provident Fund Commissioner that he is not proceedings in accordance with the said order.

24. In Writ Petition No. 28708 (M/S) of 2017, the order dated 31.08.2017, passed by the Provident Fund Commissioner was assailed and vide order dated 29.11.2017, this Court had recorded the fact that the petitioners were ready to furnish a list of "Commissioner Agents/Field Workers/Motivators" to the respondents within a week.

25. The writ petition no.37087 (MS) of 2018 is connected with Writ Petitions Nos. 15274(MS) of 2017, 15277 (MS) / 2017, 15279 (MS) / 2017, 15300 (MS) / 2017, 28708 (MS) / 2017, 6267 (MS) / 2018, and are pending consideration before this Court. All the writ petitions have been preferred by the petitioners challenging various orders passed during the course of the proceedings pending before the Provident Fund Commissioner.

26. The substratum of the case of the petitioners is that the "Commission Agents/Field Workers/Motivators" are not employees of the petitioners and are not covered by the definition of employee given in Section 2(f) of the Provident Fund and Misc. Provisions Act and therefore no

liability can be fastened on the petitioners in this regard.

27. Perusal of the orders which have been impugned in the present writ petition would indicate that they are routine orders regarding the proceedings. Statement of the parties appearing before the Regional Commissioner have been recorded therein, where it shows that the petitioners have been directed to produce certain records and they themselves have sought time to produce the same, but did not either appear on the next date of listing or sought more time to produce the record. The conduct of the petitioners clearly is not in accordance with the orders of this Court dated 21.12.2018, where the Court had expected the petitioners to cooperate in the proceedings.

28. Under the Act of 1952, definition of the "employee" as provided in Section 2(f) of the Act of 1952, is reproduced herein below :-

"2(f). *"employee" means any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment, and who gets his wages directly or indirectly from the employer, and includes any person-*

(i) employed by or through a contractor in or in connection with the work of the establishment;

(ii) engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961, or under the standing orders of the establishment;"

29. A perusal of the aforesaid definition of the term "employee" would indicate that according to the Act of 1952 "employee' means any person who is employed in any kind of work manual or otherwise in connection with establishment and gets his wages directly or indirectly from the employer. It is not necessary that a person has to be directly connected with the work of principal establishment, but even if he is somehow connected with the work of the establishment and gets wages directly or indirectly from the employer would fall within the definition of "employee'. the Provident Fund Commissioner is totally within its competence and power to determine as to who are the employees of the establishment. The nomenclature of "employee' will not be determinative with regard to the nature of his employment and it is only after detailed enquiry can the Provident Fund Commissioner can come to a conclusion whether person or class of persons is included within the definition of "employee' as per section 2(f) of the Act of 1952.

30. In the present case, notices were issued to the petitioners some time in the year 2013 as the Provident Fund Commissioner was seeking to examine whether "Commissioner Agents/Field Workers/Motivators" would be covered within the definition of "employee" as provided under the Act of 1952. In furtherance of enquiry, the Provident Fund Commissioner was within his competence to ask the employer ,that is the petitioners, to submit all the documents, in order to determine the nature of employment, and as to whether they i.e. "Commissioner Agents/Field Workers/Motivators" would fall within the definition of term "employee' as defined under the Act of 1952, and consequently liability if any of the petitioners.

31. In order to make necessary enquiry the Provident Fund Commissioner

is clothed with sufficient powers to direct the Inspector to enter, search any establishment/premise and examine any relevant matter as provided for in Section 7-A(2) of the Act of 1952.

32. In light of the provisions contained in the Act of 1952, the issue to be decided by the Provident Fund Commissioner, is as to whether the persons termed as "Commission Agents", "Stringers" and "Motivators" fulfill the conditions prescribed in Section 2(f) of the Act of 1952 or not. For coming to any such decision or a finding, the course open for the Provident Fund Commissioner is to seek information from the employer i.e. the petitioners, from which he can determine the relationship between the petitioners and "Commission Agents", "Stringers" and "Motivators", but the petitioners are not cooperating and submitting documents and material, as clearly recorded by the Division Bench in its order dated 20/02/2020 and also by the learned Single Judge.

33. It is necessary to refer to one of the orders in the series of writ petitions preferred by the petitioners which is Writ Petition No. 37087 (M/S) of 2018, in which order dated 31.07.2019 was passed, where this Court has also recorded that, *"the said writ petition pertains to same dispute as raised by the petitioners in Writ Petition No. 28708 (M/S) of 2017 - M/s Sahara India Financial Corporation Ltd. Vs. Union of India and Another".* In the said order this Court had sought information from the petitioners on three points stated therein namely :-

"1. Whether company, SIFCL, is having license from the Reserve Bank of India for running NBFC activities, for the purposes of which Commission Agents are required.

2. Whether looking into the fact that the Management and Stock Holders in both firms and company are nearly the same and both of them can be clubbed together as one establishment for the purposes of ESI.

3. Whether any evidence was filed before the authority concerned before passing of the impugned order, with regard to the relationship between company and the alleged Commission Agents."

34. At the very outset it is noticed that the said order has not been disclosed by the petitioner in the entire writ petition. The petitioners in the instant writ petition have deliberately concealed the said order, thereby conveniently avoiding to answer the inconvenient questions posed by this Court in the aforesaid order dated 31.07.2019.

35. The petitioners also could not respond to the query raised by this Court in its order dated 21/07/2019 passed in Writ Petition No. 37087 (MS) of 2018, as to whether they are having any license from the Reserve Bank of India for running Non Banking Financial Corporation activities, and in case the answer is in negative, then how could they engage "Commission Agents" when they were not involved in business of banking. Instead of pursuing their remedy in the writ petitions already preferred by them earlier, pertaining to the same subject matter. The petitioners have filed number of petitions, raising the same issue, time and again, without placing all the material before this Court as directed in Writ Petition No. 37087/2018 nor are they cooperating in the proceedings before the Regional Commissioner. No averment has been made in this regard in the writ petition.

36. The aforesaid questions raised by this Court were extremely pertinent and the answers would have been extremely helpful in deciding the controversy as raised by the petitioners before the Regional Provident Fund Commissioner.

37. From the bare reading the order dated 31.07.2019 passed in Writ Petition No. 37087 (M/S) of 2018 makes is clear that the petitioners have contended before this Court that they had appointed Commissioner Agents to collect the premium from various individuals which was to be collected by M/s SIFCL which was "Non Banking Financial Corporation", registered by the Reserve Bank of India. The said license was annulled by the Reserve Bank of India some time in the year 2013, but still the said "Commission Agents" etc. continued to be retained with the petitioners and in this context this Court had made above query, as to why the so called Commission Agents were continuing when the company ceases to function as a Non Banking Financial Corporation.

38. Perusal of the writ petition would indicate that the petitioners has not even attempted to place relevant records or attempted to answer the question as sought by the Court and have instead instituted fresh proceedings by filing the instant writ petition.

39. From a bare perusal of the details of the writ petitions filed by the petitioners, as well as the orders passed by this Court, it is clear that the petitioners were repeatedly seeking interference from this Court so as to stall the proceedings before the Provident Fund Commissioner, inasmuch as, they are reluctant from providing information with regard to the so-called "Commission Agents, Stringers and Motivators" to enable the Provident Fund Commissioner to arrive at a finding as to whether they are employees of the petitioners and consequently their liability under the Act of 1952. It has also to be borne in mind that this Court has repeatedly directed the petitioners to cooperate in the proceedings, but a bare perusal of the impugned orders clearly show beyond doubt, that the petitioners are avoiding placing all the material before the Provident Fund Commissioner, and are repeatedly approaching this Court by filing successive writ petitions challenging routine orders passed in proceedings under section 7A of the Act of 1952 which can be clearly termed as an abuse of the process of the court.

40. Perusal of orders impugned in the present writ petition as noted herein above do not decide any issue or lis between the parties but merely record the proceedings conducted on the said date. The said orders mentions the assurances given by the petitioners to provide details of the "Commissioner Agents/Field Workers/Motivators" and also records statements of the officers of the department who have received some record and have found certain deficiency with regard to the details contained therein and on their submissions the Provident Fund Commissioner had directed the petitioners to either clarify the details contained therein or to furnish further evidence. In sum and substance the impugned orders pertain to seeking requisite documents/material from the petitioners so as to decide/determine the dispute under Section 7A of the Act of 1952. The aforesaid orders have not decided any lis or any issue raised by the petitioners. The petitioners have not even whispered or alleged any violation of the rights much

less Constitutional rights by the impugned orders. In absence of any such allegation the jurisdiction of this Court to entertain such a writ petition under Article 226/227 of the Constitution will have to be examined.

Jurisdiction of High Court under article 226

41. Ordinarily this Court in exercise of power under Article 226/227 of the Constitution would not interfere in the day to day proceedings of statutory authority or Tribunal unless in conduct of the same there is some jurisdictional error going to the root of the matter where by it can be said that said authority would be proceeding without any sanction of law or that in the course of proceedings some orders have been passed which are violative of part III of the Constitution. It is only when the statutory authority or a Tribunal have decided the lis between the parties and in case there is no efficacious alternative remedy, the aggrieved person would be at liberty to approach this Court for judicial review of the order passed by the said authority or Tribunal.

42. In the present case, the dispute when decided by the Regional Commissioner would be amenable firstly to review under Section 7(b) of the Act of 1952 and secondly by way of appeal before the Industrial Tribunal under Section 7(d) of the Act of 1952.

43. Looking into the scheme of the Act and Rules framed under it, it is clear that the legislature has provided a procedure for ventilation of the grievances against the order of the Provident Fund Commissioner under Section 7A of the Act of 1952 by way of an review under Section 7B of the Act of 1952 and appeal before the Appellate Tribunal under Section 7D of the Act of 1952. The aggrieved person will have to wait for the final outcome of the proceedings under Section 7A, and a writ petition would not be maintainable against any and every order passed by the Provident Fund Commissioner. This aspect of the matter was considered by the Hon. Supreme Court in the case of **Deep Industries Limited vs ONGC, 2019 SCC online SC 1602** where the Apex Court was considering the interference by the High Court under Article 226 and 227 of the Constitution of India against the orders passed during arbitration proceedings observed as under :-

*"18. In **SBP & Co. (2005 (8) SCC 618),** this Court while considering interference with an order passed by an arbitral tribunal under Article 226/227 of the Constitution laid down as follows:-*

"45. It is seen that some High Courts have proceeded on the basis that any order passed by an arbitral tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution. We see no warrant for such an approach. Section 37 makes certain orders of the arbitral tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating his grievances against the award including any in-between orders that might havebeen passed by the arbitral tribunal acting under Section 16 of the Act. The party aggrieved by any order of the arbitral tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The arbitral tribunal is, after all, a creature of a contract between the parties, the arbitration agreement, even though, if

the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the arbitral tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the arbitral tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution. Such an intervention by the High Courts is not permissible.

46. The object of minimizing judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated if the High Court could be approached under Article 227 or under Article 226 of the Constitution against every order made by the arbitral tribunal therefore, it is necessary to indicate that once arbitration is commenced in the arbitral tribunal unless course of right of appeal is available for under Section 37 of the Act even at early stage."

44. In the above judgment the Supreme Court also considered the case of **Mafatlal Industries Limited vs Union of India (1997) 5 SCC 536,** wherein the Court held as under :

"so far in the jurisdiction of the High Court under article 226-or for that matter, jurisdiction of this Court under article 32-is concerned, it is obvious that the provisions of the act cannot bar and curtails the remedies. It is, however, equally obvious that while exercising power under article 226/32, the Court would certainly take note of the legislative intent manifested in the provisions of the act and will exercise of jurisdiction consistent with the provisions of the enactment.

Further it will also considered "in the judgement is relied upon by Sri Vaidyanathan, which, by a large, reiterated the proposition laid down in ***BabuRam Prakash Chandra Maheshwari vs Antarim Zila Parishad, AIR 1969 SC 556,*** *it has been held that alternative remedy is not a bar to entertaining of writ petitions filed for enforcement of any of the fundamental rights or where there has been a violation of principles of natural justice order by the order under challenge is wholly without jurisdiction or where vires of the statute is under challenge."*

45. In absence of allegation of the petitioners with regard to violation of any of his fundamental rights, this Court would loathe to interfere in such a matter and needless to say, that during the pendency of a dispute before the statutory authority or Tribunal this Court would not arrogate to itself the proceedings pending before the Provident Fund Commissioner and embark upon an enquiry so as proceed to determine and answer the questions pending before the Regional Commissioner as to whether "Commissioner Agents/Field Workers/Motivators" are employees of the petitioners or not. Wherever a statutory authority or Tribunal has been empowered to decide a particular dispute, the same will have to be decided by that authority, and only after a decision is taken, which is adverse to the petitioners, the same can be appropriately challenged.

46. It is a settled legal proposition that a person cannot be permitted to meddle in any proceeding, unless he satisfies the Authority/Court, that he falls within the category of aggrieved persons.

47. Only a person who has suffered, or suffers from legal injury can challenge the act/action/order etc. A writ petition underArticle 226of the Constitution is maintainable either for the purpose of enforcing a statutory or legal right, or allegation that there has been a breach of statutory duty on the part of the Authorities. Therefore, there must be a judicially enforceable right available for enforcement, on the basis of which writ jurisdiction is resorted to. The Court can of course, enforce the performance of a statutory duty by a public body, using its writ jurisdiction at the behest of a person, provided that such person satisfies the Court that he has a legal right to insist on such performance. The existence of such right is a condition precedent for invoking the writ jurisdiction of the courts. It is implicit in the exercise of such extraordinary jurisdiction that, the relief prayed for must be one to enforce a legal right. Infact, the existence of such right, is the foundation of the exercise of the said jurisdiction by the Court. The legal right that can be enforced must ordinarily be the right of the appellant himself, who complains of infraction of such right and approaches the Court for relief as regards the same. (Vide :**State of Orissa v. Madan Gopal Rungta, AIR 1952 SC 12;Saghir Ahmad & Anr. v. State of U.P., AIR 1954 SC 728;1044;Rajendra Singh v. State of Madhya Pradesh, AIR 1996 SC 2736; and Tamilnad Mercantile Bank Shareholders Welfare Association (2) v. S.C. Sekar & Ors., (2009) 2 SCC 784).**

48. A "legal right", means an entitlement arising out of legal rules. Thus, it may be defined as an advantage, or a benefit conferred upon a person by the rule of law. The expression, "person aggrieved" does not include a person who suffers from a psychological or an imaginary injury; a person aggrieved must therefore, necessarily be one, whose right or interest has been adversely affected or jeopardized. (Vide: **Shanti Kumar R. Chanji v. Home Insurance Co. of New York, AIR 1974 SC 1719; andState of Rajasthan & Ors. v. Union of India & Ors., AIR 1977 SC 1361).**

49. The jurisdiction of the High Court underArticle 226of 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 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 underArticle 226, where the petitioners have 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 questionswhich demand an elaborate examination of evidence to establish the right to enforce for which the writ is claimed.

50. 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 underArticle 226trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioners 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 Article 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. The petitioners having failed to make any allegations regarding violation of fundamental rights, violation of principles of natural justice, or violation of any statutory provision, the present writ petition would not be maintainable under Article 226 of the Constitution of India.

51. The manner and impunity in which series of writ petitions have been filed, coupled with the fact that before the Regional Provident Fund Commissioner the petitioners are reluctant to furnish relevant information desired from them, it is clear their effort is to procrastinate the proceedings before the Regional Provident Fund Commissioner so that no liability is fastened upon them nor the issues as raised therein determined expeditiously.

52. Considering the aforesaid facts in totality, I am of the considered view that the present writ petition is nothing but clear abuse of process of law in light of the fact that numerous writ petitions have been filed in this court one after another for the same cause of action seeking interference of this Court in the proceedings pending before the Provident fund commissioner. This Court is of the considered view that the petitioners are not co-operating with the Provident Fund Commissioner, and are not producing documents as directed, thereby deliberately delaying the decision in the matter, which is pending since last more than 7 years. The proceedings cannot be kept pending indefinitely on account on non production of document by the petitioners, and despite directions of this Court, it seems, not much progress has taken place.

53. We also notice with anguish that earlier this Court also by means of order dated 21.12.2018, passed in Writ Petition No. 6267 (M/S) of 2018, had directed the petitioners to cooperate in the proceedings, and also in the order dated 31.7.2019 passed in writ petition no. 37087(MS) of 2018 certain pertinent information was sought, but it seems that the said directions were not complied by the petitioners and have conveniently chosen to file yet another petition without disclosing about the order dated 31.7.2018 or placing on record the reply to the query of the Court. The petitioners are clearly responsible for delaying the proceedings before the Provident Fund Commissioner and therefore the matter is not being determined finally by him.

54. I am also satisfied that the manner in which the orders of the Provident Fund Commissioner are being challenged before this Court without any adverse orders having been passed against the petitioners nor any of the rights of the petitioners having been determined, the petitioners are clearly guilty of abusing the process of the Court.

55. The writ petition for the reasons recorded hereinabove is bereft of merits and is liable to be dismissed. Before parting, it is necessary to reiterate the directions given by this Court with regard to the proceedings pending before the Provident Fund Commissioner. The Provident Fund Commissioner is expected to conclude the proceedings pending before him, expeditiously, say within a period of four months from the date a copy of this

order is produced before him. The petitioners shall produce all the material and documents as directed by the Regional Provident fund Commissioner within a period of one month from today. Subject to the protection given to the petitioners in the various orders passed by this court, the Regional Provident fund Commissioner shall exercise the powers as provided to him under the Act of 1952 to procure all the material necessary for deciding the dispute pending before him, and conclude the proceedings in the time provided by this court in accordance with law after giving the opportunity of hearing to the petitioners within the time provided. In case the document are not filed, the Provident Fund Commissioner shall close the opportunity to file documents and proceed to hear and pass final orders on the basis of material before him making best assessment judgment.

56. In light of the above, the writ petition is dismissed with cost of Rs. 50,000/- (Fifty Thousand). The cost is required to be deposited with the Senior Registrar of this Court within a period of one month from today. In case the said amount is not deposited within one month, the Senior Registrar shall take steps and intimate this order to the District Magistrate/Collector Lucknow, who shall proceed and recover the amount of cost from the petitioners as arrears of land revenue. On receipt of the amount of cost, by the Senior Registrar, the same shall be transferred to the State Legal Service Authority, Uttar Pradesh.

(2020)10ILR A155
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.09.2020

BEFORE
THE HON'BLE ALOK MATHUR, J.

Misc Single No. 15444 of 2020

Brijendra Mani Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Pravin Kumar Singh

Counsel for the Respondents:
Rajnish Ojha

Petitioner challenged review order of Respondent-wherein a contrary finding recorded-declaring the Petitioner and his family members not a resident of the concerned village-directed their name to be removed from electoral list-Act of 1947 or Rules of 1994 have no provision enabling Sub Divisional Magistrate/ Assistant Electoral Registration Officer to review its order-impugned order quashed-

Writ Petition allowed. (E-9)

List of Cases Cited:-

1. Whirlpool Corporation Vs Registrar of Trade Marks Mumbai & ors., (1998) 8 SCC 1,

2.Urmila Jaiswal Vs St. of U.P. & ors., 2013 (4) ADJ 205

3.Naresh Kumar & ors. Vs Govt. (NCT of Delhi)

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

1. Heard Sri Sudeep Seth, learned Senior Advocate assisted by Sri Pravin Kumar Singh, learned counsel for the petitioner as well as learned Additional Chief Standing Counsel for the State respondents, and Sri Abhijeet Raj, learned counsel for respondent no. 5, through video conferencing in view of COVID-19 pandemic.

2. By means of instant writ petition the petitioner has assailed the order dated

24th August, 2020, passed by respondent no. 4 – Deputy Collector/Assistant Electoral Registration Officer (Panchayat), Lalganj, District - Pratapgarh, whereby he has reviewed his own earlier order dated 25.05.2020, and consequently recorded a contrary finding, declaring that petitioner is not a resident of Village – Ramgarh Raila and further directed that name of the petitioner as well his family members be removed from the electoral list of village - Ramgarh Raila. The brief facts of the case are as under:-

(i) The petitioner contested the elections in 2015 for the post of Gram Panchayat- Ramgarh Raila and was elected as Gram Pradhan while respondent no.5 who also contested the said elections lost by a margin of 78 votes.

(ii) The respondent No.5 had raised an objection regarding inclusion of the name of the petitioner in the electoral roll of Village Ramgarhia Raila and thereafter after a detailed enquiry by opposite party No.4 by means of order dated 10/11/2015 the name of the petitioner in the electoral role was retained.

(iii) Against the order dated 10/11/15 respondent No.5 filed an appeal under Rule 21A of the U.P Panchayati Raj (Registration of Electors) Rules, 1994 which was rejected on 20.11.2015. The order dated 20.11.2015 was challenged before this Court in writ petition No.279 (M/S) of 2015. The said petition was disposed of by this Hon'ble Court vide judgment and order dated 17.12.2019 where the order dated 20.11.2015 was quashed and the matter was remanded back to opposite party No.4 for fresh consideration.

(iv) Consequent to the remand of the matter the opposite party No.4, after giving due notice to the parties concerned, decided the matter by means of a detailed and speaking order dated 25/5/2020, thereby the representation of Opposite party no. 5 was rejected.

(v) Counsel for the petitioner has further submitted that the petitioner apprehended miscarriage of justice at the hands of opposite party No.4, and therefore moved the representation before District Magistrate, Pratapgarh stating that oppostie party No.4 was acting in collusion with opposite party No.5 and therefore requested that the matter be transferred to another Sub Divisional Magistrate. The District Magistrate on 18/8/2020 had made an endorsement on the application preferred by the petitioner directing the Sub Divisional Magistrate, Lalganj to do the needful. It has been alleged by the petitioner that opposite party No.4, in the most hurried manner, without fixing any date, allowed the review application moved by opposite party No.5.

(vi) It is in light of the aforesaid facts that this Court has been called upon to decide as to whether opposite party No.4 has the jurisdiction to review his own order dated 25.05.2020.

3. It has been submitted by learned counsel for the petitioner that order dated 24.08.2020, has been passed by the Deputy Collector/Assistant Electoral Registration Officer (Panchayat), Lalganj, District - Pratapgarh on the application for review preferred by respondent no. 5 on 28.01.2020, seeking review of earlier order dated 25.05.2020.

4. It is further submitted on behalf of petitioner that proceedings were initiated by the Deputy Collector/Assistant Electoral Registration Officer on the basis of complaint made by respondent no. 5 with regard to petitioner, alleging that he is not

the resident of village - Ramgarh Raila and therefore his name should be struck off from the electoral list of village - Ramgarh Raila. The Deputy Collector/Assistant Electoral Registration Officer in exercise of power under Rule 16 of the U.P. Panchayat Raj (Registration of Electors) Rules, 1994 *(hereinafter referred to as "the Rules, 1994")* after issuing notice to the petitioner and taking necessary evidence, rejected the application of respondent no.5 by means of order dated 25.05.2020, holding the petitioner, Brijendra Mani Yadav to be a resident of village - Ramgarh Raila and not resident of any other village as alleged in the complaint.

5. The learned counsel for the petitioner urged that the impugned order dated 24.08.2020, is beyond jurisdiction, inasmuch as the Deputy Collector/Assistant Electoral Registration Officer having exercised power under Rule 16 of the Rules, 1994 becomes functus officio and said Act of 1947 or the Rules of 1994 does not clothe him with any power of review of his orders, and in absence of any specific provision under the said Act or Rules, the Deputy Collector/Assistant Electoral Registration Officer denuded of exercising power of review and therefore the impugned order is clearly illegal, arbitrary, beyond jurisdiction and deserves to be set aside.

6. Sri Abhijeet Raj, learned counsel has put in appearance on behalf of respondent no. 5. He has raised preliminary objection regarding maintainability of the writ petition. He has submitted that against the impugned order passed by Deputy Collector/Assistant Electoral Registration Officer dated 24.08.2020, the petitioner has efficacious alternative remedy under Rule 21A of the Rules, 1994, of an appeal before the District Magistrate. Learned counsel for respondent no. 5 has vehemently submitted that in the light of the fact that when statutory alternative remedy is available, writ petition should not be entertained in exercise of power under Articles 226 and 227 of the Constitution of India and the petition deserves to be dismissed at the very outset.

7. Counsel for respondent no. 5 further submitted that there is inherent lack of jurisdiction in the order passed by the Deputy Collector/Assistant Electoral Registration Officer and therefore he had moved an application for review.

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

9. The application for review which has been annexed along with the writ petition indicates that the said application was moved with the primary allegation that the petitioner was not residing in village - Ramgarh Raila and further the house which has been shown to be inhabited by the petitioner, belongs to one Daya Ram and in case proper enquiry in this regard is made, it would be evident that petitioner is not resident of village Ramgarh Raila and therefore, the finding of fact arrived at by the Deputy Collector/Assistant Electoral Registration Officer in his earlier order dated 25.05.2020, were erroneous and the order deserves to be reviewed.

10. It has been recorded by the Deputy Collector/Assistant Electoral Registration Officer, in the impugned order, that notices were issued to the petitioner, while the petitioner in his writ petition has stated that notices were never served upon him. The petitioner has submitted that when he came to know about the

proceedings pending before the Deputy Collector/Assistant Electoral Registration Officer, he appeared on 17.08.2020 and sought time to file objections and the Deputy Collector/Assistant Electoral Registration Officer granted him three day's time for the said purpose, but he could not file any objection within the said period and subsequently the review application was decided against him. He has further submitted that no date for final hearing was either fixed or communicated to him and therefore he submitted that no order sheet in this regard was prepared.

12. In the present writ petition only ground urged by the petitioner is that the impugned order is wholly without jurisdiction inasmuch as the respondent - Sub Divisional Magistrate/Assistant Electoral Registration Officer has reviewed his earlier order dated 25.05.2020 where he has considered the entire facts afresh and re-appreciated the evidence and has come to a contrary finding and has thereby allowed the review application.

13. It has been submitted that the Act, 1947 nor the Rules empower the Sub Divisional Magistrate/Assistant Electoral Registration Officer to exercise power of review on merits and in absence of such power he had no jurisdiction or authority to embark upon the re-appreciation of evidence afresh to record a contrary finding.

14. The entire exercise in entertaining the application for review and embarking upon exercise of reviewing his earlier order is illegal, arbitrary and violative of Article 14 of the Constitution of India.

15. With regard to the plea of alternative remedy, this Court in exercise of power under Article 226 of the Constitution of India usually remits the matter to the appropriate authority or Tribunal where a person has efficacious alternative remedy by way of appeal, review etc., but in appropriate cases where the impugned order has been passed in gross violation of principles of natural justice or where the action of respondents is shown to be wholly without jurisdiction then this Court in such appropriate cases would necessarily interfere and exercise its power under Article 226 of the Constitution of India.

16. In the case of **Whirlpool Corporation Vs. Registrar of Trade Marks Mumbai and others, 1998 (8) SCC 1,** this aspect of the matter has been elaborately considered by Hon'ble Apex Court. The position of law as laid down by the Apex Court in **Wirlpool Corporation (supra)** is quoted herein below :-

"14. The power to issue prerogative writs under Article 226 of the Constitution is primary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose".

15. Under Article 226 of the Constitution, the High Court having regard to the facts of the case, has the discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of such is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently

held by this Court not to operate as a bar in at least three contingencies, namely, where a writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of principles of natural justice or where an order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field."

17. In the light of aforesaid judgment, where the issue raised is solely with regard to jurisdiction of the authority in reviewing his order which goes to the root of the matter,preliminary objection of alternative remedy raised by the respondents is misconceived and is liable to be rejected.

18. The moot question for consideration before this Court is whether the Sub Divisional Magistrate/Assistant Electoral Registration Officer had jurisdiction to review his order dated 25.05.2020, who after hearing all the parties and considering all the relevant facts, had recorded definite finding of fact whether the petitioner was in fact resident of Village - Ramgarh Raila or not in favour of petitioner.

19. The Panchayati Raj Act, 1947 or the Rules framed thereunder do not ascribe any power of review with the Sub Divisional Magistrate/Assistant Electoral Registration Officer.

20. Learned counsel for the respondents also could not point out any such power vested in the Act or Rules for exercise of such power of review by the Sub Divisional Magistrate/Assistant Electoral Registration Officer.

21. A Division Bench of this Court in the case of **Urmila Jaiswal Vs. State of U.P. and Others, 2013 (4) ADJ 205,** while considering the matter pertaining to allotment of Fair Price Shop where appeal was dismissed and subsequently the review application was allowed, and the issue raised before the said Division Bench was as to whether the Commissioner could have reviewed his earlier order, the Division Bench of this Court after considering the catena of cases while allowing the writ petition, held as under :-

"15. Now the question which is to be answered as to whether the Appellate Authority can review its order since the respondent no.4 has filed the review application dated 01.06.2012 taking various grounds of review and one of the ground was that the Government Order issued on 17th August 2002 was not attracted on the respondent no.4. The Commissioner heard the review on merits and had passed an order allowing the review application and setting aside the earlier order of cancellation. The Order 2004 does not contain any provision empowering the Appellate Authority to review its order. There is no dispute that the Appellate Authority has exercised the quasi-judicial power. The Full Bench relied by the learned counsel for the petitioner in Smt. Shivraji (Supra) has laid down following proposition of law. Para 35 of the said judgment is quoted below:

35. Any tribunal exercising judicial or quasi-judicial power, which is not vested with power of review under the statute expressly or by necessary implication, has an inherent power of review of its previous order in any

circumstances. In our view the decisions only lay down the proposition that a tribunal exercising judicial or quasi judicial power has the inherent power to correct a clerical mistake or arithmetical error in its order and has the power to review an order which has been obtained by practicing fraud on the Court, provided that injustice has been perpetrated on a party by such order. Therefore, these decisions should not be construed as laying down any proposition of law contrary to the well settled principle of law that any order delivered and signed by a judicial or quasi judicial authority attains finality subject to appeal or revision as provided under the Act and if the authority passing the order is not specifically vested with power of review under the statute, it cannot reopen the proceeding and review/revise its previous order.

16. The Full Bench held that any Tribunal exercising judicial or quasi-judicial power, which is not vested with power of review under the Statute expressly or by necessary implication, has no power of review except an inherent power to correct the clerical mistake or to correct the order, which has been obtained by practising the fraud on the Court.

17. A Division Bench judgment in ***Sudha Sharma*** *(supra) as well as* ***Syed Madadgar Husain Rizvi*** *(supra) lays down the same principles. The Division Bench has held that a quasi judicial authority is not permitted to review its order unless it is so expressly conferred by the Statute itself.*

18. The Apex Court in 1987(4) SCC 525 ***Dr (Smt.) Kuntesh Gupta Vs. Management of Hindu Kanya Mahavidyayla, Sitapur (U.P.) & Others*** *had occasion to consider the issue as to whether the Vice-Chancellor of a University under the provisions of U.P. State Universities Act, 1973 has power of review. The Vice-Chancellor had passed an order on 24.01.1987 disapproving the order of dismissal of the appellant. Subsequently, the Vice-Chancellor had review the said order on 07.03.1987. While considering the aforesaid case, following was laid down by the Supreme Court in paragraph 11: "It is now well established that a quasi-judicial authority cannot review its own order, unless the power of review is expressly conferred on it by the statute under which it derives its jurisdiction. The Vice-Chancellor in considering the question of approval of an order or dismissal of the Principal, acts as a quasi-judicial authority. It is not disputed that the provisions of the U.P. State Universities Act, 1973 or of the Statutes of the University do not confer any power on the Vice-Chancellor. In the circumstances, it must be held that the Vice-Chancellor acted wholly without jurisdiction in reviewing her order dated January 24, 1987 by her order dated March 7, 1987. The said order of the Vice-Chancellor dated March 7, 1987 was a nullity."*

19. The Apex Court in 2005 (13) SCC 777, ***Kapra Mazdoor Ekta Union Vs. Birla Cotton Spinning and Weaving Mills Ltd. and another*** *had again considered the power of review. The Tribunal had reviewed its earlier award dated 12.06.1987. The matter was taken to the High Court, which held that in absence of an express provision in the Industrial Disputes Act, Tribunal could not review its earlier award. The matter was taken to the Apex Court, where one of the submission raised was that even in the absence of an express power of review, the Tribunal had the power to review its order if some illegality was pointed out. Rejecting the submissions following was laid down in paragraph 17 and 18: "*

17. The question still remains whether the Tribunal had jurisdiction to recall its earlier "Award dated June 12, 1987. The High Court was of the view that in the absence of an express provision in the Act conferring upon the Tribunal the power of review the Tribunal could not review its earlier Award. The High Court has relied upon the judgments of this Court in ***Dr. (Smt.) Kuntesh Gupta v. Management of Hindu Kanya Maha Vidyalaya, Sitapur (U.P.) and Ors. and Patel Narshi Thakershi and Ors. v. Pradyumansinghji Arjunsingji : AIR1970SC1273*** *wherein this Court has clearly held that the power of review is not an inherent power and must be conferred by law either expressly or by necessary implication. The appellant sought to get over this legal hurdle by relying upon the judgment of this Court in* ***Grindlays Bank Ltd. v. Central Government Industrial Tribunal and Ors.*** *(supra). In that case the Tribunal made an ex-parte Award. Respondents applied for setting aside the ex-parte Award on the ground that they were prevented by sufficient cause from appearing when the reference was called on for hearing. The Tribunal set aside the ex-parte Award on being satisfied that there was sufficient cause within the meaning of Order 9 Rule 13 of the Code of Civil Procedure and accordingly set aside the ex-parte Award. That order was upheld by the High Court and thereafter in appeal by this Court.*

18. It was, therefore, submitted before us relying upon ***Grindlays Bank Ltd. v. Central Government Industrial Tribunal and Ors.*** *(supra) that even in the absence of an express power of review, the Tribunal had the power to review its order if some illegality was pointed out. The submission must be rejected as misconceived. The submission does not take notice of the difference between a procedural review and a review on merits. This Court in* ***Grindlays Bank Ltd. v. Central Government Industrial Tribunal and Ors.*** *(supra) clearly highlighted this distinction when it observed :-*

"Furthermore, different considerations arise on review. The expression 'review' is used in the two distinct senses, namely (1) a procedural review which is either inherent or implied in a court or Tribunal to set aside a palpably erroneous order passed under a mis-apprehension by it, and (2) a review on merits when the error sought to be corrected is one of law and is apparent on the face of the record. It is in the latter sense that the court in ***Patel Narshi Thakershi*** *case held that no review lies on merits unless a statute specifically provides for it. Obviously when a review is sought due to a procedural defect, the inadvertent error committed by the Tribunal must be corrected ex debit a justitiae to prevent the abuse of its process, and such power inheres in every court or Tribunal".*

20. Again in (2010) 9 SCC 437, ***Kalabharti Advertising Vs. Hemant Vimalnath Narichania and Others,*** *the power of review in the absence of statutory provisions was considered by the Apex Court. Following proposition was laid in paragraph nos. 12, 13 and 14: "12. It is settled legal proposition that unless the statute/rules so permit, the review application is not maintainable in case of judicial/quasi-judicial orders. In absence of any provision in the Act granting an express power of review, it is manifest that a review could not be made and the order in review, if passed is ultra-vires, illegal and without jurisdiction. (vide:* ***Patel Chunibhai Dajibha v. Narayanrao Khanderao Jambekar and Anr. : AIR 1965 SC 1457 and Harbhajan Singh v. Karam Singh and Ors.*** *: AIR 1966 SC 641).*

*13. In **Patel Narshi Thakershi and Ors. v. Shri Pradyuman Singhji Arjunsinghji : AIR 1970 SC 1273; Maj. Chandra Bhan Singh v. Latafat Ullah Khan and Ors. : AIR 1978 SC 1814; Dr. Smt. Kuntesh Gupta v. Management of Hindu Kanya Mahavidhyalaya, Sitapur (U.P.) and Ors. : AIR 1987 SC 2186; State of Orissa and Ors. v. Commissioner of Land Records and Settlement, Cuttack and Ors. : (1998) 7 SCC 162 and Sunita Jain v. Pawan Kumar Jain and Ors :** (2008) 2 SCC 705, this Court held that the power to review is not an inherent power. It must be conferred by law eitherexpressly/specifically or by necessary implication and in absence of any provision in the Act/Rules, review of an earlier order is impermissible as review is a creation of statute. Jurisdiction of review can be derived only from the statute and thus, any order of review in absence of any statutory provision for the same is nullity being without jurisdiction.*

14. Therefore, in view of the above, the law on the point can be summarised to the effect that in absence of any statutory provision providing for review, entertaining an application for review or under the garb of clarification/modification/correction is not permissible."

21. From the proposition of law as laid down in the above cases, it is well established that unless the Statute/Rule permit, the review application is not maintainable in case of judicial/quasi judicial orders. In Order 2004, no power of review has been expressly provided nor such power can be read by implication. The Commissioner after dismissing the appeal filed under Clause 28 of Order 2004 has entertained the review application on merits and had allowed the review on merits."

22. Hon'ble Apex Court in the case of **Naresh Kumar and Other Vs. Government (NCT of Delhi)** and one more connected case, reported in **(2019) 9 SCC 416,** while considering the same proposition held as under :-

"13. It is settled law that the power of review can be exercised only when the statute provides for the same. In the absence of any such provision in the statute concerned, such power of review cannot be exercised by the authority concerned. This Court in Kalabharati Advertising v. Hemant Vimalnath Narichania, has held as under :

".....12. It is settled legal proposition that unless the statute/rules so permit, the review application is not maintainable in case of judicial/quasi-judicial orders. In the absence of any provision in the Act granting an express power of review, it is manifest that a review could not be made and the order in review, if passed, is ultra vires, illegal and without jurisdiction. (Vide Patel Chunibhai Dajibha v. Narayanrao Khanderao Jambekar and Harbhajan Singh v. Karam Singh)

13. In Patel Narsi Thakershi v. Pradyuman Singhji Arjunsinghji, Chandra Bhan Singh v. Latafat Ullah Khan, Kuntesh Gupta v. Hindu Kanya Kahavidyalaya, State of Orissa v. Commr. of Land Records & Seettlement and Sunita Jain v. Pawan Kumar Jain this Court held that the power to "review is not an inherent power. It must be conferred by law either expressly/specifically or by necessary implication" and in the absence of any provision in the Act/Rules, review of an earlier order is impermissible as review is a creation of statute. Jurisdiction of review can be derived only from the statute and thus, any order of review in the absence of

any statutory provision for the same is a nullity, being without jurisdiction.

14. Therefore, in view of the above, the law on the point can be summarised to the effect that in the absence of any statutory provision providing for review, entertaining an application for review or under the grab of clarification/modification/correction is not permissible.""

23. In the present case the exercise of power by the Sub Divisional Magistrate/Assistant Electoral Registration Officer in entertaining the application of respondent no. 5 and thereby reviewing his own earlier order dated 25.05.2020, was clearly without jurisdiction in the light of the fact that there is no provision in the Act of 1947or Rules of 1994 enabling the Sub Divisional Magistrate/Assistant Electoral Registration Officer to do the same.

24. In case respondent no. 5 was not satisfied with the findings of fact recorded by the Sub Divisional Magistrate/Assistant Electoral Registration Officer, it was open for him to file an appeal under Section 21A of the Rules, 1994.

25. In the light of above, the impugned order dated 24.08.2020, being without jurisdiction, is hereby quashed.

26. The writ petition is **allowed.**

(2020)10ILR A163
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.10.2020

BEFORE

THE HON'BLE PANKAJ MITHAL, J.
THE HON'BLE JASPREET SINGH, J.

Misc Bench No. 16278 of 2020

Shah Rasheed Ahmad ...Petitioner
Versus
Custodian of Enemy Property, G.O.I., New Delhi & Ors. ...Respondents

Counsel for the Petitioner:
Shyam Mohan Pradhan, Akhilesh Kumar Kalra, Rahul Kapoor

Counsel for the Respondents:
C.S.C., A.S.G.

Property treated as enemy property-belongs to real uncle of the Petitioner-who were Pakistani nationals-property was incorporated in Schedule-II of the Declaration and authorization vested-same was in the knowledge of the parties-never challenged-impugned order legal and consequential orders.

Writ Petition dismissed. (E-9)

(Delivered by Hon'ble Pankaj Mithal, J. & Hon'ble Jaspreet Singh, J.)

1. Heard Shri Shyam Mohan learned counsel for the petitioner and the Additional Solicitor General of India Shri S. B. Pandey, learned Senior Advocate assisted by Shri Raman Pandey for opposite party no.1 while the notices have been received on behalf of the opposite parties no.2 to 4 by the office of the Chief Standing Counsel.

2. The petitioner by means of the present petition has prayed for the following reliefs:-

(i) issue a writ, order or direction or writ in the nature of certiorari quashing the orders dated 17.07.2020 and 14.08.2020, passed by the respondent no.1 and respondent no.3 as contained in Annexure No.1 & Annexure No.2, order

dated 13.02.2020 passed by the respondent no.2 as well as order dated 18.01.1975, passed by the respondent no.1, contained Annexure No.3 & 4 to the writ petition respectively.

(ii) issue a writ, order or direction or writ in the nature of mandamus commanding the respondents not to proceed in pursuance of the aforesaid impugned orders.

3. It has been submitted by the learned counsel for the petitioner that the property in question which is being treated as an enemy property by the respondent no.1 actually belonged one Jafar Hasan, son of Muzaffar Ali who is the real uncle of the present petitioner. It has been submitted that Jafar Hasan alongwith other co-sharers which included the father of the present petitioner amongst other were the joint tenure holders of Khasra Nos.1106, 1130, 1268, 826, 827, 1037, 1048, 1097, 1102, 1103, 1137, 1138, 1153, 1165, 1174, 1175, 1192, 1216 and 1218. Jafar Hasan had executed a Will on 01.10.1970 in favour of the petitioner (real nephew) and upon the death of Jafar Hasan on 20.06.1974 his shares devolved on the petitioner and moreover the name of the petitioner was also mutated and he continued to remain in possession of the property in question.

4. It has been submitted that Jafar Hasan had never migrated to Pakistan and he continued to have his 1/6th share in the property in question which after his death came in the hands of the petitioner. It has further been mentioned that earlier the other co-sharers which included the father of the petitioner had instituted writ petition before a Division Bench of this Court bearing Writ Petition No.2394 of 1976 wherein by means of order and judgment dated 07.11.1979 the writ petition was partly allowed restraining the opposite parties from dispossessing the petitioners from the plots mentioned in the document of declaration issued by the custodian enemy property and which plots are in actual possession of the petitioner.

5. It has further been urged by Shri Shyam Mohan that despite the aforesaid order the respondents did not make any effort to partition or demarcate the shares and once again in the year 2001 attempted to auction the land in question which was in the possession of the present petitioner with a standing crop thereon which prompted the petitioner to institute another writ petition before this Court bearing No.1534 (M/S) of 2001.

6. It has further been submitted that in the aforesaid writ petition an interim order was passed that the crop shall not be auctioned and the aforesaid writ petition is pending till date.

7. It is in the aforesaid backdrop that the respondent no.1 has issued the impugned orders dated 17.07.2020, 14.08.2020 and 13.02.2020 and while assailing the aforesaid three orders the petitioner now challenges the authorization order passed under Section 8 of the Enemy Property Act, 1968 dated 18th of January, 1975.

8. It has been urged that the aforesaid orders are bad in the eyes of law; inasmuch as Jafar Hasan the predecessor in interest of the present petitioner had never migrated to Pakistan and as such the property could not be treated as enemy property and by passing the impugned orders the respondents are presupposing and treating the property to be enemy property despite the fact that the matter was already

resolved by a Division Bench of this Court by means of judgment and order dated 07.11.1979 in writ petition No.2394 of 1976.

9. The Court has considered the submissions of the learned counsel for the petitioner. However, on the perusal of the record it indicates that it is incorrect to state that Jafar Hasan was not a pakistani national or that his property was not treated as an enemy property.

10. From the perusal of the judgment and order dated 07.11.1979 passed in writ petition No.2394 of 1979, it would be clear that the Division Bench noticing the claim of the petitioners in the said writ petition clearly recorded the fact that Maqbool Hasan and Jafar Hasan were pakistani nationals. The order dated 07.11.1979 clearly indicated the fact that since Maqbool Hasan and Jafar Hasan who were real brothers had migrated to Pakistan and being Pakistani nationals their property was incorporated in Schedule-II of the Declaration dated 10th of September, 1965. Even the said property was mentioned in the authorization issued under Section 8 of the Enemy Property Act, 1968. Significantly, the said order, said authorization issued on 18th of January 1975 was very well in the knowledge of the father of the petitioner Mansoor Hasan who was the petitioner no.1 in the writ petition No.2394 of 1976 alongwith the other co-sharers and who clearly had taken a stand that the other brothers, namely Jafar Hasan and Maqbool Hasan were Pakistani nationals and in the aforesaid circumstances, the Division Bench by means of order dated 07.11.1979 had passed the order which reads as under:-

"The petitioners claim to be co-shares in certain property along with Maqbool Hasan and Jafar Hasan, who are Pakistani Nationals, and whose property has under Government of India Notification dated 10th September, 1965, been treated an enemy property and vested in the Custodian of Enemy Property. An order of Authorization under Section 8 of the Enemy Property Act, 1968 has been issued by the Custodian of Enemy Property, where under the Sub-Divisional Magistrate has been authorized to take such measures as he may consider necessary or expedient for the preservation and management of the Enemy Property specified in the Schedule. This order is Annexure - 2 to the petition. The petitioners do not dispute (except to the extent the will precisely clarify) that the said Maqbool Hasan and Jafar Hasan have in that property the shares specified in the order, annexure - 2. This order shows that in one plot Maqbool Hasan has 1/9 share, while in two others he has 2/9 share, and Jafar Hasan has 1/9 share in three plots. There is only one plot in annexure - 2 of which Jafar Hasan has been shown exclusive owner, i.e., plot No.56. As regards this plot, the case of the petitioners is that the plot was ancestral, in which Jafar Hasan was only a co-sharer, and further that the plot comprises a grove which was planted by the petitioner No.1 and as such, the name is in his exclusive possession.

So far as plots, which according to the order, annexure - 2 and also according to the petitioners' own case, are jointly owned by one or more of the petitioners and the Pakistani Nationals, are concerned, It is obvious that if the petitioners as co-sharers are in actual possession, then the Custodian of the Enemy Property stepping into the shoes of the said Pakistani Nationals cannot have any right of dispossessing the petitioners. He can claim a right of getting the property partitioned or to claim his share in profits, but he cannot dispossess the petitioners so

long as jointness continues. As regards plot No.56, the facts appear to be in dispute. We do not have before us the original notification of vesting that may have been issued under the Defence of India Rules, 1962. Even annexure -2 has not been sought to be quashed. We therefore express no opinion on the merits of the case set up by petitioner No.1 with respect to plot No.56. It will be open to the said petitioner and to the Custodian to have the matter resolved through appropriate proceedings.

In the result, the writ petition is allowed in part and the opposite parties are restrained from dispossessing the petitioners from plots mentioned in annexure - 2 in which the Pakistani Nationals have only a share and which plots are in actual possession of the petitioners. It shall, however, be open to the opposite parties to take other proceedings in regard to those plots as indicted above. No order as to costs."

11. It will be significant to notice that the name of the present petitioner is on the basis of an alleged unregistered Will said to have been executed by Jafar Hasan who is said to have died on 20.06.1974. The fact remains that when the petitioner's father, namely, Mansoor Hasan alongwith the other co-sharers had instituted the writ petition in the year 1976 which came to be decided in the year 1979. There was never any claim or even vague whisper that Jafar Hasan had not migrated to Pakistan, or that he had died and had left his Will by virtue of which the present petitioner who is the son of Mansoor Hasan (Mansoor Hasan petitioner no.1 in writ petition No.2394 of 1976). Even in the earlier writ petition, both the notifications dated 10th of September, 1965 as well as the authorization order passed under Section 8 of the Enemy Property Act, 1968 dated 18th of January, 1975 was in the knowledge of the parties yet there was never any challenge thereto. Now for the first time, the petitioner is assailing the authorization order under Section 8 dated 18th of January, 1975.

12. The submission of Shri Shyam Mohan that the said order was not in notice is also not tenable coupled with the fact that despite a challenge having been raised to the authorization order without challenging the initial order passed on 10th of September, 1975 by virtue of which the immovable properties of Jafar Hasan vested with the custodian, the challenge to Section 8 authorization order pales into insignificance.

13. At this juncture, it will be apposite to notice Section 8 of the

14. Enemy Property Act, 1968 which reads as under:-

"8. Power of Custodian in respect of enemy property vested in him.-- 1[(1) With respect to the property vested in the Custodian under this Act, the Custodian may take or authorise the taking of such measures as he considers necessary or expedient for preserving such property till it is disposed of in accordance with the provisions of this Act.]

(2) Without prejudice to the generality of the foregoing provision, the Custodian or such person as may be specifically authorised by him in this behalf, may, for the said purpose,--

(i) carry on the business of the enemy;

2[(ia) fix and collect the rent, standard rent, lease rent, licence fee or usage charges, as the case may be, in respect of enemy property;]

(ii) take action for recovering any money due to the enemy;

(iii) make any contract and execute any document in the name and on behalf of the enemy;

(iv) institute, defend or continue any suit or other legal proceeding, refer any dispute to arbitration and compromise any debts, claims or liabilities;

2[(iva) secure vacant possession of the enemy property by evicting the unauthorised or illegal occupant or trespasser and remove unauthorised or illegal constructions, if any].

(v) raise on the security of the property such loans as may be necessary;

(vi) incur out of the property any expenditure including the payment of any taxes, duties, cesses and rates to Government or to any local authority and of any wages, salaries, pensions, provident fund contributions to, or in respect of, any employee of the enemy and the repayment of any debts due by the enemy to persons other than enemies;

(vii) transfer by way of sale, mortgage or lease or otherwise dispose of any of the properties;

(viii) invest any moneys held by him on behalf of enemies for the purchase of Treasury Bills or such other Government securities as may be approved by the Central Government for the purpose;

(ix) make payments to the enemy and his dependents;

(x) make payments on behalf of the enemy to persons other than those who are enemies, of dues outstanding on the 25th October, 1962 3[or on the 3rd December, 1971]; and

(xi) make such other payments out of the funds of the enemy as may be directed by the Central Government.

Explanation.--In this sub-section and in sections 10 and 17, "enemy" includes an enemy subject and an enemy firm.

15. From the perusal of the aforesaid Section, it would indicate that the aforesaid Section only authorizes the custodian to takes such measures as he considers necessary or expedient for preserving the property. The important section by virtue of which property vests in the custodian is under Section 5 which reads as under:-

"5. Property vested in the Custodian of Enemy Property for India under the Defence of India Rules, 1962, and the Defence of India Rules, 1971 to continue to vest in Custodian.--4[(1)] Notwithstanding the expiration of the Defence of India Act, 1962 (51 of 1962), and the Defence of India Rules, 1962, all enemy property vested before such expiration in the Custodian of Enemy Property for India appointed under the said Rules and continuing to vest in him immediately before the commencement of this Act, shall, as from such commencement, vest in the Custodian.

(2) Notwithstanding the expiration of the Defence of India Act, 1971 (42 of 1971) and the Defence of India Rules, 1971, all enemy property vested before such expiration in the Custodian of Enemy Property for India appointed under the said Rules and continuing to vest in him immediately before the commencement of the Enemy Property, (Amendment) Act, 1977 (40 of 1977) shall, as from such commencement, vest in the Custodian.]

(3) The enemy property vested in the Custodian shall, notwithstanding that the enemy or the enemy subject or the enemy firm has ceased to be an enemy due to death, extinction, winding up of business or change of nationality or that the legal heir and successor is a citizen of India or

the citizen of a country which is not an enemy, continue to remain, save as otherwise provided in this Act, vested in the Custodian.

Explanation.--For the purposes of this sub-section, "enemy property vested in the Custodian" shall include and shall always be deemed to have been included all rights, titles, and interest in, or any benefit arising out of, such property vested in him under this Act.]

16. Thus, from the conjoint reading of the aforesaid two sections, it would indicate that there has never been any challenge to the order passed under Section 5 dated 10th of September, 1965 by which the immovable property of Jafar Hasan and Maqbool Hasan vested with the custodian. Even in the instant petition, the petitioner has raised a feeble challenge to the authorization order dated 18th of January, 1975. However, there is yet no challenge to the vesting order dated 10th of September, 1965.

17. In the aforesaid backdrop, where the fact that neither the father of the petitioner nor the concerned person Jafar Hasan,, who was admittedly alive till 1974, never assailed the vesting order and moreover his other real brother and co-sharers also stated before the High Court that Jafar Hasan and his other real brother Maqbool Hasan were Pakistani nationals and under the aforesaid circumstances, the earlier Division Bench had passed the order dated 07.11.1979.

18. In light of the aforesaid order, which has been relied upon by the petitioner himself, while filing other writ petition bearing No.1534 (M/S) of 2001, the fact remains that it is now not open for the petitioner to assail the aforesaid orders. Moreover, under the Enemy Property Act, there is a complete procedure which has been provided regarding assailing the order of vesting of property in terms of Section 18 of the Act which has further been made appealable in terms of Section 18-C of the said Act.

19. In view of the aforesaid facts the submission of the learned counsel for the petitioner does not merit consideration and even otherwise the orders dated 17.07.2020, 14.08.2020 and 13.02.2020 are merely consequential orders.

20. The petition is misconceived and is accordingly dismissed, however, there shall be no order as to costs.

21. In view of the aforesaid, the submission of the learned counsel for the petitioner does not have merit. The writ petition is devoid of merit and is accordingly dismissed.

(2020)10ILR A168
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.08.2020

BEFORE

THE HON'BLE AJAY BHANOT, J.

Matters Under Article 227 No. 237 of 2020
(Civil)

Mrs. Madhuri Saxena ...Petitioner
Versus
Sahkari Awas Evam Vitt Nigam Ltd. Sarojni Marg, Lucknow ...Respondent

Counsel for the Petitioner:
Shrish Chandra

Counsel for the Respondent:

Civil Law - Arbitration and Conciliation Act (26 of 1996)- Section 34(6) - Expeditious disposal - Application for setting aside

arbitral award - Courts to dispose off within a period of one year from the date on which the notice is served upon the other party - Delay in disposal - in case application is not decided within the statutory time limit of one year, court should make all out endeavours to decide it within a reasonable time frame proximate thereafter - S. 34(6) directory in nature, prevent the courts from being rushed into decisions by breaching fundamental norms of fairness and justice - however, merely because S. 34(6) is directory it does not permit courts to extend the statutory time frame indefinitely or unreasonably - Justice to be meaningful has to be delivered in a relevant time frame - (Para 29, 40, 41)

Arbitration case filed in the year 2017 against the arbitral award - No effective hearing on any dates - matter remained pending before court below - Petition filed before High Court for expeditious disposal of arbitration case - *Held* - Court below directed to decide the Arbitration Case within a period of six months from the date of receipt of a certified copy - not to grant any unnecessary adjournment - in case adjournment is to be granted in the interest of justice court to record reasons for adjournment & impose costs not below Rs.10,000/- for each adjournment upon the party seeking such adjournment - in case counsels abstain from work on account of strike, parties be permitted to appear in person & court to proceed and pass appropriate orders - In case counsel does not appear on account of strike not to permit such counsel (of either party) to appear in the case on all future dates & to take out appropriate proceedings in law against the erring counsels - if Presiding Officer is not available, matter may be transferred to another competent court which is available (Para 49)

Allowed (E-5)

List of Cases cited:-

1. M/s Shiv Cotex Vs Tirgum Auto Plast P. Ltd. & ors. 2011 (89) ALR 232

2. Noor Mohammed Vs Jethanand & anr. (2013) 5 SCC 202

3. Siddhartha Kumar & ors. Vs Upper Civil Judge (S.D.) Ghazipur & ors. AIR 1998 All 265

4. Indian Council of Legal Aid and Advice Vs Bar Council of India (1995) 1 SCC 732

5. Sanjeev Datta, In re, (1995) 3 SCC 619

6. Mahabir Prasad Singh Vs Jacks Aviation (P) Ltd. (1998) 1 SCC 201

7. Ramson Services (P) Ltd. Vs Subhash Kapoor (2001) 1 SCC 118

8. B.L. Wadehra (Dr) Vs State (NCT of Delhi) AIR 2000 Del 266

9. Ex-Capt. Harish Uppal Vs U.O.I. & anr. (2003) 2 SCC 45

10. Supreme Court Bar Association Vs U.O.I. (1998) 4 SCC 409

11. Krishnakant Tamrakar Vs St of M.P. AIR (2018) SC 3635

(Delivered by Hon'ble Ajay Bhanot, J.)

1. This petition has been filed with the following prayer:

"A. To issue an appropriate order or direction to the learned District Judge, Ghaziabad (Prescribed Authority), to forthwith decide and conclude the proceedings of Arbitration Case No.903 of 2017 (Sahkari Awas Nirman Evam Vitt Nigam Ltd. Vs. Paresh Saxena) as expeditiously as possible and within the time stipulated by this Hon'ble Court without granting any unnecessary adjournments.

B. To issue an appropriate order or direction to the learned District Judge, Ghaziabad to forthwith decide the execution application in furtherance of the arbitral award filed in Execution Case No.59 of 2017 (Paresh Saxena Vs. Sahkari Awas Nirman Evam Vitt Nigam Ltd.) as expeditiously as possible and within the time stipulated by this Hon'ble Court without granting any unnecessary adjournments."

2. Proceedings under Section 34 of the Arbitration and Conciliation Act, 1996 taken out by the petitioner against the arbitral award dated 29.05.2017, rendered by the learned sole Arbitrator, came to be registered as Arbitration Case No.903 of 2017 (Sahkari Awas Nirman Evam Vitt Nigam Ltd. Vs. Paresh Saxena) before the learned District Judge, Ghaziabad.

3. After institution of the proceedings, the matter was first placed before the learned Presiding Officer on 24.08.2017 but no one was present and the case was posted for 04.09.2017. On 04.09.2017 no effective hearing could happen because the counsels abstained from work in pursuance of a strike call. On 12.09.2017, the counsels again abstained from work on account of strike call and the learned Presiding Officer did not proceed with the case. The case was thereafter posted before the learned Presiding Officer on 18.09.2017. Notices were issued to the petitioner on 18.09.2017. The order-sheet of the proceedings on 21.12.2017, 19.01.2018 and 21.03.2018, records that notices had not been served upon the petitioner. The order-sheet of 30.04.2018 and 29.05.2018 reveals that the petitioner had not been served with the notice. Consequently the respondent-Sahkari Awas Nirman Evam Vitt Nigam Ltd. was required to take fresh steps for service. The petitioner subsequently entered appearance, and tendered its objections to the application instituting the proceedings under Section 34 of the Arbitration and Conciliation Act, 1996 on 23.08.2018.

4. No hearing could take place on 23.08.2018 since the lawyers were abstaining from work on account of strike calls. The matter was again posted on 31.08.2018 and 07.09.2018 on which dates counsels were present. But the matter could not be taken up due to pre-occupation of the learned Presiding Officer. On 27.09.2018, again the counsels abstained from work due to strike call.

5. On 12.11.2018, 14.12.2018, 10.01.2019 and 20.12.2019, the learned Presiding Officer could not hold the court due to various reasons like being on training or on leave.

6. A perusal of the order-sheet on subsequent dates reveals these facts. The counsel for the respondent-Sahkari Awas Nirman Evam Vitt Nigam Ltd. was present on 01.02.2019, however, the petitioner was not present. On 04.04.2019 the respondent's pairokar was present, however, the petitioner was not present. On 30.08.2019, the respondent-Sahkari Avas Evam Vitt Nigam Ltd. was not present, however, petitioner's pairokar was present to prosecute the case.

7. An application registered as application 16-C submitted by the counsel for the respondent (Sahkari Avas Evam Vitt Nigam Ltd.), before the learned Presiding Officer for summoning of the records of the arbitration proceedings, was served upon the petitioner before the court below on 28.11.2018. Application

registered as paper no.17-C was submitted by the petitioner in the court below on 21.02.2019, while the copies of the same were supplied to the learned counsel for the Sahkari Awas Nirman Evam Vitt Nigam Limited on 12.03.2019. Due to pre-occupation of the learned Presiding Officer in other matters, the aforesaid applications could not be heard on various dates including 03.05.2019 and 01.11.2019.

8. No one was present on 04.09.2017, 12.09.2017, 30.05.2019 and 06.02.2020, as lawyers were on strike. The court proceedings were completely stalled by the striking lawyers on the aforesaid dates. The matter thus remains pending before the learned court below.

9. The constitutional courts are cognizant of the problem of delays in our judicial system. They have consistently attempted to purge the legal system of this menace. Various judgments have identified some of the causes of delays, & appropriate judicial directions have been issued to address the problem.

10. The following question was posed for determination before the Hon'ble Supreme Court in ***M/s Shiv Cotex Versus Tirgum Auto Plast P. Ltd. and others,*** reported at ***2011 (89) ALR 232 :***

"14.....Is the court obliged to give adjournment after adjournment merely because the stakes are high in the dispute? Should the court be silent spectator and leave control of the case to a party to the case who has decided not to take the case forward?"

11. Thereafter, the Hon'ble Supreme Court while emphasizing the imperative of expeditious disposal of suits to preserve the faith in the judicial system held thus:

"15...It is sad, but true, that the litigants seek - and the courts grant - adjournments at the drop of the hat. In the cases where the judges are little pro-active and refuse to accede to the requests of unnecessary adjournments, the litigants deploy all sorts of methods in protracting the litigation. It is not surprising that civil disputes drag on and on. The misplaced sympathy and indulgence by the appellate and revisional courts compound the malady further. The case in hand is a case of such misplaced sympathy. It is high time that courts become sensitive to delays in justice delivery system and realize that adjournments do dent the efficacy of judicial process and if this menace is not controlled adequately, the litigant public may lose faith in the system sooner than later. The courts, particularly trial courts, must ensure that on every date of hearing, effective progress takes place in the suit."

16....No litigant has a right to abuse the procedure provided in CPC. Adjournments have grown like cancer corroding the entire body of justice delivery system."

17....."A party to the suit is not at liberty to proceed with the trial at its leisure and pleasure and has no right to determine when the evidence would be let in by it or the matter should be heard. The parties to a suit -- whether the plaintiff or the defendant -- must cooperate with the court in ensuring the effective work on the date of hearing for which the matter has been fixed. If they don't, they do so at their own peril."

12. Interminable delays caused by unnecessary adjournments sought for and granted to parties in a routine manner, and the collective responsibility of all the stake holders in the judicial system arose for determination before the Hon'ble Supreme Court in ***Noor Mohammed Vs. Jethanand***

and another, reported at (***2013) 5 SCC 202.***

13. Dispensing justice is the fundamental raison d'etre of the judicial system. Timely delivery of justice is indispensable to retaining the faith of the common man in the justice dispensation system.

14. Reiterating the importance of timely delivery of justice, and after setting its face against indifference of the judicial system to the plight of the litigants, the Hon'ble Supreme Court in ***Noor Mohammed (supra)*** defined the problem and issued directions for its resolution :

"27. The anguish expressed in the past and the role ascribed to the Judges, lawyers and the litigants is a matter of perpetual concern and the same has to be reflected upon every moment. An attitude of indifference can neither be appreciated nor tolerated. Therefore, the serviceability of the institution gains significance. That is the command of the Majesty of Law and none should make any maladroit effort to create a concavity in the same. Procrastination, whether at the individual or institutional level, is a systemic disorder. Its corrosive effect and impact is like a disorderly state of the physical frame of a man suffering from an incurable and fast progressive malignancy. Delay either by the functionaries of the court or the members of the Bar significantly exhibits indolence and one can aphoristically say, borrowing a line from Southwell "Creeping snails have the weakest force". Slightly more than five decades back, talking about the responsibility of the lawyers, Nizer Louis[16] had put thus: -

"I consider it a lawyer's task to bring calm and confidence to the distressed client. Almost everyone who comes to a law office is emotionally affected by a problem. It is only a matter of degree and of the client's inner resources to withstand the pressure."

A few lines from illustrious Frankfurter is fruitful to recapitulate:

"I think a person who throughout his life is nothing but a practicing lawyer fulfils a very great and essential function in the life of society. Think of the responsibilities on the one hand and the satisfaction on the other, to be a lawyer in the true sense."

28. In a democratic set up, intrinsic and embedded faith in the adjudicatory system is of seminal and pivotal concern. Delay gradually declines the citizenry faith in the system. It is the faith and faith alone that keeps the system alive. It provides oxygen constantly. Fragmentation of faith has the effect-potentiality to bring in a state of cataclysm where justice may become a casuality. A litigant expects a reasoned verdict from a temperate Judge but does not intend to and, rightly so, to guillotine much of time at the altar of reasons. Timely delivery of justice keeps the faith ingrained and establishes the sustained stability. Access to speedy justice is regarded as a human right which is deeply rooted in the foundational concept of democracy and such a right is not only the creation of law but also a natural right. This right can be fully ripened by the requisite commitment of all concerned with the system. It cannot be regarded as a facet of Utopianism because such a thought is likely to make the right a mirage losing the centrality of purpose. Therefore, whoever has a role to play in the justice dispensation system cannot be allowed to remotely conceive of a casual approach.

33. In the case at hand, as we perceive, the learned counsel sought

adjournment after adjournment in a nonchalant manner and the same were granted in a routine fashion. It is the duty of the counsel as the officer of the court to assist the court in a properly prepared manner and not to seek unnecessary adjournments. Getting an adjournment is neither an art nor science. It has never been appreciated by the courts. All who are involved in the justice dispensation system, which includes the Judges, the lawyers, the judicial officers who work in courts, the law officers of the State, the Registry and the litigants, have to show dedicated diligence so that a controversy is put to rest. Shifting the blame is not the cure. Acceptance of responsibility and dealing with it like a captain in the frontier is the necessity of the time. It is worthy to state that diligence brings satisfaction. There has to be strong resolve in the mind to carry out the responsibility with devotion. A time has come when all concerned are required to abandon idleness and arouse oneself and see to it that the syndrome of delay does not erode the concept of dispensation of expeditious justice which is the constitutional command. Sagacious acceptance of the deviation and necessitous steps taken for the redressal of the same would be a bright lamp which would gradually become a laser beam. This is the expectation of the collective, and the said expectation has to become a reality. Expectations are not to remain at the stage of hope. They have to be metamorphosed to actuality. Long back, Francis Bacon, in his aphoristic style, had said, "Hope is good breakfast, but it is bad supper". We say no more on this score."

15. In ***Gayathri Vs. M.Girish,*** reported at ***(2016) 14 SCC 142,*** the Hon'ble Supreme Court exhorted the trial courts to address themselves to the malady of long delays in our judicial system:

"9. In the case at hand, as we have stated hereinbefore, the examination-in-chief continued for long and the matter was adjourned seven times. The Defendant sought adjournment after adjournment for cross-examination on some pretext or the other which are really not entertainable in law. But the trial Court eventually granted permission subject to payment of costs. Regardless of the allowance extended, the Defendant stood embedded on his adamantine platform and prayed for adjournment as if it was his right to seek adjournment on any ground whatsoever and on any circumstance. The non-concern of the Defendant-Petitioner shown towards the proceedings of the Court is absolutely manifest. The disregard shown to the Plaintiff's age is also visible from the marathon of interlocutory applications filed. A counsel appearing for a litigant has to have institutional responsibility. The Code of Civil Procedure so command. Applications are not to be filed on the grounds which we have referred to hereinabove and that too in such a brazen and obtrusive manner. It is wholly reprehensible. The law does not countenance it and, if we permit ourselves to say so, the professional ethics decries such practice. It is because such acts are against the majesty of law.

12. In the case at hand, it can indubitably be stated that the Defendant-Petitioner has acted in a manner to cause colossal insult to justice and to the concept of speedy disposal of civil litigation. We are constrained to say the virus of seeking adjournment has to be controlled. The saying of Gita "Awake! Arise! Oh Partha" is apt here to be stated for guidance of trial courts."

16. This Court in ***Siddhartha Kumar and others etc. Vs. Upper Civil Judge, Senior Division, Ghazipur and others,*** reported at ***AIR 1998 All 265*** made a searching enquiry into the causes of delay in the disposal of matters pending in the trial courts. Thereafter, comprehensive directions were issued in this regard. Some of the directions were to be implemented by this court on the administrative side.

17. The calling of law envisages highest standards of professionalism and ethical conduct on part of lawyers, while assisting the process of law. In the same breath law has set its face firmly against the lawyers abstaining from work in pursuance of strike calls. Good and high authorities in point have entrenched these propositions in our legal blood stream. Speaking to the obligations of the legal fraternity in-general, and the imperative of maintaining highest standards of professional conduct and morality among the lawyers in particular, the Hon'ble Supreme Court in ***Indian Council of Legal Aid and Advice Vs Bar Council of India*** reported at ***(1995) 1 SCC 732*** stated:

"It is generally believed that members of the legal profession have certain social obligations, e.g., to render 'pro bono publico' service to the poor and the underprivileged. Since the duty of a lawyer is to assist the court in the administration of justice, the practice of law has a public utility flavour and, therefore, he must strictly and scrupulously abide by the code of conduct behoving the noble profession and must not indulge in any activity which may tend to lower the image of the profession in society. That is why the functions of the Bar Council include the laying down of standards of professional conduct and etiquette which advocates must follow to maintain the dignity and purity of the profession."

18. Adherence to high standards of ethical and noble conduct in the personal and private lives of lawyers as members of the legal fraternity was reiterated by the Hon'ble Supreme Court in ***Sanjeev Datta, In re,*** reported ***1995 (3) SCC 619:***

"20. The legal profession is a solemn and serious occupation. It is a noble calling and all those who belong to it are its honourable members. Although the entry to the profession can be had by acquiring merely the qualification of technical competence, the honour as a professional has to be maintained by its members by their exemplary conduct both in and outside the court. The legal profession is different from other professions in that what the lawyers do, affects not only an individual but the administration of justice which is the foundation of the civilized society. Both as a leading member of the intelligentsia of the society and as a responsible citizen, the lawyer has to conduct himself as a model for others both in his professional and in his private and public life. The society has a right to expect of him such ideal behaviour. It must not be forgotten that the legal profession has always been held in high esteem and its members have played an enviable role in public life. The regard for the legal and judicial systems in this country is in no small measure due to the tireless role played by the stalwarts in the profession to strengthen them. They took their profession seriously and practised it with dignity, deference and devotion. If the profession is to survive, the judicial system has to be vitalised. No service will be too small in making the system efficient, effective and credible."

19. In ***Mahabir Prasad Singh Vs Jacks Aviation (P) Ltd.*** reported at ***1998 (1) SCC 201*** the Hon'ble Supreme Court dwelt on the obligations of courts when faced with strike calls by an Association of Advocates, and required the courts to proceed with the judicial business and not yield to strike calls or any pressure tactics:

"If any counsel does not want to appear in a particular court, that too for justifiable reasons, professional decorum and etiquette require him to give up his engagement in that court so that the party can engage another counsel. But retaining the brief of his client and at the same time abstaining from appearing in that court, that too not on any particular day on account of some personal inconvenience of the counsel but as a permanent feature, is unprofessional as also unbecoming of the status of an advocate. No court is obliged to adjourn a cause because of the strike call given by any association of advocates or a decision to boycott the courts either in general or any particular court. It is the solemn duty of every court to proceed with the judicial business during court hours. No court should yield to pressure tactics or boycott calls or any kind of browbeating."

20. ***Mahabir Prasad Singh (supra)*** was also followed by Hon'ble Supreme Court in ***Ramson Services (P) Ltd. Vs Subhash Kapoor*** reported at ***2001 (1) SCC 118,*** wherein the Hon'ble Supreme Court penalised the erring advocates by observing:

"15. Therefore, we permit the appellant to realise half of the said amount of Rs 5000 from the firm of advocates M/s B.C. Das Gupta & Co. or from any one of its partners. Initially we thought that the appellant could be permitted to realise the whole amount from the said firm of advocates. However, we are inclined to save the firm from bearing the costs partially since the Supreme Court is adopting such a measure for the first time and the counsel would not have been conscious of such a consequence befalling them. Nonetheless we put the profession to notice that in future the advocate would also be answerable for the consequence suffered by the party if the non-appearance was solely on the ground of a strike call. It is unjust and inequitable to cause the party alone to suffer for the self-imposed dereliction of his advocate. We may further add that the litigant who suffers entirely on account of his advocate's non-appearance in court, has also the remedy to sue the advocate for damages but that remedy would remain unaffected by the course adopted in this case. Even so, in situations like this, when the court mulcts the party with costs for the failure of his advocate to appear, we make it clear that the same court has power to permit the party to realise the costs from the advocate concerned. However, such direction can be passed only after affording an opportunity to the advocate. If he has any justifiable cause the court can certainly absolve him from such a liability. But the advocate cannot get absolved merely on the ground that he did not attend the court as he or his association was on a strike. If any advocate claims that his right to strike must be without any loss to him but the loss must only be for his innocent client such a claim is repugnant to any principle of fair play and canons of ethics. So when he opts to strike work or boycott the court he must as well be prepared to bear at least the pecuniary loss suffered by the litigant client who entrusted his brief to that advocate with all confidence that his cause would be safe in the hands of that advocate.

16. In all cases where the court is satisfied that the ex parte order (passed due to the absence of the advocate pursuant to any strike call) could be set aside on terms, the court can as well permit the party to realise the costs from the advocate concerned without driving such party to initiate another legal action against the advocate.

17. We may also observe that it is open to the court as an alternative course to permit the party (while setting aside the ex parte order or decree earlier passed in his favour) to realise the cost fixed by the court for that purpose, from the counsel of the other party whose absence caused the passing of such ex parte order, if the court is satisfied that such absence was due to that counsel boycotting the court or participating in a strike."

21. The Hon'ble Delhi High Court in ***B.L. Wadehra (Dr) Vs State (NCT of Delhi)*** reported at ***AIR 2000 Del 266*** held that a lawyers strike would infringe the fundamental rights of litigants for speedy trial, and that such strikes interfere with the administration of justice. The observations of the Hon'ble Delhi High Court which were cited with approval by the Hon'ble Supreme Court in ***Ex-Capt. Harish Uppal Vs Union of India and another*** reported at ***(2003) 2 SCC 45*** are reproduced herein to support this narrative:

"30. In the light of the abovementioned views expressed by the Supreme Court, lawyers have no right to strike i.e. to abstain from appearing in Court in cases in which they hold vakalat for the parties, even if it is in response to or in compliance with a decision of any association or body of lawyers. In our view, in exercise of the right to protest, a lawyer may refuse to accept new engagements and may even refuse to appear in a case in which he had already been engaged, if he has been duly discharged from the case. But so long as a lawyer holds the vakalat for his client and has not been duly discharged, he has no right to abstain from appearing in Court even on the ground of a strike called by the Bar Association or any other body of lawyers. If he so abstains, he commits a professional misconduct, a breach of professional duty, a breach of contract and also a breach of trust and he will be liable to suffer all the consequences thereof. There is no fundamental right, either under Article 19 or under Article 21 of the Constitution, which permits or authorises a lawyer to abstain from appearing in Court in a case in which he holds the vakalat for a party in that case. On the other hand a litigant has a fundamental right for speedy trial of his case, because, speedy trial, as held by the Supreme Court in Hussainara Khatoon (I) v. Home Secy., State of Bihar [(1980) 1 SCC 81 : 1980 SCC (Cri) 23 : AIR 1979 SC 1360] is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21 of the Constitution. Strike by lawyers will infringe the abovementioned fundamental right of the litigants and such infringement cannot be permitted. Assuming that the lawyers are trying to convey their feelings or sentiments and ideas through the strike in exercise of their fundamental right to freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution, we are of the view that the exercise of the right under Article 19(1)(a) will come to an end when such exercise threatens to infringe the fundamental right of another. Such a limitation is inherent in the exercise of the right under Article 19(1)(a). Hence the lawyers cannot go on strike infringing the fundamental right of

the litigants for speedy trial. The right to practise any profession or to carry on any occupation guaranteed by Article 19(1)(g) may include the right to discontinue such profession or occupation but it will not include any right to abstain from appearing in Court while holding a vakalat in the case. Similarly, the exercise of the right to protest by the lawyers cannot be allowed to infract the litigant's fundamental right for speedy trial or to interfere with the administration of justice. The lawyer has a duty and obligation to cooperate with the Court in the orderly and pure administration of justice. Members of the legal profession have certain social obligations also and the practice of law has a public utility flavour. According to the Bar Council of India Rules, 1975 'an advocate shall, at all times, comport himself in a manner befitting his status as an officer of the Court, a privileged member of the community and a gentleman, bearing in mind that what may be lawful and moral for a person who is not a member of the Bar or for a member of the Bar in his non-professional capacity, may still be improper for an advocate'. It is below the dignity, honour and status of the members of the noble profession of law to organize and participate in strike. It is unprofessional and unethical to do so. In view of the nobility and tradition of the legal profession, the status of the lawyer as an officer of the court and the fiduciary character of the relationship between a lawyer and his client and since strike interferes with the administration of justice and infringes the fundamental right of litigants for speedy trial of their cases, strike by lawyers cannot be approved as an acceptable mode of protest, irrespective of the gravity of the provocation and the genuineness of the cause. Lawyers should adopt other modes of protest which will not interrupt or disrupt court proceedings or adversely affect the interest of the litigant. Thereby lawyers can also set an example to other sections of the society in the matter of protest and agitations.

31. Every court has a solemn duty to proceed with the judicial business during court hours and the court is not obliged to adjourn a case because of a strike call. The court is under an obligation to hear and decide cases brought before it and it cannot shirk that obligation on the ground that the advocates are on strike. If the counsel or/and the party does not appear, the necessary consequences contemplated in law should follow. The court should not become privy to the strike by adjourning the case on the ground that lawyers are on strike. Even in Common Cause case [(1995) 1 Scale 6] the Supreme Court had asked the members of the legal profession to be alive to the possibility of Judges refusing adjournments merely on the ground of there being a strike call and insisting on proceeding with the cases. Strike infringes the litigant's fundamental right for speedy trial and the court cannot remain a mute spectator or throw up its hands in helplessness on the face of such continued violation of the fundamental right.

32. Either in the name of a strike or otherwise, no lawyer has any right to obstruct or prevent another lawyer from discharging his professional duty of appearing in court. If anyone does it, he commits a criminal offence and interferes with the administration of justice and commits contempt of court and he is liable to be proceeded against on all these counts."

22. The Hon'ble Supreme Court in ***Ex-Capt. Harish Uppal (supra)*** noticed the consequences of strikes/boycott calls. The

Constitution Bench of Hon'ble Supreme Court found that such actions hold the judicial system to ransom and threaten the administration of justice :

"20. Thus the law is already well settled. It is the duty of every advocate who has accepted a brief to attend trial, even though it may go on day to day and for a prolonged period. It is also settled law that a lawyer who has accepted a brief cannot refuse to attend court because a boycott call is given by the Bar Association. It is settled law that it is unprofessional as well as unbecoming for a lawyer who has accepted a brief to refuse to attend court even in pursuance of a call for strike or boycott by the Bar Association or the Bar Council. It is settled law that courts are under an obligation to hear and decide cases brought before them and cannot adjourn matters merely because lawyers are on strike. The law is that it is the duty and obligation of courts to go on with matters or otherwise it would tantamount to becoming a privy to the strike. It is also settled law that if a resolution is passed by Bar Associations expressing want of confidence in judicial officers, it would amount to scandalising the courts to undermine its authority and thereby the advocates will have committed contempt of court. Lawyers have known, at least since Mahabir Singh case [(1999) 1 SCC 37] that if they participate in a boycott or a strike, their action is ex facie bad in view of the declaration of law by this Court. A lawyer's duty is to boldly ignore a call for strike or boycott of court/s. Lawyers have also known, at least since Ramon Services case [(2001) 1 SCC 118 : 2001 SCC (Cri) 3 : 2001 SCC (L&S) 152] that the advocates would be answerable for the consequences suffered by their clients if the non-appearance was solely on grounds of a strike call.

21. It must also be remembered that an advocate is an officer of the court and enjoys special status in society. Advocates have obligations and duties to ensure smooth functioning of the court. They owe a duty to their clients. Strikes interfere with administration of justice. They cannot thus disrupt court proceedings and put interest of their clients in jeopardy. In the words of Mr H.M. Seervai, a distinguished jurist:

"Lawyers ought to know that at least as long as lawful redress is available to aggrieved lawyers, there is no justification for lawyers to join in an illegal conspiracy to commit a gross, criminal contempt of court, thereby striking at the heart of the liberty conferred on every person by our Constitution. Strike is an attempt to interfere with the administration of justice. The principle is that those who have duties to discharge in a court of justice are protected by the law and are shielded by the law to discharge those duties, the advocates in return have duty to protect the courts. For, once conceded that lawyers are above the law and the law courts, there can be no limit to lawyers taking the law into their hands to paralyse the working of the courts. "In my submission', he said that "it is high time that the Supreme Court and the High Courts make it clear beyond doubt that they will not tolerate any interference from any body or authority in the daily administration of justice. For in no other way can the Supreme Court and the High Courts maintain the high position and exercise the great powers conferred by the Constitution and the law to do justice without fear or favour, affection or ill will."

22. It was expected that having known the well-settled law and having seen that repeated strikes and boycotts have shaken the confidence of the public in the

legal profession and affected administration of justice, there would be self-regulation. The abovementioned interim order was passed in the hope that with self-restraint and self-regulation the lawyers would retrieve their profession from lost social respect. The hope has not fructified. Unfortunately strikes and boycott calls are becoming a frequent spectacle. Strikes, boycott calls and even unruly and unbecoming conduct are becoming a frequent spectacle. On the slightest pretence strikes and/or boycott calls are resorted to. The judicial system is being held to ransom. Administration of law and justice is threatened. The rule of law is undermined."

23. Further the Constitution Bench in ***Ex-Capt. Harish Uppal (supra)*** relied on the law laid down in ***Supreme Court Bar Association Vs Union of India*** reported at ***1998 (4) SCC 409*** that every advocate should boldly ignore call for strike/boycott:

"25. In the case of Supreme Court Bar Assn. v. Union of India [(1998) 4 SCC 409] it has been held that professional misconduct may also amount to contempt of court (para 21). It has further been held as follows: (SCC pp. 444-46, paras 79-80)

"79. An advocate who is found guilty of contempt of court may also, as already noticed, be guilty of professional misconduct in a given case but it is for the Bar Council of the State or Bar Council of India to punish that advocate by either debarring him from practice or suspending his licence, as may be warranted, in the facts and circumstances of each case. The learned Solicitor-General informed us that there have been cases where the Bar Council of India taking note of the contumacious and objectionable conduct of an advocate, had initiated disciplinary proceedings against him and even punished him for "professional misconduct', on the basis of his having been found guilty of committing contempt of court. We do not entertain any doubt that the Bar Council of the State or Bar Council of India, as the case may be, when apprised of the established contumacious conduct of an advocate by the High Court or by this Court, would rise to the occasion, and take appropriate action against such an advocate. Under Article 144 of the Constitution "all authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court'. The Bar Council which performs a public duty and is charged with the obligation to protect the dignity of the profession and maintain professional standards and etiquette is also obliged to act "in aid of the Supreme Court'. It must, whenever facts warrant, rise to the occasion and discharge its duties uninfluenced by the position of the contemner advocate. It must act in accordance with the prescribed procedure, whenever its attention is drawn by this Court to the contumacious and unbecoming conduct of an advocate which has the tendency to interfere with due administration of justice. It is possible for the High Courts also to draw the attention of the Bar Council of the State to a case of professional misconduct of a contemner advocate to enable the State Bar Council to proceed in the manner prescribed by the Act and the Rules framed thereunder. There is no justification to assume that the Bar Councils would not rise to the occasion, as they are equally responsible to uphold the dignity of the courts and the majesty of law and prevent any interference in the administration of justice. Learned counsel for the parties present before us do not dispute and rightly so that whenever a court of record records its findings about the

conduct of an advocate while finding him guilty of committing contempt of court and desires or refers the matter to be considered by the Bar Council concerned, appropriate action should be initiated by the Bar Council concerned in accordance with law with a view to maintain the dignity of the courts and to uphold the majesty of law and professional standards and etiquette. Nothing is more destructive of public confidence in the administration of justice than incivility, rudeness or disrespectful conduct on the part of a counsel towards the court or disregard by the court of the privileges of the Bar. In case the Bar Council, even after receiving "reference' from the Court, fails to take action against the advocate concerned, this Court might consider invoking its powers under Section 38 of the Act by sending for the record of the proceedings from the Bar Council and passing appropriate orders. Of course, the appellate powers under Section 38 would be available to this Court only and not to the High Courts. We, however, hope that such a situation would not arise.

80. In a given case it may be possible, for this Court or the High Court, to prevent the contemner advocate to appear before it till he purges himself of the contempt but that is much different from suspending or revoking his licence or debarring him to practise as an advocate. In a case of contemptuous, contumacious, unbecoming or blameworthy conduct of an Advocate-on-Record, this Court possesses jurisdiction, under the Supreme Court Rules itself, to withdraw his privilege to practise as an Advocate-on-Record because that privilege is conferred by this Court and the power to grant the privilege includes the power to revoke or suspend it. The withdrawal of that privilege, however, does not amount to suspending or revoking his licence to practise as an advocate in other courts or tribunals."

Thus a Constitution Bench of this Court has held that the Bar Councils are expected to rise to the occasion as they are responsible to uphold the dignity of courts and majesty of law and to prevent interference in administration of justice. In our view it is the duty of the Bar Councils to ensure that there is no unprofessional and/or unbecoming conduct. This being their duty no Bar Council can even consider giving a call for strike or a call for boycott. It follows that the Bar Councils and even Bar Associations can never consider or take seriously any requisition calling for a meeting to consider a call for a strike or a call for boycott. Such requisitions should be consigned to the place where they belong viz. the waste-paper basket. In case any Association calls for a strike or a call for boycott the State Bar Council concerned and on their failure the Bar Council of India must immediately take disciplinary action against the advocates who give a call for strike and if the Committee members permit calling of a meeting for such purpose, against the Committee members. Further, it is the duty of every advocate to boldly ignore a call for strike or boycott."

24. The Hon'ble Supreme Court in ***Ex-Capt. Harish Uppal (supra)*** unequivocally asserted that courts are not helpless in this matter:

"26. It must also be noted that courts are not powerless or helpless. Section 38 of the Advocates Act provides that even in disciplinary matters the final appellate authority is the Supreme Court.

Thus even if the Bar Councils do not rise to the occasion and perform their duties by taking disciplinary action on a complaint from a client against an advocate for non-appearance by reason of a call for strike or boycott, on an appeal the Supreme Court can and will. Apart from this, as set out in Ramon Services case [(2001) 1 SCC 118 : 2001 SCC (Cri) 3 : 2001 SCC (L&S) 152] every court now should and must mulct advocates who hold vakalatsbut still refrain from attending courts in pursuance of a strike call with costs. Such costs would be in addition to the damages which the advocate may have to pay for the loss suffered by his client by reason of his non-appearance."

25. After declining to accept the reasons given to justify a strike or call for boycott, the Hon'ble Supreme Court in ***Ex-Capt. Harish Uppal (supra)*** held that lawyers do not have the right to go on strike :

"32. Now let us consider whether any of the reasons set out in the affidavit of the Bar Council of India justify a strike or call for boycott. The reasons given are:

(1) Local issues.--A dispute between a lawyer/lawyers and police or other authorities can never be a reason for going on even a token strike. It can never justify giving a call for boycott. In such cases an adequate legal remedy is available and it must be resorted to. The other reasons given under the item "local issues" and even Items (IV) and (V) are all matters which are exclusive within the domain of courts and/or legislatures. Of course the Bar may be concerned about such things but there can be no justification to paralyse the administration of justice. In such cases representations can and should be made. It will be for the appropriate authority to consider those representations. We are sure that a representation by the Bar will always be seriously considered. However, the ultimate decision in such matters has to be that of the authority concerned. Beyond making representations no illegal method can be adopted. At the most, provided it is permissible or feasible to do so, recourse can be had by way of legal remedy. So far as problems concerning courts are concerned, we see no harm in setting up Grievance Redressal Committees as suggested. However, it must be clear that the purpose of such Committees would only be to set up a forum where grievance can be ventilated. It must be clearly understood that recommendations or suggestions of such Committees can never be binding. The deliberations and/or suggestions and/or recommendations of such Committees will necessarily have to be placed before the appropriate authority viz. the Chief Justice or the District Judge concerned. The final decision can only be of the Chief Justice concerned or the District Judge concerned. Such final decision, whatever it be, would then have to be accepted by all and no question then arises of any further agitation. Lawyers must also accept the fact that one cannot have everything to be the way that one wants it to be. Realities of life are such that, in certain situations, after one has made all legal efforts to cure what one perceives as an ill, one has to accept the situation. So far as legislation, national and regional issues are concerned, the Bar always has recourse to legal remedies. Either the demand of the Bar on such issues is legally valid or it is not. If it is legally valid, of all the persons in society, the Bar is the most competent and capable of getting it enforced in a court of law. If the demand is not legally valid and cannot be enforced in a court of law or

is not upheld by a court of law, then such a demand cannot be pursued any further.

33. The only exception to the general rule set out above appears to be Item (III). We accept that in such cases a strong protest must be lodged. We remain of the view that strikes are illegal and that courts must now take a very serious view of strikes and calls for boycott. However, as stated above, lawyers are part and parcel of the system of administration of justice. A protest on an issue involving dignity, integrity and independence of the Bar and the judiciary, provided it does not exceed one day, may be overlooked by courts, who may turn a blind eye for that one day."

26. Finally the Hon'ble Supreme Court in ***Ex-Capt. Harish Uppal (supra)*** laid down nature of right to practise law and the powers of courts by holding thus:

"34. One last thing which must be mentioned is that the right of appearance in courts is still within the control and jurisdiction of courts. Section 30 of the Advocates Act has not been brought into force and rightly so. Control of conduct in court can only be within the domain of courts. Thus Article 145 of the Constitution of India gives to the Supreme Court and Section 34 of the Advocates Act gives to the High Court power to frame rules including rules regarding condition on which a person (including an advocate) can practise in the Supreme Court and/or in the High Court and courts subordinate thereto. Many courts have framed rules in this behalf. Such a rule would be valid and binding on all. Let the Bar take note that unless self-restraint is exercised, courts may now have to consider framing specific rules debarring advocates, guilty of contempt and/or unprofessional or unbecoming conduct, from appearing before the courts. Such a rule if framed would not have anything to do with the disciplinary jurisdiction of the Bar Councils. It would be concerning the dignity and orderly functioning of the courts. The right of the advocate to practise envelopes a lot of acts to be performed by him in discharge of his professional duties. Apart from appearing in the courts he can be consulted by his clients, he can give his legal opinion whenever sought for, he can draft instruments, pleadings, affidavits or any other documents, he can participate in any conference involving legal discussions, he can work in any office or firm as a legal officer, he can appear for clients before an arbitrator or arbitrators etc. Such a rule would have nothing to do with all the acts done by an advocate during his practice. He may even file vakalat on behalf of a client even though his appearance inside the court is not permitted. Conduct in court is a matter concerning the court and hence the Bar Council cannot claim that what should happen inside the court could also be regulated by them in exercise of their disciplinary powers. The right to practise, no doubt, is the genus of which the right to appear and conduct cases in the court may be a specie. But the right to appear and conduct cases in the court is a matter on which the court must and does have major supervisory and controlling power. Hence courts cannot be and are not divested of control or supervision of conduct in court merely because it may involve the right of an advocate. A rule can stipulate that a person who has committed contempt of court or has behaved unprofessionally and in an unbecoming manner will not have the right to continue to appear and plead and conduct cases in courts. The Bar Councils cannot overrule such a regulation concerning the orderly conduct of court proceedings. On the contrary, it will be

their duty to see that such a rule is strictly abided by. Courts of law are structured in such a design as to evoke respect and reverence to the majesty of law and justice. The machinery for dispensation of justice according to law is operated by the court. Proceedings inside the courts are always expected to be held in a dignified and orderly manner. The very sight of an advocate, who is guilty of contempt of court or of unbecoming or unprofessional conduct, standing in the court would erode the dignity of the court and even corrode its majesty besides impairing the confidence of the public in the efficacy of the institution of the courts. The power to frame such rules should not be confused with the right to practise law. While the Bar Council can exercise control over the latter, the courts are in control of the former. This distinction is clearly brought out by the difference in language in Section 49 of the Advocates Act on the one hand and Article 145 of the Constitution of India and Section 34(1) of the Advocates Act on the other. Section 49 merely empowers the Bar Council to frame rules laying down conditions subject to which an advocate shall have a right to practise i.e. do all the other acts set out above. However, Article 145 of the Constitution of India empowers the Supreme Court to make rules for regulating this practice and procedure of the court including inter alia rules as to persons practising before this Court. Similarly Section 34 of the Advocates Act empowers High Courts to frame rules, inter alia to lay down conditions on which an advocate shall be permitted to practise in courts. Article 145 of the Constitution of India and Section 34 of the Advocates Act clearly show that there is no absolute right to an advocate to appear in a court. An advocate appears in a court subject to such conditions as are laid down by the court. It must be remembered that Section 30 has not been brought into force and this also shows that there is no absolute right to appear in a court. Even if Section 30 were to be brought into force control of proceedings in court will always remain with the court. Thus even then the right to appear in court will be subject to complying with conditions laid down by courts just as practice outside courts would be subject to conditions laid down by the Bar Council of India. There is thus no conflict or clash between other provisions of the Advocates Act on the one hand and Section 34 or Article 145 of the Constitution of India on the other.

35. In conclusion, it is held that lawyers have no right to go on strike or give a call for boycott, not even on a token strike. The protest, if any is required, can only be by giving press statements, TV interviews, carrying out of court premises banners and/or placards, wearing black or white or any colour armbands, peaceful protest marches outside and away from court premises, going on dharnas or relay fasts etc. It is held that lawyers holding vakalats on behalf of their clients cannot refuse to attend courts in pursuance of a call for strike or boycott. All lawyers must boldly refuse to abide by any call for strike or boycott. No lawyer can be visited with any adverse consequences by the Association or the Council and no threat or coercion of any nature including that of expulsion can be held out. It is held that no Bar Council or Bar Association can permit calling of a meeting for purposes of considering a call for strike or boycott and requisition, if any, for such meeting must be ignored. It is held that only in the rarest of rare cases where the dignity, integrity and independence of the Bar and/or the Bench are at stake, courts may ignore (turn a blind eye) to a protest abstention from

work for not more than one day. It is being clarified that it will be for the court to decide whether or not the issue involves dignity or integrity or independence of the Bar and/or the Bench. Therefore in such cases the President of the Bar must first consult the Chief Justice or the District Judge before advocates decide to absent themselves from court. The decision of the Chief Justice or the District Judge would be final and have to be abided by the Bar. It is held that courts are under no obligation to adjourn matters because lawyers are on strike. On the contrary, it is the duty of all courts to go on with matters on their boards even in the absence of lawyers. In other words, courts must not be privy to strikes or calls for boycotts. It is held that if a lawyer, holding a vakalat of a client, abstains from attending court due to a strike call, he shall be personally liable to pay costs which shall be in addition to damages which he might have to pay his client for loss suffered by him."

27. The issue of lawyers going on strike repeatedly and thereby bringing the wheels of the administration of justice to a standstill, once again evoked the concern of the Hon'ble Supreme Court in ***Krishnakant Tamrakar Vs State of Madhya Pradesh*** reported at ***AIR 2018 SC 3635***. The Hon'ble Supreme Court therein after adverting to other causes of delays in the judicial system, also called for structural changes to meet the challenge:

"50. Since the strikes are in violation of law laid down by this Court, the same amount to contempt and at least the office-bearers of the associations who give call for the strikes cannot disown their liability for contempt. Every resolution to go on strike and abstain from work is per se contempt. Even if proceedings are not initiated individually against such contemnors by the court concerned or by the Bar Council concerned for the misconduct, it is necessary to provide for some mechanism to enforce the law laid down by this Court, pending a legislation to remedy the situation.

51. Accordingly, we consider it necessary, with a view to enforce fundamental right of speedy access to justice under Articles 14 and 21 and law laid by this Court, to direct the Ministry of Law and Justice to present at least a quarterly report on strikes/abstaining from work, loss caused and action proposed. The matter can thereafter be considered in its contempt or inherent jurisdiction of this Court. The Court may, having regard to the fact situation, hold that the office-bearers of the Bar Association/Bar Council who passed the resolution for strike or abstaining from work, are liable to be restrained from appearing before any court for a specified period or until such time as they purge themselves of contempt to the satisfaction of the Chief Justice of the High Court concerned based on an appropriate undertaking/conditions. They may also be liable to be removed from the position of office-bearers of the Bar Association forthwith until the Chief Justice of the High Court concerned so permits on an appropriate undertaking being filed by them. This may be in addition to any other action that may be taken for the said illegal acts of obstructing access to justice. The matter may also be considered by this Court on receipt of a report from the High Courts in this regard. This does not debar report/petition from any other source even before the end of a quarter, if situation so warrants.

52. We may now sum up our conclusions:

(i) In the light of 124th and 272nd Reports of the Law Commission of India, judgment of this Court in Gujarat Urja [Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd., (2016) 9 SCC 103] , the Minutes of the Arrears Committee of Supreme Court dated 8-4-2017 and all other relevant considerations, the authorities concerned may examine whether there is need for any changes in the judicial structure by creating appropriate fora to decongest the constitutional courts so as to realistically achieve the constitutional goal of speedy justice.

(ii) In view of 14th Report of the Law Commission of India, judgment of this Court inAll India Judges Assn. v. Union of India [All India Judges Assn. v. Union of India, (1992) 1 SCC 119, para 12 : 1992 SCC (L&S) 9] , the Minutes of the Arrears Committee of this Court dated 8-4-2017, and the experience on the subject, pending consideration of issue of All-India Judicial Service, there is need to consider the proposal for Central Selection Mechanism for filling up vacancies in courts other than the constitutional courts and also to consider as to how to supplement inadequacies in the present system of appointment of Judges to the constitutional courts at all levels.

(iii) There is need to consider in the light of observations hereinabove and all other relevant considerations whether there should be a body of full-time experts without affecting independence of judiciary, to assist in identifying, scrutinising and evaluating candidates at pre-appointment stage and to evaluate performance post appointment. The Government may also consider what changes are required in the process of evaluation of candidates at its level so that no wrong candidate is appointed. What steps are required for ensuring righteous conduct of Judges at later stage is also an issue for consideration.

(iv) Pending legislative measures to check the malady of frequent uncalled for strikes obstructing access to justice, the Ministry of Law and Justice may compile information and present a quarterly report on strikes/abstaining from work, loss caused and action proposed. The matter can thereafter be considered in the contempt or inherent jurisdiction of this Court. The Court may direct having regard to a fact situation, that the office-bearers of the Bar Association/Bar Council who passed the resolution for strikes or abstaining from work or took other steps in that direction are liable to be restrained from appearing before any court for a specified period or till they purge themselves of contempt to the satisfaction of the Chief Justice of the High Court concerned based on an appropriate undertaking/conditions. They may also be liable to be removed from the position of office-bearers of the Bar Association forthwith until the Chief Justice of the High Court concerned so permits on an appropriate undertaking being filed by them. This may be in addition to any other action that may be taken for the said illegal acts of obstructing access to justice. The matter may also be considered by this Court on receipt of a report from the High Courts in this regard. This does not debar report/petition from any other source even before the end of a quarter, if situation so warrants.

53. Accordingly, we dispose of this appeal in above terms. We direct the Union of India to file an affidavit in the light of the above observations within three months. First report in terms of para 52.4 may be filed by 30-6-2018. The matter may be listed for consideration of the above

affidavit on Wednesday, 4-7-2018 before the appropriate Bench."

28. The courts cannot be held to ransom by the conduct of the parties or the strikes of the counsels. Striking lawyers are accountable to law. The process of law has to run its course unimpeded by any such obstructions. The courts have to pass appropriate orders in accordance with law when the parties or counsels are not cooperating with the judicial process. Court proceedings cannot be brought to a halt by striking lawyers or lethargic litigants. No party or matter can have an unlimited draught on the time of the court.

29. The foremost goal set out in the Preamble of the Constitution, is to secure to all citizens: Justice, social, economic and political.

Justice to be meaningful has to be delivered in a relevant time frame. Delay invariably defeats justice. Indefinite delays are the bane of our judicial system. Interminable legal proceedings reflect the apathy of an impersonal system to the plight of helpless litigants. So long as timely justice is denied, so long the constitutional promise of justice will not be redeemed, and the constitutional mandate of the judicial system will not be implemented.

30. The constitutional courts are seized with, and the legislatures have taken cognizance of the malaise of delays in the judicial process. Delays in the judicial process have earned the displeasure of constitutional courts, and have evoked the concern of the legislatures. Law will not countenance delays in the judicial process. This is evident from the imperative directions issued by the constitutional courts to purge the judicial system of delays. This will also be apparent from the timelines set by the legislature to cure the mischief of delays in the judicial process. The judicial system will have to evolve an ethos to be alert to, and endeavour to respect timelines created by the legislature.

31. The impact of globalisation was acutely felt in the field of law. India's unwavering commitment to its international obligations contained in the UNCITRAL Model on International Commercial Arbitration, was manifested in the promulgation of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'The Act of 1996'). India's international obligations to UNCITRAL, are implemented by the most fundamental instruments of national sovereignty, namely, the legislatures and the courts. The Arbitration and Conciliation Act, 1996 has to be interpreted and implemented by the courts in a manner which is in accord with the intendment of the Indian Parliament, and consistent with the international obligations of India to the UNCITRAL Model.

32. The UNCITRAL Model and the Arbitration and Conciliation Act, 1996, reflect an evolving trend in international jurisprudence. Together both instruments reflect a global consensus of judicial values, and a unification of the system of international jurisprudence in the field of arbitration. The courts in India implement the Arbitration and Conciliation Act, 1996, as instruments of national sovereignty, and also members of the international comity of courts.

33. Meeting the international obligations of India to the UNCITRAL Model was the avowed legislative intent of

the Arbitration and Conciliation Act, 1996. Expeditious disposal of proceedings under the Arbitration and Conciliation Act, 1996 is the congruent objective of the twin instruments of international law and the domestic law.

34. Section 34(5) and (6) of the Act, 1996 are relevant to the instant controversy and the provisions are extracted hereunder:

"34. Application for setting aside arbitral award.--(1)-(4) * * *

(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party."

35. Delay in disposal of the proceedings under the Act of 1996, topped the concerns and lay at the heart of 246th Law Commission Report, when it introduced the said provisions. The relevant extracts of the 246th Law Commissioner Report are set out hereunder:

"3. The Arbitration and Conciliation Act, 1996 (hereinafter "the Act") is based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 and the UNCITRAL Conciliation Rules, 1980. The Act has now been in force for almost two decades, and in this period of time, although arbitration has fast emerged as a frequently chosen alternative to litigation, it has come to be afflicted with various problems including those of high costs and delays, making it no better than either the earlier regime which it was intended to replace; or to litigation, to which it intends to provide an alternative. Delays are inherent in the arbitration process, and costs of arbitration can be tremendous. Even though courts play a pivotal role in giving finality to certain issues which arise before, after and even during an arbitration, there exists a serious threat of arbitration related litigation getting caught up in the huge list of pending cases before the courts. After the award, a challenge under section 34 makes the award inexecutable and such petitions remain pending for several years. The object of quick alternative disputes resolution frequently stands frustrated.

4. There is, therefore, an urgent need to revise certain provisions of the Act to deal with these problems that frequently arise in the arbitral process. The purpose of this Chapter is to lay down the foundation for the changes suggested in the report of the Commission. The suggested amendments address a variety of issues that plague the present regime of arbitration in India and, therefore, before setting out the amendments, it would be useful to identify the problems that the suggested amendments are intended to remedy and the context in which the said problems arise and hence the context in which their solutions must be seen.

* * *

25. Similarly, the Commission has found that challenges to arbitration awards under sections 34 and 48are similarly kept pending for many years. In this context, the Commission proposes the addition of sections 34(5) and 48(4) which would require that an application under those sections shall be disposed of expeditiously and in any event within a period of one year from the date of service

of notice. In the case of applications under section 48 of the Act, the Commission has further provided a time limit under section 48(3), which mirrors the time limits set out in section 34(3), and is aimed at ensuring that parties take their remedies under this section seriously and approach a judicial forum expeditiously, and not by way of an afterthought ....."

36. The aforesaid provisions fell for consideration before the Hon'ble Supreme Court in ***State of Bihar and others Vs. Bihar Rajya Bhumi Vikas Bank Samiti***, reported at ***(2018) 9 SCC 472***. The Hon'ble Supreme Court held Section 34(5) and (6) of the Act, 1996 to be directory in nature on the foot of the following reasons:

"22. However, according to Shri Tripathi, an application filed under Section 34 is a condition precedent, and if no prior notice is issued to the other party, without being accompanied by an affidavit by the applicant endorsing compliance with the said requirement, such application, being a non-starter, would have to be dismissed at the end of the 120 days' period mentioned in Section 34(3). Apart from what has been stated by us hereinabove, even otherwise, on a plain reading of Section 34, this does not follow. Section 34(1) reads as under:

"34. Application for setting aside arbitral award.--(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3)." What is conspicuous by its absence is any reference to sub-section (5).

The only requirement in Section 34(1) is that an application for setting aside an award be in accordance with sub-sections (2) and (3). This, again, is an important pointer to the fact that even legislatively, sub- section (5) is not a condition precedent, but a procedural provision which seeks to reduce the delay in deciding applications under Section 34. One other interesting thing needs to the noted - the same Amendment Act brought in a new Section 29A. This provision states as follows:

"29A. Time limit for arbitral award.-- (1) The award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference. Explanation.-- For the purpose of this sub-section, an arbitral tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment.

(2) If the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.

(3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.

(4) If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period: Provided that while extending the period under this sub- section, if the court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent for each month of such delay."

23. It will be seen from this provision that, unlike Section 34(5) and (6), if an Award is made beyond the stipulated or extended period contained in the Section, the consequence of the mandate of the Arbitrator being terminated is expressly provided. This provision is in stark contrast to Section 34(5)and (6) where, as has been stated hereinabove, if the period for deciding the application under Section 34 has elapsed, no consequence is provided. This is one more indicator that the same Amendment Act, when it provided time periods in different situations, did so intending different consequences.

24. Shri Tripathi then argued that Section 34(5) is independent of Section 34(6) and is a mandatory requirement of law by itself. There are two answers to this. The first is that sub-section (6) refers to the date on which the notice referred to in sub-section (5) is served upon the other party. This is for the reason that an anterior date to that of filing the application is to be the starting point of the period of one year referred to in Section 34(6). The express language of Section 34(6), therefore, militates against this submission of Shri Tripathi. Secondly, even if sub- section (5) be construed to be a provision independent of sub-section (6), the same consequence in law is the result - namely, that there is no consequence provided if such prior notice is not issued. This submission must therefore fail.

25. We come now to some of the High Court judgments. The High Courts of Patna,2 Kerala,3 Himachal Pradesh,4 Delhi,5 and Gauhati6 have all taken the view that Section 34(5) is mandatory in nature. What is strongly relied upon is the object sought to be achieved by the provision together with the mandatory nature of the language used in Section 34(5). Equally, analogies with Section 80, CPC have been drawn to reach the same result. On the other hand, in Global Aviation Services Private Limited v. Airport Authorities of India,7 the Bombay High Court, in answering question 4 posed by it, held, following some of our judgments, that the provision is directory, largely because no consequence has been provided for breach of the time limit specified. When faced with the argument that the object of the provision would be rendered otiose if it were to be construed as directory, the learned Single Judge of the Bombay High Court held as under: (SCC OnLine Bom para 133)

"133. Insofar as the submission of the learned counsel for the respondent that if section 34(5) is considered as directory, the entire purpose of the amendments would be rendered otiose is concerned, in my view, there is no merit in this submission made by the learned counsel for the respondent. Since there is no consequence provided in the said provision in case of non-compliance thereof, the said provision cannot be considered as mandatory. The purpose of avoiding any delay in proceeding with the matter expeditiously is already served by insertion of appropriate rule in Bombay High Court (Original Side) Rules. The Court can always direct the petitioner to issue notice along with papers and proceedings upon other party before the matter is heard by the Court for admission as well as for final hearing. The vested rights of a party to challenge an award under section 34 cannot be taken away for non-compliance of issuance of prior notice before filing of the arbitration petition."

The aforesaid judgment has been followed by recent judgments of the High Courts of Bombay8 and Calcutta.

26. We are of the opinion that the view propounded by the High Courts of

Bombay and Calcutta represents the correct state of the law. However, we may add that it shall be the endeavour of every Court in which a Section 34 application is filed, to stick to the time limit of one year from the date of service of notice to the opposite party by the applicant, or by the Court, as the case may be. In case the Court issues notice after the period mentioned in Section 34(3) has elapsed, every Court shall endeavour to dispose of the Section 34 application within a period of one year from the date of filing of the said application, similar to what has been provided in Section 14 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015. This will give effect to the object sought to be achieved by adding Section 13(6) by the 2015 Amendment Act.

27. We may also add that in cases covered by Section 10 read with Section 14 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, the Commercial Appellate Division shall endeavour to dispose of appeals filed before it within six months, as stipulated. Appeals which are not so covered will also be disposed of as expeditiously as possible, preferably within one year from the date on which the appeal is filed. As the present appeal has succeeded on Section 34(5) being held to be directory, we have not found it necessary to decide Shri Rai's alternative plea of maintainability of the Letters Patent Appeal before the Division Bench."

37. I had the occasion to consider the nature of the legislative mandate to the courts, where directory provisions in a statute require the courts to render a final decision in a specified time frame in ***Tribhuwan Prasad Vs. Uttar Pradesh Sarkar and others,*** reported at ***2018 (9) ADJ 466.*** In ***Tribhuwan Prasad (supra)*** the time frame provided in the statute for deciding the appeal was two months.

38. In ***Tribhuwan Prasad (supra)*** it was found that the provision containing a time frame to decide the appeal was directory, and then the consequences of the said holding were construed on the foot of good authority. The directory nature of the provision may not require strict adherence but insists on substantial compliance. Most pertinently it does not permit indefinite enlargement of the time fixed by the statute:

"21. Statutes fixing time-lines to accomplish an action, as discussed above, were held to be directory in nature. The legislative intent was sought to be defeated by a highly delayed compliance on the pretext of the provision being directory in nature. The action of the authorities was invalidated and such interpretation was negatived by the Hon'ble Supreme Court. Inordinate delay does not satisfy the requirement of substantial compliance of a directory provision. The Hon'ble Supreme Court in the case of State of Haryana Vs. P.C. Wadhwa, IPS, Inspector General of Police and another, reported at (1987) 2 SCC 602, while laying down the law, dispelled all such doubts. The relevant parts of the judgement are being extracted for ease of reference:

"14. The whole object of the making and communication of adverse remarks is to give to the officer concerned an opportunity to improve his performance, conduct or character, as the case may. The adverse remarks should not be understood in terms of punishment, but really it should be taken as an advice to the officer concerned, so that he can act in accordance with the advice and improve his service

career. The whole object of the making of adverse remarks would be lost if they are communicated to the officer concerned after an inordinate delay. In the instant case, it was communicated to the respondent after twenty seven months. It is true that the provisions of Rules 6, 6A and 7 are directory and not mandatory, but that does not mean that the directory provisions need not be complied with even substantially. Such provisions may not be complied with strictly, and substantial compliance will be sufficient. But, where compliance after an inordinate delay would be against the spirit and object of the directory provision, such compliance would not be substantial compliance. In the instant case, while the provisions of Rules 6, 6A and 7 require that everything including the communication of the adverse remarks should be completed within a period of seven months, this period cannot be stretched to twenty seven months, simply because these Rules are directory, without serving any purpose consistent with the spirit and objectives of these Rules. We need not, however, dilate upon the question any more and consider whether on the ground of inordinate and unreasonable delay, the adverse remarks against the respondent should be struck down or not, and suffice it to say that we do not approve of the inordinate delay made in communicating the adverse remarks to the respondent."

39. Thereafter, the duties of the court and the manner of implementation of the law were laid down :

"23. In case the appeal is decided within two months, the letter and spirit of the statute is implemented. However, mere failure to decide the appeal within two months does not violate the statutory mandate. In the latter case, the statutory obligation will be defined by the quality of the efforts made to decide the appeal with promptitude and dispatch. The obligation will be met if the appeal is decided within a reasonable time, after the expiry of two months from its institution.

24. Statutes of limitation are statutes of repose. Statutes with time lines for decision making are statutes of endeavour. Statutory duty is discharged not only when the act is done but also when effort is made. However, the leeway to the authority is not unlimited and the time to accomplish the act is not indefinite. The statutory duty of the appellate authority, in the event the appeal is not decided within two months is to be seen.

25. The appellate authority shall have discharged its statutory duties initially, if it makes efforts commensurate to decide the appeal expeditiously, and finally when it enters a judgement, in a reasonable time after the expiry of two months. In such circumstances, the appellate authority can implement the law, by making honest endeavours and serious efforts to decide the appeal with dispatch and expedition. This is the statutory duty of the appellate authority. While the statutory duty of the appellate authority is to make earnest efforts to decide expeditiously, the proof of its performance is in the order-sheet of the court. The order-sheet of the appellate court is the most reliable evidence of the sincerity or earnestness of the efforts made by the appellate authority. The order-sheet of the appellate court is true testimony to the accomplishment of the statutory duty or the failure of the authority to perform its statutory duty. In the latter case the authority is liable to be mandamused."

40. A composite reading of Section 34 (5) and (6) of the Arbitration and Conciliation Act, 1996, the law laid by the Hon'ble Supreme Court in ***State of Bihar and others (supra)*** and this Court in ***Tribhuwan Prasad (supra)*** yields these results. Section 34(5) and (6) of the Arbitration and Conciliation Act, 1996 being directory in nature, prevent the courts from being rushed into decisions by breaching fundamental norms of fairness and justice. The timeline set by the statute, cannot stampede the courts into passing orders which cause miscarriage of justice. However, the courts cannot extend the statutory time frame indefinitely or unreasonably. Neither can the courts be purblind to the timeframe provided in the statute on the pretext that provision is directory. Substantial compliance of the said provisions is sufficient to satisfy the legislative mandate. What substantial compliance entails in regard to these provisions needs to be understood clearly to enable the courts to implement the law faithfully. The duties of the court while deciding an application under Section 34 of the Arbitration and Conciliation Act, 1996 are distilled hereinunder.

41. The courts always have to be alert to the statutory time period of one year to decide the application, and make sincere efforts to adhere to the stipulated time line. In case the application is not decided within the statutory time limit of one year, the court should make all out endeavours to decide it within a reasonable time frame thereafter. At all times, the mandate of law requires the court to proceed with full diligence, and make earnest endeavours to decide the application under Section 34 of the Arbitration and Conciliation Act, 1996, within the time prescribed by the statute or in proximity to it. An unreasonable delay in deciding the matter represents a failure to implement the law. If serious efforts to decide matter within the statutory time frame is the requirement of the law, the order-sheet of the court is the most reliable evidence of the implementation of the law.

42. From the facts of the case prised out at the very inception, and the law discussed in the preceding paragraphs these facts are established. The proceedings under Section 34 of the Arbitration and Conciliation Act, 1996, registered as Arbitration Case No.903 of 2017 (Sahkari Awas Nirman Evam Vitt Nigam Ltd. Vs. Paresh Saxena), could not be concluded within the prescribed statutory time limit, or in a time frame proximate to it. No end to the proceedings is in sight. And if the order-sheet of the court below is a guide, the proceedings could well linger indefinitely. The delay in deciding the case is unreasonable and unacceptable. Long identified and familiar reasons have caused the delay in this case. Unnecessary time taken in service of notices, absence of the presiding officer, adjournment of counsels, and abstention from work by counsels on account of repeated strike calls, have prevented the proceedings from being concluded by a final judgment.

43. The compliance of directions of the Hon'ble Supreme Court and adherence to the law laid down by this Court in various authorities discussed earlier is not in evidence. The legislative mandate of Section 34 (5) and (6) of the Arbitration and Conciliation Act, 1996 has not been implemented. The stakeholders have shown apathy towards the litigant, and indifference to the noble charter of the legal profession. Honest endeavours and earnest efforts to conclude the proceedings with diligence and dispatch are not disclosed

from the order-sheet. The order-sheet of the case is equally a reflection and an indictment of the judicial process. The court has ample powers to ensure that the process of law is not stalled by the dilatory tactics of any party. The courts are not helpless and cannot be seen to be helpless.

44. The rule of law cannot be flouted or permitted to fail. It is the obligation of this Court to ensure that the rule of law is upheld under all circumstances.

45. In light of these facts and the authorities at hand, I am of the opinion that this is a fit case to exercise the supervisory jurisdiction under Article 227 of the Constitution of India by issuing strict directions to decide the matter finally within a stipulated period of time.

46. The supervening event of the COVID 19 pandemic, and its impact on the judicial process has to be noticed before issuing final directions. It is true that COVID 19 pandemic has disrupted the regular functioning of the courts. Admittedly, certain latitude has to be given to the courts and the counsels in view of the prevalence of the COVID 19 pandemic.

47. But it is equally true that compliance of law laid down by the Hon'ble Supreme Court and this Court cannot be neglected on the pretext of the pandemic. The law cannot be held in suspended animation for the same reason.

48. If the rule of constitutional order is to exist at all times, the rule of law has to prevail under all circumstances. Laws cannot stand still and courts cannot fall silent, even in the face of mortal peril to humanity. Laws will evolve and the courts will adapt, but their existence is constant and their reckoning is inevitable.

49. The courts in the State have adapted their functioning to the new realities of the day. Detailed guidelines have been issued by the High Court on the administrative side, regarding functioning of the courts in the district judgeships of the State of Uttar Pradesh during the COVID 19 pandemic. The proceedings of this case shall be conducted in adherence to the said guidelines, and this case shall be treated as "most urgent" at all times.

50. The following measures shall facilitate the learned court below / the learned District Judge, Ghaziabad, to dispose of the said proceedings under Section 34 of the Arbitration and Conciliation Act, 1996 in the time stipulated in the succeeding paragraphs:

(I) The learned court below / the learned District Judge, Ghaziabad, is directed to decide the Arbitration Case No.903 of 2017 (Sahkari Awas Nirman Evam Vitt Nigam Ltd. Vs. Paresh Saxena), within a period of six months from the date of receipt of a certified copy of this order.

(II) The learned court below / the learned District Judge, Ghaziabad, shall not grant any unnecessary adjournment to the parties.

(III) In case any adjournment is granted in the paramount interest of justice, the learned court below / the learned District Judge, Ghaziabad, shall record the reasons for adjournment and impose costs not below Rs.10,000/- for each adjournment upon the party seeking such adjournment.

(IV) In case the counsels abstain from work on account of strike calls, the learned court below / the learned District Judge, Ghaziabad, shall proceed in the absence of such counsels and pass appropriate orders. The parties shall be permitted to appear in person if they so desire.

(V) In case the counsel for any party does not appear before the learned court below / the learned District Judge, Ghaziabad, on any date on account of strike of advocates, the learned court below / the learned District Judge, Ghaziabad, shall not permit such counsel (of either party) to appear in this case on all future dates.

(VI). In this case, if the functioning of the court is brought to a stand still because of strike call, the learned court below / the learned District Judge, Ghaziabad, shall take out appropriate proceedings in law against the erring counsels for flouting the directions of the Hon'ble Supreme Court in the cases of ***Ex-Capt. Harish Uppal (supra) and Krishnakant Tamrakar (supra).***

(VII) The learned court below / the learned District Judge, Ghaziabad shall fix at least two dates every week in the matter. If required, the learned court below / the learned District Judge, Ghaziabad shall proceed with the matter on a day to day basis, and even in the absence of counsels, to ensure that the above stipulated time period of six months for concluding the proceedings is strictly adhered to.

(VIII) If the Presiding Officer is not available for any reason, the matter may be transferred to another competent court which is available, if required in the interest of justice and permissible by law.

51. This order shall be held in abeyance in case the court is shut down due to any emergency created by COVID-19 pandemic. However, the order shall become operative immediately after the reopening of the court. The time-line in this order shall be adjusted accordingly by the learned Presiding Officer.

52. The petition is finally disposed of.

(2020)10ILR A194
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.08.2020

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE AJAY BHANOT, J.

Writ- C No. 11838 of 2020

Pramod Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri M.D. Singh Shekhar, Sri Awadhesh Kumar Malviya, Sri Ram Dayal Tiwari

Counsel for the Respondents:
C.S.C., Sri Ajeet Singh(Addl. A.A.G.), Sri I.S. Tomar

A. Constitution of India – Article 226 – Writ – Mandamus – Scope – Willful violation of contract – Recovery – A writ lies when any fundamental or legal rights are infringed. A writ of mandamus can be issued in favour of a person when he has legally protected and judicially enforceable subsisting right – Petitioner willfully violated conditions of contract resulting in cancellation of contract in terms of clause 40 of the Agreement – Court can neither rewrite contract by providing a new schedule of payment nor can suspend the operation of clause 40 of the Agreement. (Para 15 and 17)

B. Constitution of India – Article 226 – Writ – Suppression of material fact – Effect – A person who approaches the court for grant of

relief, equitable or otherwise, is under a solemn obligation to candidly disclose all the material/important facts which have bearing on the adjudication of the issues raised in the case – If he is found guilty of material facts or making an attempt to pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such person –Petitioner has willfully suppressed material facts and has attempted to mislead this Court – Held, the conduct of the petitioner disentitles him to invoke equitable and discretionary jurisdiction of this Court under Article 226 of the Constitution of India. (Para 18 and 20)

Writ Petition dismissed (E-1)

Cases relied on :-

1. Director of Settlements Vs M.R. Apparao (2002) 4 SCC 638

2. UOI Vs Upendra Singh (1994) 3 SCC 357

3. S. Govind Menon Vs UOI, AIR 1967 SC 1274

4. Oswal Fats & Oil Ltd. Vs Commissioner (Administration) (2010) 4 SCC 728

5. S.P. Chengalvaya Naidu Vs Jagannath, AIR 1994 SC 853

(Delivered by Hon'ble Surya Prakash Kesarwani, J. &
Hon'ble Ajay Bhanot, J.)

1. Heard Sri M.D. Singh Shekhar, learned Senior Counsel assisted by Sri Awadhesh Kumar Malviya, learned counsel for the petitioner and Sri Ajeet Singh, learned Additional Advocate General assisted by Sri I.S. Tomar, learned counsel for the respondents.

2. This writ petition has been filed praying for the following relief;

"(a) Issue a writ, order or direction the nature of certiorari quashing the impugned order dated 26.06.2020 passed by the respondent no. 2 (Annexure-17 to the writ petition) as well as order dated 27.06.2020 passed by the respondent no. 3 (Annexure-18 to the writ petition).

(b) Issue a writ, order or direction in the nature of mandamus directing the respondents not to interfere in the functioning of the petitioner fishing work of the petitioner in Rihand Reservoir in any manner during the period. As per agreement dated 02.01.2019 (Annexure-4A to the writ petition).

(c) Issue a writ, order or direction in the nature of mandamus directing the respondents not to take any coercive action against the petitioners pursuant to impugned orders (Annexure-17 and 18 to the writ petition)."

Facts:

3. By the impugned order dated 26.06.2020 passed by the Director, Fisheries, U.P. Lucknow, the contract of the petitioner for fishing has been cancelled for default in payment of fifth, sixth and seventh installments of the contract amount of the second year and certain arrears of interest, totalling Rs. 1,20,31,144/-. The Director has also granted liberty to the competent authority to initiate proceedings for recovery of arrears and black listing. The second impugned order is dated 27.06.2020 which has been passed by the Assistant Director (Fisheries), Rihand, District Sonbhadra (U.P.) intimating the cancellation of the contract. The proceeding for black listing has not yet been initiated.

4. The contract of the petitioner for fishing was accepted by the competent authority by order dated 11.12.2018 for the period from 22.11.2018 to 30.06.2028 for total consideration of Rs. 40,72,89,736/-.

5. The aforesaid order was followed by acceptance letter dated 18.12.2018

issued by the Deputy Director of Fisheries, Vindhyanchal Division, Mirzapur, annexing therewith schedule of payment of yearly consideration amount in seven equal monthly instalments each year payable by 15th September, 15th October, 15th November, 15th December, 15th January, 15th February and 31st March. Thereafter, the petitioner executed an agreement dated 02.01.2019 with the Fisheries Department of Uttar Pradesh for five years for the period from the year 2018-19 to 30.06.2023 for total contract amount/consideration of Rs. 15,60,19,220.00. As per the aforesaid agreement, in the fifth and seventh year, after review, agreement for remaining period of contract shall be executed.

6. The petitioner has filed with the writ petition as Annexure 4 **only three pages of the aforesaid Agreement dated 02.01.2019** and suppressed the remaining portion containing conditions of agreement which has been executed by the petitioner on Non Judicial Stamp Papers of total Rs. 25,800/- containing thirteen pages and the attached schedule of payments in two pages.

7. Learned Standing Counsel has produced instructions of the Director Fisheries dated 10.07.2020 alongwith a copy of the aforesaid Agreement of the petitioner dated 02.01.2019 which is kept on record.

8. Conditions of contract provides schedule of payment. It provides that 25% of the contract amount of the **first year** shall be paid on acceptance of the tender and remaining 75% shall be deposited in monthly installments up to 31st March. For the **second year and other subsequent years** 25% of the yearly contract amount shall be deposited up to 16.08.2020 and the remaining 75% shall be deposited in seven equal monthly installments. Thus in the second year after deposit of 25% amount the petitioner was liable to deposit the balance 75% amount in seven monthly installments by 15th September, 15th October, 15th November, 15th December 2019 and 15th January, 15th February and 31st March 2020. **The petitioner defaulted in payment of third, fourth, fifth, sixth and seventh installments of the second year.** After notice he belatedly deposited third installment on 29.04.2020, part of fourth installment on 23.05.2020 and the remaining amount of the fourth installment on 11.06.2020. **The fifth, sixth and seventh installments which fell due in the month January, February and March were not deposited by the petitioner. He has also not deposited interest on the belated deposit of installment in the first year and second year.** All these resulted in huge arrears of contractual amount which the petitioner failed to deposit under the contract. The installments were due and payable by the petitioner even prior to the start of lock down period on account of COVID-19 pandemic.

9. Respondents issued notices to the petitioner from time to time to deposit the amount but the petitioner failed to comply with the notices. Copy of notices dated 24.04.2020, 01.05.2020, 02.05.2020 and 05.06.2020 have been filed by the petitioner collectively as Annexure 11 to the writ petition. Copy of notice dated 18.06.2020 has not been filed by the petitioner which has been produced by the learned Standing Counsel alongwith the aforesaid instructions. Since the petitioner failed to deposit the contractual amount and did not deposit it even after notices,

therefore, the respondents have cancelled the contract by the impugned orders and ordered for recovery of arrears.

10. The relevant conditions of the Agreement dated 02.01.2019 are reproduced below:-

Relevant Conditions of contract:

"3. उच्चतम ई - निविदादाता को निविदा प्रकिया समाप्त होने पर ई - निविदा से सम्बन्धित अन्य शर्तो के अतिरिक्त वार्षिक आधार पर जो सबसे अधिक मूल्य प्राप्त होगा , उसकी 25 प्रतिशत धनराशि -निविदा स्वीकार करने के उपरान्त ठेकेदार / समिति को तत्काल अगले कार्य दिवस तक जमा करना अनियार्य होगा। शेष 75 प्रतिशत धनराशि अनुबंध के पश्चात 31 मार्च तक समान मासिक से सलग्न सारिणी के अनुसार जमा की जायेगी । ठेको के आगामी वर्षो की 25 प्रतिशत धनराशि ठेकेदार / समिति को 16 अगस्त तक जमा करना अनिवार्य है, जिसके लिये समयवृद्धि नहीं दी जायेगी तथा शेष 75 प्रतिशत धनराशि 31 मार्च तक **समान मासिक किश्तो में संलग्न समय सारणी के अनुसार जमा करना होगी ।** श्रेणी -1 के जलाशयो में ठेकदार / समिति द्वारा 75 प्रतिशत धनराशि को सुनिश्चित रूप से जमा कराने हेतु समतुल्य धनराशि का बैंक गारण्टी पत्र अथवा एफ 0 डी 0 आर 0 के रूप में सम्बन्धित उप निदेशक मत्स्य के पास बन्धक के रूप में 30 दिन के अन्दर जमा कराया जायेगा जो ठेका समाप्ति की तिथि तक बधक रहेगी । अवशेष अवधि के ठेको में ठेकेदार / समिति को अधिकतम छ : माह की अवशेष अवधि हेतु 100 प्रतिशत धनराशि ई - निविदा प्रकिया समाप्त होने के तत्काल अथवा अगले कार्य दिवस तक बैंक ड्राफट / आर ० टी ० जी ० एस ० द्वारा जमा करनी होगी । जिन प्रकरणों में 6 माह से अधिक बकाया अवधि शेष रहेगी उनमे ठेका अवधि 7 से 8 माह की अवशेष अवधि के विरुद्ध 50 प्रतिशत की धनराशि निविदा के तुरन्त बाद तथा 40 प्रतिशत धनराशि ठेका स्वीकृत होने के एक माह में जमा करनी होगी एव किश्त की **धनराशि जमा करने हेतु समयवृद्धि प्रदान नहीं की जायेगी । उक्त दोनो स्थिति में समय से किश्त की धनराशि जमा न होने पर निदेशक मत्स्य को अधिकार होगा कि ठेका निरस्त कर दे ।**

4. ठेका स्वीकृत करने के उपरान्त अनुबंध पूर्ण होने पर एक माह तक यदि ठेकेदार / समिति द्वारा मासिक किश्तों की धनराशि जमा नहीं की जाती है तो ठेकेदार / समिति को किश्त देय की निर्धारित तिथि के पश्चात **दो प्रतिशत प्रतिमाह ब्याज दण्ड स्वरूप आगामी देय किश्त के साथ - साथ भुगतान करना होगा ।**

40. रिहन्द जलाशय श्रेणी -1 के ठेके के अनुबन्ध पत्र की शर्त संख्या -1 से 39 तक का उल्लघन यदि ठेकेदार / ठेकेदार द्वारा नामित प्रतिनिधि / ठेकेदार द्वारा रखे गये कर्मचारी द्वारा किया जाता है तो रिहन्द जलाशय श्रेणी -1 के सापेक्ष जमा जमानत की धनराशि जब्त करते हुये ठेका निररत कर दिया जायेगा एवं ठेकेदार काली सूची में सूचीबद्ध किया जायेगा, जिसकी सम्पूर्ण जिम्मेदारी ठेकेदार की होगी"

Submissions on behalf of the Petitioner:

11. Learned counsel for the petitioner submits as under:-

(i) Impugned orders have been passed in breach of principles of natural justice inasmuch as no notice was issued to the petitioner.

(ii) Payment of instalments could not be made due to lockdown on account of Covid-19 Pandemic which started from 24.03.2020.

(iii) Petitioner is ready to deposit the entire due amount in instalments.

(iv) Condition No. 18 of the Agreement, contains arbitration clause as contended by the Additional Advocate General, is not applicable to the case of the petitioner, since there is no dispute with regard to the contract. The grievance of the petitioner is that the due amount could not be deposited in time due to lockdown on account of Pandemic Covid-19 and the petitioner is now ready to deposit.

Submissions on behalf of the Respondents

12. Learned Additional Advocate General submits as under:

(i) The petitioner has deliberately filed incomplete copy of the Agreement dated 02.01.2019 so as to suppress the relevant conditions of contract. Petitioner has also suppressed notices issued to him.

(ii) Submission of the petitioner that due to lockdown instalment could not be deposited, is misleading since the petitioner has regularly defaulted in payment of instalments which were due much prior to the start of lock down.

(iii) Petitioner has breached conditions of the Agreement. Hence in view of condition No. 40, the contract has been cancelled and impugned orders have been passed in accordance with law.

(iv) Court can interpret conditions of contract but cannot rewrite contract.

Discussion and Findings

13. We have carefully considered the submissions of learned counsels for the parties.

14. It is admitted case of the petitioner that he did not deposit the third, fourth, fifth, sixth and seventh instalments which were due and payable by the petitioner on or before 15th November 2019, 15th December 2019, 15th January 2020, 15th February 2020 and 15th March 2020 respectively. Besides, the petitioner has also not deposited interest and certain other charges in terms of the Agreement. Consequently, notices dated 28.01.2020, 06.02.2020, 15.02.2020 and 25.04.2020 were issued by the respondents to the petitioner asking him to deposit the due instalments and interest. Total amount of instalments and interest payable by the petitioner upto 31.03.2020 accumulated to Rs. 1,77,35,692.00 as per the aforesaid notice dated 25.04.2020. Thereafter, the petitioner deposited third instalment of Rs. 30,11,905.00 on 29.04.2020 which was due and payable on or before 15.11.2019. The Bank Guarantee submitted by the petitioner had also expired which was not renewed by him despite request of the respondents. Condition no. 28 of the Agreement was also violated. Hence, the respondents again gave a notice dated 02.05.2020 requiring the petitioner to pay the arrears and to renew the Bank Guarantee which was followed by notices dated 11.05.2020, 23.05.2020, 05.06.2020, 12.06.2020 and 18.06.2020. The petitioner deposited part amount of fourth instalment (Rs. 20,07,937.00) on 23.05.2020 and Rs. 10,03,968.00 on 11.06.2020. Thus, admittedly the petitioner has not deposited the 5th, 6th and 7th instalments which were due and payable on or before 15th January, 15th February and 31st March 2020, respectively. He has also not deposited interest in terms of the contract. Sufficient opportunity was afforded to the petitioner to deposit the arrears by issuing notices as aforementioned and to comply with Condition no. 28. Therefore, for breach of conditions of contract the impugned orders

have been passed cancelling the contract in terms of clause 40 of the Agreement. Thus the impugned orders do not suffer from any manifest error of law.

15. Submission of learned counsel for the petitioner for grant of time to deposit the arrears in instalment, cannot be accepted in the writ petition under Article 226 of the Constitution of India, inasmuch as, **firstly** the petitioner has willfully violated conditions of contract resulting in cancellation of contract in terms of clause 40 of the Agreement and **Secondly** this Court can neither rewrite contract by providing a new schedule of payment nor can suspend the operation of clause 40 of the Agreement.

16. The submission of learned counsel for the petitioner that he could not deposit instalments due to lock down from 24.03.2020 on account of the Pandemic Covid-19, is wholly unfounded. Undisputed facts as noted above clearly shows that the petitioner has been a regular defaulter. Monthly instalments of contractual amount were due and payable much before the start of lock down.

17. A writ lies when any fundamental or legal rights are infringed. A writ of mandamus can be issued in favour of a person when he has legally protected and judicially enforceable subsisting right, vide **Director of Settlements Vs M.R. Apparao (2002) 4 SCC 638.** A writ of prohibition can be issued only when patent lack of jurisdiction is made out, vide **Union of India Vs Upendra Singh (1994) 3 SCC 357** (para 4) and **S. Govind Menon Vs Union of India, AIR 1967 SC 1274.** A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or Tribunals or where the impugned orders suffers from manifest error of law. None of the above circumstances exist in the case of the present petitioner which may entitle him for relief in the nature of writ of mandamus or certiorari as prayed. The impugned orders have been passed in terms of the agreement on breach of conditions of agreement, for which a writ of certiorari cannot be issued.

18. It is settled law that a person who approaches the court for grant of relief, equitable or otherwise, is under a solemn obligation to candidly disclose all the material/important facts which have bearing on the adjudication of the issues raised in the case. In other words he owes a duty to the court to bring out all the facts and refrain from concealing/suppressing any material fact within his knowledge or which he could have known by exercising diligence expected of a person of ordinary prudence. If he is found guilty of material facts or making an attempt to pollute the pure stream of justice, as happened in the present case, the court not only has the right but a duty to deny relief to such person. The above principle is supported by the law laid down by Hon'ble Supreme Court in **Oswal Fats & Oil Ltd. Vs Commissioner (Administration) (2010) 4 SCC 728.**

19. In the case of **S.P. Chengalvaya Naidu Vs Jagannath, AIR 1994 SC 853** (para 7 and 8), Hon'ble Supreme Court observed that the courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. A person whose case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation. ***A litigant who approaches the court, is bound to produce all the documents***

executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party.

20. We find that the petitioner has willfully suppressed material facts and has attempted to mislead this Court by filing incomplete copy of the Agreement dated 02.01.2019 suppressing the entire portion of this Agreement containing conditions of contract. He has also not filed agreed schedule of payment of instalments which was part of the Agreement dated 02.01.2019. This conduct of the petitioner also disentitles him to invoke equitable and discretionary jurisdiction of this Court under Article 226 of the Constitution of India.

21. Insofar as the question of black listing is concerned, it goes without saying that in the event the respondents propose to take any such action for black listing they shall afford reasonable opportunity of hearing to the petitioner before passing any order of black listing.

22. For all the reasons aforestated, we do not find any merit in this writ petition. Consequently, the writ petition is **dismissed** with costs.

(2020)10ILR A200
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.09.2020

BEFORE

THE HON'BLE SHASHI KANT GUPTA, J.
THE HON'BLE PIYUSH AGRAWAL, J.

Writ- C No. 12745 of 2020

Meena Jaiswal ...Petitioner
Versus
Indian Oil Corporation Ltd., Varanasi Divisional Office, Varanasi ...Respondent

Counsel for the Petitioner:
Sri Vinayak Mithal, Sri Sagar Mehrotra

Counsel for the Respondent:
Sri Pramod Kumar Rai

A. Constitution of India – Article 14 – Natural Justice – Petrol pump dealership – Appointment – Dispute regarding dimensions of land – Non-speaking order – It's justification – Corporation has only recoded its conclusion without assigning any reason – To give reasons is the rule of natural justice – The administrative order also must be supported by the reasons recorded in it. The reason is heartbeat of every conclusion – Held, the absence of reason makes an order unsustainable. (Para 14 and 29)

Writ Petition allowed (E-1)

Cases relied on :-

1. Writ C No. 15653 of 2018; Panch Dev Kumar Vs Indian Oil Corporation Ltd. & 2 ors. decided on 09.05.2018

2. Assistant Commissioner, Commercial Tax Department, Works Contract & Leasing, Kota Vs Shukla & Bros.; (2010) 4 SCC 785

3. M/s Travancore Rayon Ltd. Vs UOI; (1969) 3 SCC 868

4. S.N. Mukherjee Vs UOI (1990) 4 SCC 594

5. Dharampal Satyapal Limited Vs Deputy Commissioner of Central Excise, Gauhati & ors.; (2015) 8 SCC 519

6. J. Ashoka Vs University of Agricultural Sciences & ors.; (2017) 2 SCC 609

7. Kranti Associates Pvt. Ltd. & anr. Vs Masood Ahmed Khan &

Others; (2010) 9 SCC 496

8. Writ C No. 18164 of 2018; Nanak Chand Sharma Vs St. of U.P. & 3 ors., decided on 03.12.2018

9. Secretary & Curator, Victoria Memorial Hall Vs Howrah Ganatantrik Samity & ors.; (2010) 3 SCC 732

(Delivered by Hon'ble Piyush Agrawal, J.)

1. We have heard Shri Vinayak Mithal, learned counsel for the petitioner and Shri Pramod Kumar Rai, learned counsel for the respondent - Corporation.

2. The present writ petition has been filed challenging the order dated 23.06.2020, by which the petitioner's candidature for retail outlet dealership under the OBC category has been rejected.

3. The brief facts of the case are that on 25.11.2018, an advertisement was issued inviting applications for appointment of Regular/Rural retail Outlet (Petrol Pump) Dealership in the State of U.P. Pursuant thereto, the petitioner applied for the retail outlet dealership in respect of "between km. Stone 18 to 23 on State Highway - 87, Varansi - Bhadohi Road" at serial no. 1023 of the advertisement, which was reserved for Other Backward Class (OBC) category. The minimum dimensions of the land required for aforesaid retail outlet dealership were mentioned as 35 meters (frontage) X 35 meters (depth). Thereafter, on 24.12.2018, the petitioner submitted online application form for the aforesaid retail outlet dealership, along with non-refundable application fee under the OBC category. The land offered by the petitioner was taken on lease from its owner for a period of 19 years & 11 months by means of a registered lease deed executed on 24.12.2018. However, due to inadvertent mistake, the dimensions of the plot of land were wrongly recorded as 110 feet (33.528 meters) X 130 feet (39.624 meters), instead of 116 feet (35.35 meters) X 123.3 feet (37.56 meters).

4. The petitioner's application was rejected by the impugned order dated 23.06.2020 on the ground that the lease deed, submitted along with the application form, does not qualify the minimum land required for the retail outlet dealership.

5. Shri Vinayak Mithal, learned counsel for the petitioner submits that after completing due formalities, the petitioner submitted online application on 24.12.2018 under the OBC category, along with all relevant documents. He further submits that the land was taken on lease for a period of 19 years & 11 months by way of a registered lease deed executed on 24.12.2018, but inadvertently, the dimensions in the lease deed executed on 24.12.2018 was wrongly mentioned and after coming to the knowledge of the same, a rectification lease deed (Titimma) was executed by the land owner in favour of the petitioner on 01.02.2019. Shri Mithal further submits that the dimensions of the land offered by the petitioner were 116 feet (35.35 meters) X 123.3 feet (37.56 meters) which is larger than the minimum requirement of land for the retail outlet dealership. It is further argued that the petitioner has not made any alteration in the boundaries mentioned in the original lease deed or any addition/deletion of any kind. The only dimensions, which were wrongly mentioned in the lease deed was rectified and therefore, the execution of the rectification deed would relate back to the date of execution of the original lease deed. Hence, the aforesaid land offered by the petitioner for establishment of retail outlet fulfils the parameters as mentioned in the brochure for qualifying the eligibility criteria for individual applicant. It is further argued that the petitioner was selected in the draw of lots for the location mentioned at serial no. 1023 of the advertisement. The

petitioner was also directed to deposit a sum of Rs. 40,000/- towards initial security deposit and submit all documents for scrutiny. On 17.10.2019, the petitioner, after depositing the initial security deposit, submitted all documents for necessary verification. He also submitted the original lease deed dated 24.12.2018 as well as the rectification lease deed dated 01.02.2019, along with all other documents for verification.

6. Shri Mithal submits that the impugned order has been passed in a mechanical way as neither any reason has been assigned for not looking into the rectification lease deed, which relate back to the execute of the original lease deed, nor any reason has been given for the same. He further submits that it is the duty and the obligation on the part of the respondent to record reason while rejecting the claim of the petitioner. He further submits that the respondent has passed the impugned order without proper and due application of mind and hence, has violated the principles of natural justice.

7. Learned counsel for the petitioner on the strength of the judgement of the Coordinate Bench of this Court in ***Panch Dev Kumar Vs. Indian Oil Corporation Ltd. & 2 Others*** (Writ C No. 15653 of 2018, decided on 09.05.2018), has tried to argue that if there is a rectification in the lease deed of the offered land, which will relate back to the date of execution of the original lease deed, then the same may be considered from the date of the execution of the original lease deed and on that ground, the applicant's application cannot be rejected.

8. Learned counsel for the respondent - Corporation tried to justify the impugned order. It was argued that since in the original lease deed, the dimensions of the land were not as per the advertisement, therefore, the authority was justified in rejecting the application of the petitioner.

9. The rival submissions fall for consideration.

10. We have gone through the averments of the writ petition and the materials brought on record.

11. The fact, inter se the parties, are not in dispute. The only reason assigned in the communication dated 23.06.2020 is that the dimensions mentioned in the lease deed does not fulfil the minimum advertised criteria. The impugned order goes to show that no reason has been assigned as to whether in the rectification lease deed executed on 01.02.2019, any change of land was there or some new land has been offered or, altogether, new land was offered.

12. In our opinion, the approach of the respondent - Corporation in rejecting the candidature of the petitioner is hyper-technical and is neither based on any reasoning nor proper appreciation of material brought on record. The Coordinate Bench of this Court in the case of ***Panch Dev Kumar*** (supra) as held as under:-

"The petitioner in the application form provided for the land and the lease deed which is prior to the last date of submission of the application form. Lease deed though for 20 years did not provide for sub-lease, consequently, petitioner submitted a rectification/supplementary document providing for sub-lease, which in our opinion, was permissible in view of clause (viii) of procedure for filling and

submission of application. Clause (viii) read with the conditions provided under the heading 'land', the requirement of sub-lease is a condition if the offered land is a long term lease which may not apply to the land leased for 20 years. Even otherwise taking the case, as is being urged on behalf of the Corporation, that the lease deed must contain a provision for sub-lease, even then in our opinion, the same can be provided by a rectification deed executed after the last date of the submission of the application, for the reason that the rectification does not tantamount to any alteration/addition/deletion insofar it pertains to the offered land, but merely seeks to supplement the information provided in the application form in respect of the land offered on the date of affidavit/application. The rectification will relate back to the date on which the lease deed was executed.

.....

..... The rectification/additional document was submitted in support of eligibility parameters insofar it relates to the 'land'. Petitioner has neither made any alteration/addition/deletion changing the eligibility criteria in respect of the offered land by incorporating the sub-lease clause in the lease deed offered prior to the date of submission of the application/affidavit which is not a ground to render the applicant ineligible either under the Brochure or Manual. ... ... The rectification deed/supplementary document would relate back to the date of execution of the lease deed which admittedly is prior to the last date of submission of the form/affidavit."

13. The lease deed for a period of 19 years & 11 months was executed on 24.12.2018 mentioning the dimensions of the land as 116 feet (35.35 meters) X 123.3 feet (37.56 meters). The material on record shows that inadvertently, the dimensions offered were wrongly mentioned, which were rectified by executing a rectification lease deed on 01.02.2019 and the petitioner has submitted all the documents for verification along with other documents on 17.10.2019. The respondent - Corporation before passing the impugned order ought to have verified the same and should have applied its mind. Without assigning any reason, the Corporation was not justified in passing the impugned order.

14. It is settled law that reason is the heartbeat of every conclusion. An order without valid reasons cannot be sustained. To give reasons is the rule of natural justice. One of the most important aspect for necessitating to record reason is that it substitutes subjectivity with objectivity. It is well settled that not only the judicial order, but also the administrative order must be supported by reasons recording in it.

15. Highlighting this rule, the Hon'ble Supreme Court, in the case of ***Assistant Commissioner, Commercial Tax Department, Works Contract & Leasing, Kota Vs. Shukla & Brothers, (2010) 4 SCC 785***, has observed that the administrative authority and the tribunal are obliged to give reasons, absence whereof would render the order liable to judicial chastisement. The relevant paragraphs of the aforesaid judgement are quoted as under:-

"10. The increasing institution of cases in all Courts in India and its resultant burden upon the Courts has invited attention of all concerned in the justice administration system. Despite heavy quantum of cases in Courts, in our view, it would neither be permissible nor possible

to state as a principle of law, that while exercising power of judicial review on administrative action and more particularly judgment of courts in appeal before the higher Court, providing of reasons can never be dispensed with. The doctrine of audi alteram partem has three basic essentials. Firstly, a person against whom an order is required to be passed or whose rights are likely to be affected adversely must be granted an opportunity of being heard. Secondly, the concerned authority should provide a fair and transparent procedure and lastly, the authority concerned must apply its mind and dispose of the matter by a reasoned or speaking order. This has been uniformly applied by courts in India and abroad.

11. The Supreme Court in the case of S.N. Mukherjee v. Union of India [(1990) 4 SCC 594], while referring to the practice adopted and insistence placed by the Courts in United States, emphasized the importance of recording of reasons for decisions by the administrative authorities and tribunals. It said "administrative process will best be vindicated by clarity in its exercise". To enable the Courts to exercise the power of review in consonance with settled principles, the authorities are advised of the considerations underlining the action under review. This Court with approval stated:-

"11. ...the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained."

12. In exercise of the power of judicial review, the concept of reasoned orders/actions has been enforced equally by the foreign courts as by the courts in India. The administrative authority and tribunals are obliged to give reasons, absence whereof could render the order liable to judicial chastisement. Thus, it will not be far from absolute principle of law that the Courts should record reasons for its conclusions to enable the appellate or higher Courts to exercise their jurisdiction appropriately and in accordance with law. It is the reasoning alone, that can enable a higher or an appellate court to appreciate the controversy in issue in its correct perspective and to hold whether the reasoning recorded by the Court whose order is impugned, is sustainable in law and whether it has adopted the correct legal approach. To sub-serve the purpose of justice delivery system, therefore, it is essential that the Courts should record reasons for its conclusions, whether disposing of the case at admission stage or after regular hearing.

13. At the cost of repetition, we may notice, that this Court has consistently taken the view that recording of reasons is an essential feature of dispensation of justice. A litigant who approaches the Court with any grievance in accordance with law is entitled to know the reasons for grant or rejection of his prayer. Reasons are the soul of orders. Non-recording of reasons could lead to dual infirmities; firstly, it may cause prejudice to the affected party and secondly, more particularly, hamper the proper administration of justice. These principles are not only applicable to administrative or executive actions, but they apply with equal force and, in fact, with a greater degree of precision to judicial pronouncements. A judgment without reasons causes prejudice to the person against whom it is pronounced, as that litigant is unable to know the ground which weighed with the Court in rejecting his claim and also causes impediments in his taking adequate and appropriate grounds before the higher Court in the event of challenge to that

judgment. Now, we may refer to certain judgments of this Court as well as of the High Courts which have taken this view.

14. The principle of natural justice has twin ingredients; firstly, the person who is likely to be adversely affected by the action of the authorities should be given notice to show cause thereof and granted an opportunity of hearing and secondly, the orders so passed by the authorities should give reason for arriving at any conclusion showing proper application of mind. Violation of either of them could in the given facts and circumstances of the case, vitiate the order itself. Such rule being applicable to the administrative authorities certainly requires that the judgment of the Court should meet with this requirement with higher degree of satisfaction. The order of an administrative authority may not provide reasons like a judgment but the order must be supported by the reasons of rationality. The distinction between passing of an order by an administrative or quasi-judicial authority has practically extinguished and both are required to pass reasoned orders.

15. In the case of Siemens Engineering and Manufacturing Co. of India Ltd. v. Union of India and Anr. [AIR 1976 SC 1785], the Supreme Court held as under:-

"6. .....If courts of law are to be replaced by administrative authorities and tribunals, as indeed, in some kinds of cases, with the proliferation of Administrative Law, they may have to be so replaced, it is essential that administrative authorities and tribunals should accord fair and proper hearing to the persons sought to be affected by their orders and give sufficiently clear and explicit reasons in support of the orders made by them. Then alone administrative authorities and tribunals exercising quasi-judicial function will be able to justify their existence and carry credibility with the people by inspiring confidence in the adjudicatory process. The rule requiring reasons to be given in support of an order is, like the principle of audi alteram partem, a basic principle of natural justice which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law. ..."

16. In the case of Mc Dermott International Inc. v. Burn Standard Co. Ltd. and Ors. (2006) SLT 345, the Supreme Court clarified the rationality behind providing of reasons and stated the principle as follows:-

"56. . . Reason is a ground or motive for a belief or a course of action, a statement in justification or explanation of belief or action. It is in this sense that the award must state reasons for the amount awarded.

The rationale of the requirement of reasons is that reasons assure that the arbitrator has not acted capriciously. Reasons reveal the grounds on which the Arbitrator reached the conclusion which adversely affects the interests of a party. The contractual stipulation of reasons means, as held in Poyser and Mills' Arbitration in Re, `proper adequate reasons'. Such reasons shall not only be intelligible but shall be a reason connected with the case which the Court can see is proper. Contradictory reasons are equal to lack of reasons. . . ."

17. In Gurdial Singh Fijji v. State of Punjab [(1979) 2 SCC 368], while dealing with th matter of selection of candidates who could be under review, if not found suitable otherwise, the Court explained the reasons being a link between

the materials on which certain conclusions are based and the actual conclusions and held, that where providing reasons for proposed supersession were essential, then it could not be held to be a valid reason that the concerned officer's record was not such as to justify his selection was not contemplated and thus was not legal. In this context, the Court held:-

"... "Reasons" are the links between the materials on which certain conclusions are based and the actual conclusions. The Court accordingly held that the mandatory provisions of Regulation 5(5) were not complied with by the Selection Committee. That an officer was "not found suitable" is the conclusion and not a reason in support of the decision to supersede him. True, that it is not expected that the Selection Committee should give anything approaching the judgment of a Court, but it must at least state, as briefly as it may, why it came to the conclusion that the officer concerned was found to be not suitable for inclusion in the Select List."

This principle has been extended to administrative actions on the premise that it applies with greater rigor to the judgments of the Courts.

18. In State of Maharashtra v. Vithal Rao Pritirao Chawan [(1981) 4 SCC 129], while remanding the matter to the High Court for examination of certain issues raised, this Court observed:

". . . It would be for the benefit of this Court that a speaking judgment is given."

19. In the cases where the Courts have not recorded reasons in the judgment, legality, propriety and correctness of the orders by the Court of competent jurisdiction are challenged in absence of proper discussion. The requirement of recording reasons is applicable with greater rigor to the judicial proceedings. The orders of the Court must reflect what weighed with the Court in granting or declining the relief claimed by the applicant. In this regard we may refer to certain judgments of this Court.

20. A Bench of Bombay High Court in the case of M/s. Pipe Arts India Pvt. Ltd. V. Gangadhar Nathuji Golamare [2008 (6) Maharashtra Law Journal 280], wherein the Bench was concerned with an appeal against an order, where prayer for an interim relief was rejected without stating any reasons in a writ petition challenging the order of the Labour Court noticed, that legality, propriety and correctness of the order was challenged on the ground that no reason was recorded by the learned Single Judge while rejecting the prayer and this has seriously prejudiced the interest of justice. After a detailed discussion on the subject, the Court held:-

"8. The Supreme Court and different High Courts have taken the view that it is always desirable to record reasons in support of the Government actions whether administrative or quasi judicial. Even if the statutory rules do not impose an obligation upon the authorities still it is expected of the authorities concerned to act fairly and in consonance with basic rule of law. These concepts would require that any order, particularly, the order which can be subject matter of judicial review, is reasoned one. Even in the case of Chabungbambohal Singh v. Union of India and Ors. 1995 (Suppl) 2 SCC 83, the Court held as under:

"8. ...His assessment was, however, recorded as "very good" whereas qua the appellant it had been stated unfit. As the appellant was being superseded by one of his juniors, we do not think if it was enough on the part of the Selection Committee to have merely stated unfit, and

then to recommend the name of one of his juniors. No reason for unfitness, is reflected in the proceedings, as against what earlier Selection Committees had done to which reference has already been made."

10. In the case of Jawahar Lal Singh v. Naresh Singh and Ors. (1987) 2 SCC 222, accepting the plea that absence of examination of reasons by the High Court on the basis of which the trial Court discarded prosecution evidence and recorded the finding of an acquittal in favour of all the accused was not appropriate, the Supreme Court held that the order should record reasons. Recording of proper reasons would be essential, so that the Appellate Court would have advantage of considering the considered opinion of the High Court on the reasons which had weighed with the trial Court.

12. In the case of State of Punjab and Ors. v. Surinder Kumar and Ors. [(1992) 1 SCC 489], while noticing the jurisdictional distinction between Article 142 and Article 226 of the Constitution of India, the Supreme Court stated that powers of the Supreme Court under Article 142 are much wider and the Supreme Court would pass orders to do complete justice. The Supreme Court further reiterated the principle with approval that the High Court has the jurisdiction to dismiss petitions or criminal revisions in limini or grant leave asked for by the petitioner but for adequate reasons which should be recorded in the order. The High Court may not pass cryptic order in relation to regularisation of service of the respondents in view of certain directions passed by the Supreme Court under Article 142 of the Constitution of India. Absence of reasoning did not find favour with the Supreme Court. The Supreme Court also stated the principle that powers of the High Court were circumscribed by limitations discussed and declared by judicial decision and it cannot transgress the limits on the basis of whims or subjective opinion varying from Judge to Judge.

13. In the case of Hindustan Times Ltd. v. Union of India and Ors. [(1998) 2 SCC 242], the Supreme Court while dealing with the cases under the Labour Laws and Employees' Provident Funds and Miscellaneous Provisions Act, 1952 observed that even when the petition under Article 226 is dismissed in limini, it is expected of the High Court to pass a speaking order, may be briefly.

14. Consistent with the view expressed by the Supreme Court in the afore-referred cases, in the case of State of U.P. v. Battan and Ors. [(2001) 10 SCC 607], the Supreme Court held as under:

"4. ...The High Court has not given any reasons for refusing to grant leave to file appeal against acquittal. The manner in which appeal against acquittal has been dealt with by the High Court leaves much to be desired. Reasons introduce clarity in an order. On plainest consideration of justice, the High Court ought to have set forth its reasons, howsoever brief, in its order. The absence of reasons has rendered the High Court order not sustainable."

15. Similar view was also taken by the Supreme Court in the case of Raj Kishore Jha v. State of Bihar and Ors. JT 2003 (Supp.2) SC 354.

16. In a very recent judgment, the Supreme Court in the case of State of Orissa v. Dhaniram Luhar (2004) 5 SCC 568 while dealing with the criminal appeal, insisted that the reasons in support of the decision was a cardinal principle and the High Court should record its reasons while disposing of the matter. The Court held as under:

"8. Even in respect of administrative orders Lord Denning, M.R.

In Breen v. Amalgamated Engg. Union observed: "The giving of reasons is one of the fundamentals of good administration." In Alexander Machinery (Dudley) Ltd. v. Crabtree it was observed: "Failure to give reasons amounts to denial of justice." "Reasons are live links between the mind of the decision-taker to the controversy in question and the decision or conclusion arrived at." Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can, by its silence, render it virtually impossible for the Courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system; reasons at least sufficient to indicate an application of mind to the matter before Court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made; in other words, a speaking-out. The "inscrutable face of the sphinx" is ordinarily incongruous with a judicial or quasi-judicial performance."

17. Following this very view, the Supreme Court in another very recent judgment delivered on 22nd February, 2008, in the case of State of Rajasthan v. Rajendra Prasad Jain Criminal Appeal No. 360/2008 (Arising out of SLP (Crl.) No. 904/2007) stated that "reason is the heartbeat of every conclusion, and without the same it becomes lifeless."

18. Providing of reasons in orders is of essence in judicial proceedings. Every litigant who approaches the Court with a prayer is entitled to know the reasons for acceptance or rejection of such request. Either of the parties to the lis has a right of appeal and, therefore, it is essential for them to know the considered opinion of the Court to make the remedy of appeal meaningful. It is the reasoning which ultimately culminates into final decision which may be subject to examination of the appellate or other higher Courts. It is not only desirable but, in view of the consistent position of law,mandatory for the Court to pass orders while recording reasons in support thereof, however, brief they may be. Brevity in reasoning cannot be understood in legal parlance as absence of reasons. While no reasoning in support of judicial orders is impermissible, the brief reasoning would suffice to meet the ends of justice at least at the interlocutory stages and would render the remedy of appeal purposeful and meaningful. It is a settled canon of legal jurisprudence that the Courts are vested with discretionary powers but such powers are to be exercised judiciously, equitably and in consonance with the settled principles of law. Whether or not, such judicial discretion has been exercised in accordance with the accepted norms, can only be reflected by the reasons recorded in the order impugned before the higher Court. Often it is said that absence of reasoning may ipso facto indicate whimsical exercise of judicial discretion. Patricia Wald, Chief Justice of the D.C. Circuit Court of Appeals in the Article, Blackrobed Bureaucracy Or Collegiality Under Challenge, (42 MD.L. REV. 766, 782 (1983), observed as under:-

"My own guiding principle is that virtually every appellate decision requires some statement of reasons. The discipline of writing even a few sentences or paragraphs explaining the basis for the judgment insures a level of thought and scrutiny by the Court that a bare signal of affirmance, dismissal, or reversal does not."

19. The Court cannot lose sight of the fact that a losing litigant has a cause to plead and a right to challenge the order if it is adverse to him. Opinion of the Court alone can explain the cause which led to passing of the final order. Whether an argument was rejected validly or otherwise, reasoning of the order alone can show. To evaluate the submissions is obligation of the Court and to know the reasons for rejection of its contention is a legitimate expectation on the part of the litigant.Another facet of providing reasoning is to give it a value of precedent which can help in reduction of frivolous litigation. Paul D. Carrington, Daniel J Meador and Maurice Rosenburg, Justice on Appeal 10 (West 1976), observed as under:-

"When reasons are announced and can be weighed, the public can have assurance that the correcting process is working. Announcing reasons can also provide public understanding of how the numerous decisions of the system are integrated. In a busy Court, the reasons are an essential demonstration that the Court did in fact fix its mind on the case at hand. An unreasoned decision has very little claim to acceptance by the defeated party, and is difficult or impossible to accept as an act reflecting systematic application of legal principles. Moreover, the necessity of stating reasons not infrequently changes the results by forcing the judges to come to grips with nettlesome facts or issues which their normal instincts would otherwise cause them to avoid."

20. The reasoning in the opinion of the Court, thus, can effectively be analysed or scrutinized by the Appellate Court. The reasons indicated by the Court could be accepted by the Appellate Court without presuming what weighed with the Court while coming to the impugned decision. The cause of expeditious and effective disposal would be furthered by such an approach. A right of appeal could be created by a special statute or under the provisions of the Code governing the procedure. In either of them, absence of reasoning may have the effect of negating the purpose or right of appeal and, thus, may not achieve the ends of justice.

21. It will be useful to refer words of Justice Roslyn Atkinson, Supreme Court of Queensland, at AIJA Conference at Brisbane on September 13, 2002 in relation to Judgment Writing. Describing that some judgment could be complex, in distinction to routine judgments, where one requires deeper thoughts, and the other could be disposed of easily but in either cases, reasons they must have. While speaking about purpose of the judgment, he said,

"The first matter to consider is the purpose of the judgment. To my mind there are four purposes for any judgment that is written: -

(1) to clarify your own thoughts;

(2) to explain your decision to the parties;

(3) to communicate the reasons for the decision to the public; and

(4) to provide reasons for an appeal Court to consider."

22. Clarity of thought leads to proper reasoning and proper reasoning is the foundation of a just and fair decision. In Alexander Machinery (Dudley) Ltd. v. Crabtree 1974 ICR 120, the Court went to the extent of observing that "Failure to give reasons amounts to denial of justice". Reasons are really linchpin to administration of justice. They are link between the mind of the decision taker and the controversy in question. To justify our conclusion, reasons are essential. Absence of reasoning would render the judicial order liable to interference by the higher

Court. Reasons are the soul of the decision and its absence would render the order open to judicial chastism. The consistent judicial opinion is that every order determining rights of the parties in a Court of law ought not to be recorded without supportive reasons. Issuing reasoned order is not only beneficial to the higher Courts but is even of great utility for providing public understanding of law and imposing self- discipline in the Judge as their discretion is controlled by well established norms. The contention raised before us that absence of reasoning in the impugned order would render the order liable to be set aside, particularly, in face of the fact that the learned Judge found merit in the writ petition and issued rule, therefore, needs to be accepted. We have already noticed that orders even at interlocutory stages may not be as detailed as judgments but should be supported by reason howsoever briefly stated. Absence of reasoning is impermissible in judicial pronouncement. It cannot be disputed that the order in question substantially affect the rights of the parties. There is an award in favour of the workmen and the management had prayed for stay of the operation of the award. The Court has to consider such a plea keeping in view the provisions of Section 17-B of the Industrial Disputes Act, where such a prayer is neither impermissible nor improper. The contentions raised by the parties in support of their respective claims are expected to be dealt with by reasoned orders. We are not intentionally expressing any opinion on the merits of the contentions alleged to have been raised by respective parties before the learned single Judge. Suffice it to note that the impugned order is silent in this regard. According to the learned Counsel appearing for the appellant, various contentions were raised in support of the reliefs claimed but all apparently, have found no favour with the learned Judge and that too for no reasons, as is demonstrated from the order impugned in the present appeals."

21. The principles stated by this Court, as noticed supra, have been reiterated with approval by a Bench of this Court in a very recent judgment, in State of Uttaranchal v. Sunil Kumar Singh Negi [(2008) 11 SCC 205], where the Court noticed the order of the High Court which is reproduced hereunder:-

"I have perused the order dated 27.5.2005 passed by Respondent 2 and I do not find any illegality in the order so as to interfere under Article 226/227 of the Constitution of India. The writ petition lacks merit and is liable to be dismissed."

and the Court concluded as under:-

"In view of the specific stand taken by the Department in the affidavit which we have referred to above, the cryptic order passed by the High Court cannot be sustained. The absence of reasons has rendered the High Court order not sustainable. Similar view was expressed in State of U.P. v. Battan1. About two decades back in State of Maharashtra v. Vithal Rao Pritirao Chawan the desirability of a speaking order was highlighted. The requirement of indicating reasons has been judicially recognised as imperative. The view was reiterated in Jawahar Lal Singh v. Naresh Singh.

10. In Raj Kishore Jha v. State of Bihar this Court has held that reason is the heartbeat of every conclusion and without the same, it becomes lifeless.

"11. 8. ... Right to reason is an indispensable part of a sound judicial system; reasons at least sufficient to indicate an application of mind to the matter before court. Another rationale is

that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made;..

12. In the light of the factual details particularly with reference to the stand taken by the Horticulture Department at length in the writ petition and in the light of the principles enunciated by this Court, namely, right to reason is an indispensable part of sound judicial system and reflect the application of mind on the part of the court, we are satisfied that the impugned order of the High Court cannot be sustained."

22. Besides referring to the above well-established principles, it will also be useful to refer to some text on the subject. H.W.R. Wade in the book "Administrative Law, 7th Edition, stated that the flavour of said reasons is violative of a statutory duty to waive reasons which are normally mandatory. Supporting a view that reasons for decision are essential, it was stated:-

".....A right to reasons is, therefore, an indispensable part of a sound system of judicial review. Natural justice may provide the best rubric for it, since the giving of reasons is required by the ordinary man's sense of justice...

.....Reasoned decisions are not only vital for the purposes of showing the citizen that he is receiving justice: they are also a valuable discipline for the tribunal itself....."

23. We are not venturing to comment upon the correctness or otherwise of the contentions of law raised before the High Court in the present petition, but it was certainly expected of the High Court to record some kind of reasons for rejecting the revision petition filed by the Department at the very threshold. A litigant has a legitimate expectation of knowing reasons for rejection of his claim/prayer. It is then alone, that a party would be in a position to challenge the order on appropriate grounds. Besides, this would be for the benefit of the higher or the appellate court. As arguments bring things hidden and obscure to the light of reasons, reasoned judgment where the law and factual matrix of the case is discussed, provides lucidity and foundation for conclusions or exercise of judicial discretion by the courts. Reason is the very life of law. When the reason of a law once ceases, the law itself generally ceases (Wharton's Law Lexicon). Such is the significance of reasoning in any rule of law. Giving reasons furthers the cause of justice as well as avoids uncertainty. As a matter of fact it helps in the observance of law of precedent. Absence of reasons on the contrary essentially introduces an element of uncertainty, dis- satisfaction and give entirely different dimensions to the questions of law raised before the higher/appellate courts. In our view, the court should provide its own grounds and reasons for rejecting claim/prayer of a party whether at the very threshold i.e. at admission stage or after regular hearing, howsoever precise they may be.

24. Reason is the very life of law. When the reason of a law once ceases, the law itself generally ceases (Wharton's Law Lexicon). Such is the significance of reasoning in any rule of law. Giving reasons furthers the cause of justice as well as avoids uncertainty. As a matter of fact it helps in the observance of law of precedent. Absence of reasons on the contrary essentially introduces an element of uncertainty, dis- satisfaction and give entirely different dimensions to the questions of law raised before the higher/appellate courts. In our view, the court should provide its own grounds and reasons for rejecting claim/prayer of a party whether at the very threshold i.e. at

admission stage or after regular hearing, howsoever precise they may be.

25. We would reiterate the principle that when reasons are announced and can be weighed, the public can have assurance that process of correction is in place and working. It is the requirement of law that correction process of judgments should not only appear to be implemented but also seem to have been properly implemented. Reasons for an order would ensure and enhance public confidence and would provide due satisfaction to the consumer of justice under our justice dispensation system. It may not be very correct in law to say, that there is a qualified duty imposed upon the Courts to record reasons.

26. Our procedural law and the established practice, in fact, imposes unqualified obligation upon the Courts to record reasons. There is hardly any statutory provision under the Income Tax Act or under the Constitution itself requiring recording of reasons in the judgments but it is no more res integra and stands unequivocally settled by different judgments of this Court holding that, the courts and tribunals are required to pass reasoned judgments/orders. In fact, Order XIV Rule 2 read with Order XX Rule 1 of the Code of Civil Procedure requires that, the Court should record findings on each issue and such findings which obviously should be reasoned would form part of the judgment, which in turn would be the basis for writing a decree of the Court.

27. By practice adopted in all Courts and by virtue of judge made law, the concept of reasoned judgment has become an indispensable part of basic rule of law and, in fact, is a mandatory requirement of the procedural law. Clarity of thoughts leads to clarity of vision and proper reasoning is the foundation of a just and fair decision. In the case of Alexander Machinery (Dudley) Ltd. (supra), there are apt observations in this regard to say "failure to give reasons amounts to denial of justice". Reasons are the real live links to the administration of justice. With respect we will contribute to this view. There is a rationale, logic and purpose behind a reasoned judgment. A reasoned judgment is primarily written to clarify own thoughts; communicate the reasons for the decision to the concerned and to provide and ensure that such reasons can be appropriately considered by the appellate/higher Court. Absence of reasons thus would lead to frustrate the very object stated hereinabove. The order in the present case is as cryptic as it was in the case of Sunil Kumar Singh Negi (supra). Being a cryptic order and for the reasons recorded in that case by this Court which we also adopt, the impugned order in the present appeal should meet the same fate.

28. The order in the present case is as cryptic as it was in the case of Sunil Kumar Singh Negi (supra). Being a cryptic order and for the reasons recorded in that case by this Court which we also adopt, the impugned order in the present appeal should meet the same fate."

16. In the case of ***M/s Travancore Rayon Ltd. v. Union of India,*** 1969 (3) SCC 868 the Supreme Court has held as under:

"11. ...The communication does not disclose the "points" which were considered, and the reasons for rejecting them. This is a totally unsatisfactory method of disposal of a case in exercise of the judicial power vested in the Central Government. Necessity to give sufficient reasons which disclose proper appreciation of the problem to be solved, and the mental

process by which the conclusion is reached, in cases where a non-judicial authority exercises judicial functions, is obvious. When judicial power is exercised by an authority normally performing executive or administrative functions, this Court would require to be satisfied that the decision has been reached after due consideration of the merits of the dispute, uninfluenced by extraneous considerations of policy or expediency. The Court insists upon disclosure of reasons in support of the order on two grounds : one, that the party aggrieved in a proceeding before the High Court or this Court has the opportunity to demonstrate that the reasons which persuaded the authority to reject his case were erroneous; the other, that the obligation to record reasons operates as a deterrent against possible arbitrary action by the executive authority invested with the judicial power."

17. The aforesaid said judgment has been quoted with approval by the Constitution Bench of the Supreme Court in the case of ***S.N. Mukherjee Vs. Union of India,*** (1990) 4 SCC 594.

18. The Constitution Bench of the Hon'ble Supreme Court in the case of ***S.N. Mukherjee*** (supra) has emphasized the importance of recording of reasons for decisions by the administrative authorities and tribunals. It said "administrative process will best be vindicated by clarity in its exercise".

19. The Hon'ble Supreme Court in the case of ***Dharampal Satyapal Limited Vs. Depyty Commissioner of Central Excise, Gauhati & Others,*** (2015) 8 SCC 519 has held as under:-

"19. What is the genesis behind this requirement? Why it is necessary that before an adverse action is taken against a person he is to be given notice about the proposed action and be heard in the matter? Why is it treated as inseparable and inextricable part of the doctrine of principles of natural justice?

20. Natural justice is an expression of English Common Law. Natural justice is not a single theory - it is a family of views. In one sense administering justice itself is treated as natural virtue and, therefore, a part of natural justice. It is also called 'naturalist' approach to the phrase 'natural justice' and is related to 'moral naturalism'. Moral naturalism captures the essence of commonsense morality - that good and evil, right and wrong, are the real features of the natural world that human reason can comprehend. In this sense, it may comprehend virtue ethics and virtue jurisprudence in relation to justice as all these are attributes of natural justice. We are not addressing ourselves with this connotation of natural justice here.

21. In Common Law, the concept and doctrine of natural justice, particularly which is made applicable in the decision making by judicial and quasi- judicial bodies, has assumed different connotation. It is developed with this fundamental in mind that those whose duty is to decide, must act judicially. They must deal with the question referred both without bias and they must given to each of the parties to adequately present the case made. It is perceived that the practice of aforesaid attributes in mind only would lead to doing justice. Since these attributes are treated as natural or fundamental, it is known as 'natural justice'. The principles of natural justice developed over a period of time and which is still in vogue and valid even today were: (i) rule against bias, i.e. nemo iudex in causa sua; and (ii) opportunity of being heard to the concerned party, i.e. audi alteram partem. These are known as principles of natural justice. To these

principles a third principle is added, which is of recent origin. It is duty to give reasons in support of decision, namely, passing of a 'reasoned order'."

19. The Hon'ble Supreme Court in the case of J. Ashoka Vs. University of Agricultural Sciences & Others, (2017) 2 SCC 609 has held as under:-

"22. In G. Durga Nageshwari, it was held as under:-

"9. The above case no doubt interpreted the Indian Administrative Service Regulations. Regulation 5(5) of the said Regulations required recording of reasons for supersession. But as can be seen from the above paragraph of the Judgment, the Supreme Court based its conclusion on the right to equality guaranteed under Articles 14 and 16(1) of the Constitution and observed that recording or reasons for overlooking the claim of a person who is above and select a person below was necessary. The said principle was applied by this Court in the case of T.K. Devaraju v. State of Karnataka, ILR 1988 KAR 2084. This Court pointed out that the Regulation 5(5) of the Indian Administrative Service Regulation was only for the purpose of giving effect to Article 14 and 16(1) of the Constitution and the position would be the same even in the absence of such a regulation because of recording of reasons is the only way to ensure obedience to the fundamental right guaranteed under Articles 14 and 16(1). Therefore, in our opinion, Clause (4) of Statute 30 must be read along with Articles 14 and 16(1) of the Constitution, for the reasons, the University of Agricultural Sciences is state as defined in Article 12 of the Constitution and hence bound by the Articles included in the Fundamental Rights Chapter. Therefore, when under Clause (2) of Statute 30, a Selection Committee constituted for making selection on the basis of the performance of the candidate at the interview recommends the names in the order of merit, the power of the Board of Regents to choose best among them means normally it should proceed in the order of merit as arranged by the Selection Committee, and if it is of the view that any person placed lower is the best, it can do so, but it has to record reasons. If reasons are recorded then it can be said that the provisions of Articles 14 and 16(1) are complied with. But if a person placed below is appointed without assigning any reason, there is no other alternative than to hold that such a selection and appointment is arbitrary and violative of Articles 14 and 16(1) of the Constitution.

10. In the present case, it is not disputed that no reasons had been recorded by the Board of Regents as to why the 2nd respondent was selected for appointment in preference to the petitioner though the petitioner was placed at Sl. No. 1 and the 2nd respondent was placed at Sl. No. 3. The learned Counsel for the University submitted that reasons were not recorded in view of the earlier decision of this Court in Keshayya's case in which it was held that the Board of Regents had the power to select any one of the persons whom it considers best and make the appointment. But the precise question raised in this case and which was not raised in Keshayya's case is as to whether the Board of Regents could do so without assigning any reason. As shown earlier, the recording of reasons is a must having regard to the right guaranteed to the citizens under Articles 14 and 16(1) of the Constitution. Therefore, we are of the view that whenever the Board of Regents considers that a person placed lower in merit in the list of selected

candidates recommended by the Selection Committee, it can do so only by recording reasons as to why the case of the person placed above is being overlooked and the person below is considered the best for being appointed. In the present case, no reasons have been recorded, may be for the reason the Board considered that it was unnecessary as stated by the learned Counsel. He however submitted that the Board of Regents has stated that respondent-2 is more suitable than the petitioner. That is the conclusion and not the reason. That conclusion must be preceded by the reason which is wanting in this case"

24. Reasons are the links between materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject - matter for a decision whether it is purely administrative or quasi - judicial. They should reveal a rational nexus between the facts considered and the conclusions reached. Only in this way can opinions or decisions recorded be shown to be manifestly just and reasonable. We, therefore, are of the considered opinion that the relevant provisions of the Statute were fully complied with."

21. Further, the Hon'ble Supreme Court in the case of ***Kranti Associates Private Limited & Another Vs. Masood Ahmed Khan & Others, (2010) 9 SCC 496*** has held as under:-

"12. The necessity of giving reason by a body or authority in support of its decision came up for consideration before this Court in several cases. Initially this Court recognized a sort of demarcation between administrative orders and quasi-judicial orders but with the passage of time the distinction between the two got blurred and thinned out and virtually reached a vanishing point in the judgment of this Court in A.K. Kraipak and others vs. Union of India and others reported in AIR 1970 SC 150.

13. In Kesava Mills Co. Ltd. and another vs. Union of India and others reported in AIR 1973 SC 389, this Court approvingly referred to the opinion of Lord Denning in Rigina vs. Gaming Board Ex parte Benaim [(1970) 2 WLR 1009] and quoted him as saying "that heresy was scotched in Ridge and Boldwin, 1964 AC 40".

14. The expression `speaking order' was first coined by Lord Chancellor Earl Cairns in a rather strange context. The Lord Chancellor, while explaining the ambit of Writ of Certiorari, referred to orders with errors on the face of the record and pointed out that an order with errors on its face, is a speaking order. (See 1878-97 Vol. 4 Appeal Cases 30 at 40 of the report)

15. This Court always opined that the face of an order passed by a quasi-judicial authority or even an administrative authority affecting the rights of parties, must speak. It must not be like the `inscrutable face of a Sphinx'.

16. In the case of Harinagar Sugar Mills Ltd. vs. Shyam Sunder Jhunjhunwala and others, AIR 1961 SC 1669, the question of recording reasons came up for consideration in the context of a refusal by Harinagar to transfer, without giving reasons, shares held by Shyam Sunder. Challenging such refusal, the transferee moved the High Court contending, inter alia, that the refusal is mala fide, arbitrary and capricious. The High Court rejected such pleas and the transferee was asked to file a suit. The transferee filed an appeal to the Central Government under Section 111 Clause (3)

of Indian Companies Act, 1956 which was dismissed. Thereafter, the son of the original transferee filed another application for transfer of his shares which was similarly refused by the Company. On appeal, the Central Government quashed the resolution passed by the Company and directed the Company to register the transfer. However, in passing the said order, Government did not give any reason. The company challenged the said decision before this Court.

17. The other question which arose in Harinagar (supra) was whether the Central Government, in passing the appellate order acted as a tribunal and is amenable to Article 136 jurisdiction of this Court.

18. Even though in Harinagar (supra) the decision was administrative, this Court insisted on the requirement of recording reason and further held that in exercising appellate powers, the Central Government acted as a tribunal in exercising judicial powers of the State and such exercise is subject to Article 136 jurisdiction of this Court. Such powers, this Court held, cannot be effectively exercised if reasons are not given by the Central Government in support of the order (Para 23, page 1678-79).

19. Again in the case of Bhagat Raja vs. Union of India and others, AIR 1967 SC 1606, the Constitution Bench of this Court examined the question whether the Central Government was bound to pass a speaking order while dismissing a revision and confirming the order of the State Government in the context of Mines and Minerals (Regulation and Development) Act, 1957, and having regard to the provision of Rule 55 of Mineral and Concessions Rules. The Constitution Bench held that in exercising its power of revision under the aforesaid Rule the Central Government acts in a quasi-judicial capacity (See para 8 page 1610). Where the State Government gives a number of reasons some of which are good and some are not, and the Central Government merely endorses the order of the State Government without specifying any reason, this Court, exercising its jurisdiction under Article 136, may find it difficult to ascertain which are the grounds on which Central Government upheld the order of the State Government (See para 9 page 1610). Therefore, this Court insisted on reasons being given for the order.

20. In M/s. Mahabir Prasad Santosh Kumar vs. State of U.P and others, AIR 1970 SC 1302, while dealing with U.P. Sugar Dealers License Order under which the license was cancelled, this Court held that such an order of cancellation is quasi-judicial and must be a speaking one. This Court further held that merely giving an opportunity of hearing is not enough and further pointed out where the order is subject to appeal, the necessity to record reason is even greater. The learned Judges held that the recording of reasons in support of a decision on a disputed claim ensures that the decision is not a result of caprice, whim or fancy but was arrived at after considering the relevant law and that the decision was just. (See para 7 page 1304).

21. In the case of M/s. Travancore Rayons Ltd. vs. The Union of India and others, AIR 1971 SC 862, the Court, dealing with the revisional jurisdiction of the Central Government under the then Section 36 of the Central Excise and Salt Act, 1944, held that the Central Government was actually exercising judicial power of the State and in exercising judicial power reasons in support of the order must be disclosed on two grounds. The first is that the person

aggrieved gets an opportunity to demonstrate that the reasons are erroneous and secondly, the obligation to record reasons operates as a deterrent against possible arbitrary action by the executive authority invested with the judicial power (See para 11 page 865-866).

22. In M/s. Woolcombers of India Ltd. vs. Woolcombers Workers Union and another, AIR 1973 SC 2758, this Court while considering an award under Section 11 of Industrial Disputes Act insisted on the need of giving reasons in support of conclusions in the Award. The Court held that the very requirement of giving reason is to prevent unfairness or arbitrariness in reaching conclusions. The second principle is based on the jurisprudential doctrine that justice should not only be done, it should also appear to be done as well. The learned Judges said that a just but unreasoned conclusion does not appear to be just to those who read the same. Reasoned and just conclusion on the other hand will also have the appearance of justice. The third ground is that such awards are subject to Article 136 jurisdiction of this Court and in the absence of reasons, it is difficult for this Court to ascertain whether the decision is right or wrong (See para 5 page 2761).

23. In Union of India vs. Mohan Lal Capoor and others, AIR 1974 SC 87, this Court while dealing with the question of selection under Indian Administrative Service/Indian Police Service (Appointment by Promotion Regulation) held that the expression "reasons for the proposed supersession" should not be mere rubber stamp reasons. Such reasons must disclose how mind was applied to the subject matter for a decision regardless of the fact whether such a decision is purely administrative or quasi-judicial. This Court held that the reasons in such context would mean the link between materials which are considered and the conclusions which are reached. Reasons must reveal a rational nexus between the two (See para 28 page 98).

24. In Siemens Engineering and Manufacturing Co. of India Ltd. vs. The Union of India and another, AIR 1976 SC 1785, this Court held that it is far too well settled that an authority in making an order in exercise of its quasi-judicial function, must record reasons in support of the order it makes. The learned Judges emphatically said that every quasi- judicial order must be supported by reasons. The rule requiring reasons in support of a quasi- judicial order is, this Court held, as basic as following the principles of natural justice. And the rule must be observed in its proper spirit. A mere pretence of compliance would not satisfy the requirement of law (See para 6 page 1789).

25. In Smt. Maneka Gandhi vs. Union of India and Anr., AIR 1978 SC 597, which is a decision of great jurisprudence significance in our Constitutional law, Chief Justice Beg, in a concurring but different opinion held that an order impounding a passport is a quasi-judicial decision (Para 34, page 612). The learned Chief Justice also held when an administrative action involving any deprivation of or restriction on fundamental rights is taken, the authorities must see that justice is not only done but manifestly appears to be done as well. This principle would obviously demand disclosure of reasons for the decision.

26. Justice Y.V. Chandrachud (as His Lordship then was) in a concurring but a separate opinion also held that refusal to disclose reasons for impounding a passport is an exercise of an exceptional nature and is to be done very sparingly and only when it is fully justified by the exigencies of an

uncommon situation. The learned Judge further held that law cannot permit any exercise of power by an executive to keep the reasons undisclosed if the only motive for doing so is to keep the reasons away from judicial scrutiny. (See para 39 page 613).

27. In Rama Varma Bharathan Thampuran vs. State of Kerala and Ors., AIR 1979 SC 1918, Justice V.R. Krishna Iyer speaking for a three-Judge Bench held that the functioning of the Board was quasi-judicial in character. One of the attributes of quasi- judicial functioning is the recording of reasons in support of decisions taken and the other requirement is following the principles of natural justice. Learned Judge held that natural justice requires reasons to be written for the conclusions made (See para 14 page 1922).

28. In Gurdial Singh Fijji vs. State of Punjab and Ors., (1979) 2 SCC 368, this Court, dealing with a service matter, relying on the ratio in Capoor (supra), held that "rubber-stamp reason" is not enough and virtually quoted the observation in Capoor (supra) to the extent that reasons "are the links between the materials on which certain conclusions are based and the actual conclusions." (See para 18 page 377).

29. In a Constitution Bench decision of this Court in Shri Swamiji of Shri Admar Mutt etc. etc. vs. The Commissioner, Hindu Religious and Charitable Endowments Dept. and Ors., AIR 1980 SC 1, while giving the majority judgment Chief Justice Y.V. Chandrachud referred to Broom's Legal Maxims (1939 Edition, page 97) where the principle in Latin runs as follows:

"Ces-sante Ratione Legis Cessat Ipsa Lex"

30. The English version of the said principle given by the Chief Justice is that:

"29. ....Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself." (See para 29 page 11).

31. In M/s. Bombay Oil Industries Pvt. Ltd. vs. Union of India and Others, AIR 1984 SC 160, this Court held that while disposing of applications under Monopolies and Restrictive Trade Practices Act the duty of the Government is to give reasons for its order. This court made it very clear that the faith of the people in administrative tribunals can be sustained only if the tribunals act fairly and dispose of the matters before them by well considered orders. In saying so, this Court relied on its previous decisions in Capoor (supra) and Siemens Engineering (supra), discussed above.

32. In Ram Chander vs. Union of India and others, AIR 1986 SC 1173, this Court was dealing with the appellate provisions under the Railway Servants (Discipline and Appeal) Rules, 1968 condemned the mechanical way of dismissal of appeal in the context of requirement of Rule 22(2) of the aforesaid Rule. This Court held that the word "consider" occurring to the Rule 22(2) must mean the Railway Board shall duly apply its mind and give reasons for its decision. The learned Judges held that the duty to give reason is an incident of the judicial process and emphasized that in discharging quasi-judicial functions the appellate authority must act in accordance with natural justice and give reasons for its decision (Para 4, page 1176).

33. In M/s. Star Enterprises and others vs. City and Industrial Development Corporation of Maharashtra Ltd. and others, (1990) 3 SCC 280, a three-Judge

Bench of this Court held that in the present day set up judicial review of administrative action has become expansive and is becoming wider day by day and the State has to justify its action in various field of public law. All these necessitate recording of reason for executive actions including the rejection of the highest offer. This Court held that disclosure of reasons in matters of such rejection provides an opportunity for an objective review both by superior administrative heads and for judicial process and opined that such reasons should be communicated unless there are specific justification for not doing so (see Para 10, page 284-285).

34. In Maharashtra State Board of Secondary and Higher Secondary Education vs. K.S. Gandhi and others, (1991) 2 SCC 716, this Court held that even in domestic enquiry if the facts are not in dispute non-recording of reason may not be violative of the principles of natural justice but where facts are disputed necessarily the authority or the enquiry officer, on consideration of the materials on record, should record reasons in support of the conclusion reached (see para 22, pages 738-739).

35. In the case of M.L. Jaggi vs. Mahanagar Telephones Nigam Limited and others, (1996) 3 SCC 119, this Court dealt with an award under Section 7 of the Telegraph Act and held that since the said award affects public interest, reasons must be recorded in the award. It was also held that such reasons are to be recorded so that it enables the High Court to exercise its power of judicial review on the validity of the award. (see para 8, page 123).

36. In Charan Singh vs. Healing Touch Hospital and others, AIR 2000 SC 3138, a three-Judge Bench of this Court, dealing with a grievance under CP Act, held that the authorities under the Act exercise quasi-judicial powers for redressal of consumer disputes and it is, therefore, imperative that such a body should arrive at conclusions based on reasons. This Court held that the said Act, being one of the benevolent pieces of legislation, is intended to protect a large body of consumers from exploitation as the said Act provides for an alternative mode for consumer justice by the process of a summary trial.

The powers which are exercised are definitely quasi-judicial in nature and in such a situation the conclusions must be based on reasons and held that requirement of recording reasons is "too obvious to be reiterated and needs no emphasizing". (See Para 11, page 3141 of the report)

37. Only in cases of Court Martial, this Court struck a different note in two of its Constitution Bench decisions, the first of which was rendered in the case of Som Datt Datta vs. Union of India and others, AIR 1969 SC 414, Mr. Justice Ramaswami delivering the judgment for the unanimous Constitution Bench held that provisions of Sections 164 and 165 of the Army Act do not require an order confirming proceedings of Court Martial to be supported by reasons. The Court held that an order confirming such proceedings does not become illegal if it does not record reasons. (Para 10, page 421- 422 of the report).

38. About two decades thereafter, a similar question cropped up before this Court in the case of S.N. Mukherjee vs. Union of India, AIR 1990 SC 1984. A unanimous Constitution Bench speaking through Justice S.C. Agrawal confirmed its earlier decision in Som Datt (supra) in para 47 at page 2000 of the report and held reasons are not required to be recorded for an order confirming the finding and sentence recorded by the Court Martial.

39. It must be remembered in this connection that the Court Martial as a proceeding is sui generis in nature and the Court of Court Martial is different, being called a Court of Honour and the proceeding therein are slightly different from other proceedings. About the nature of Court Martial and its proceedings the observations of Winthrop in Military Law and Precedents are very pertinent and are extracted herein below:

"Not belonging to the judicial branch of the Government, it follows that courts-martial must pertain to the executive department; and they are in fact simply instrumentalities of the executive power, provided by Congress for the President as Commander-in-Chief, to aid him in properly commanding the Army and Navy and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives."

40. Our Constitution also deals with Court Martial proceedings differently as is clear from Articles 33, 136(2) and 227(4) of the Constitution.

41. In England there was no common law duty of recording of reasons. In Marta Stefan vs. General Medical Council, (1999) 1 WLR 1293, it has been held, "the established position of the common law is that there is no general duty imposed on our decision makers to record reasons". It has been acknowledged in the Justice Report, Administration Under Law (1971) at page 23 that "No single factor has inhibited the development of English administrative law as seriously as the absence of any general obligation upon public authorities to give reasons for their decisions".

42. Even then in the case of R vs. Civil Service Appeal Board, ex parte Cunningham reported in (1991) 4 All ER 310, Lord Donaldson, Master of Rolls, opined very strongly in favour of disclosing of reasons in a case where the Court is acting in its discretion. The learned Master of Rolls said:

"..It is a corollary of the discretion conferred upon the board that it is their duty to set out their reasoning in sufficient form to show the principles on which they have proceeded. Adopting Lord Lane CJ's observations (in R vs. Immigration Appeal Tribunal, ex p Khan (Mahmud) [1983] 2 All ER 420 at 423, (1983) QB 790 at 794-795), the reasons for the lower amount is not obvious. Mr. Cunningham is entitled to know, either expressly or inferentially stated, what it was to which the board were addressing their mind in arriving at their conclusion. It must be obvious to the board that Mr. Cunningham is left with a burning sense of grievance. They should be sensitive to the fact that he is left with a real feeling of injustice, that having been found to have been unfairly dismissed, he has been deprived of his just desserts (as he sees them)".

43. The learned Master of Rolls further clarified by saying:

"..thus, in the particular circumstances of this case, and without wishing to establish any precedent whatsoever, I am prepared to spell out an obligation on this board to give succinct reasons, if only to put the mind of Mr. Cunningham at rest. I would therefore allow this application."

44. But, however, the present trend of the law has been towards an increasing recognition of the duty of Court to give reasons (See North Range Shipping Limited vs. Seatrans Shipping Corporation, (2002) 1 WLR 2397). It has been acknowledged that this trend is consistent with the development towards openness in Government and judicial administration.

45. In English vs. Emery Reimbold and Strick Limited, (2002) 1 WLR 2409, it has been held that justice will not be done if it is not apparent to the parties why one has won and the other has lost. The House of Lords in Cullen vs. Chief Constable of the Royal Ulster Constabulary, (2003) 1 WLR 1763, Lord Bingham of Cornhill and Lord Steyn, on the requirement of reason held,

"7. ...First, they impose a discipline ... which may contribute to such decisions being considered with care. Secondly, reasons encourage transparency ... Thirdly, they assist the Courts in performing their supervisory function if judicial review proceedings are launched." (Para 7, page 1769 of the report).

46. The position in the United States has been indicated by this Court in S.N. Mukherjee (supra) in paragraph 11 at page 1988 of the judgment. This Court held that in the United States the Courts have always insisted on the recording of reasons by administrative authorities in exercise of their powers. It was further held that such recording of reasons is required as "the Court cannot exercise their duty of review unless they are advised of the considerations underlying the action under review". In S.N. Mukherjee (supra) this court relied on the decisions of the U.S. Court in Securities and Exchange Commission vs. Chenery Corporation, (1942) 87 Law Ed 626 and John T. Dunlop vs. Walter Bachowski, (1975) 44 Law Ed 377 in support of its opinion discussed above.

47. Summarizing the above discussion, this Court holds:

a. In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.

b. A quasi-judicial authority must record reasons in support of its conclusions.

c. Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.

d. Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.

e. Reasons reassure that discretion has been exercised by the decision maker on relevant grounds and by disregarding extraneous considerations.

f. Reasons have virtually become as indispensable a component of a decision making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.

g. Reasons facilitate the process of judicial review by superior Courts.

h. The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the life blood of judicial decision making justifying the principle that reason is the soul of justice.

i. Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

j. Insistence on reason is a requirement for both judicial accountability and transparency.

k. If a Judge or a quasi-judicial authority is not candid enough about

his/her decision making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

l. Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or `rubber-stamp reasons' is not to be equated with a valid decision making process.

m. It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision making not only makes the judges and decision makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor (1987) 100 Harward Law Review 731-737).

n. Since the requirement to record reasons emanates from the broad doctrine of fairness in decision making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See (1994) 19 EHRR 553, at 562 para 29 and Anya vs. University of Oxford, 2001 EWCA Civ 405, wherein the Court referred to Article 6 of European Convention of Human Rights which requires,

"adequate and intelligent reasons must be given for judicial decisions".

o. In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "Due Process".

48. For the reasons aforesaid, we set aside the order of the National Consumer Disputes Redressal Commission and remand the matter to the said forum for deciding the matter by passing a reasoned order in the light of the observations made above. Since some time has elapsed, this Court requests the forum to decide the matter as early as possible, preferably within a period of six weeks from the date of service of this order upon it.

49. In so far as the appeal filed by the Bank is concerned, this Court finds that the National Consumer Disputes Redressal Commission in its order dated 4th April 2008 has given some reasons in its finding. The reasons, inter alia, are as under:

"We have gone through the orders of the District Forum and the State Commission, perused the record placed before us and heard the parties at length. The State Commission has rightly confirmed the order of the District Forum after coming to the conclusion that the Petitioner and the Builder - Respondents No.3 and 4 have colluded with each other and hence, directed them to compensate the complainant for the harassment caused to them."

22. A Division Bench of this Court in Writ C No. 18164 of 2018 ***(Nanak Chand Sharma Vs. State of U.P. & 3 Others, decided on 03.12.2018)*** has held as under:-

"We find that the authority concerned has only recoded his conclusion without assigning any reason. It is a well settled law that not only administrative but judicial order also must be supported by the reasons recorded in it. The reason is heartbeat of every conclusion. The absence of reason makes an order unsustainable. One of the most important aspects for insisting to record reason is that it substitutes the subjectivity with objectivity. It is also treated as a part of natural justice and fair play.

In the case of M/s Travancore Rayon Ltd. v. Union of India, 1969 (3) SCC 868 the Supreme Court has held as under:

"11. ...The communication does not disclose the "points" which were considered, and the reasons for rejecting them. This is a totally unsatisfactory method of disposal of a case in exercise of the judicial power vested in the Central Government. Necessity to give sufficient reasons which disclose proper appreciation of the problem to be solved, and the mental process by which the conclusion is reached, in cases where a non-judicial authority exercises judicial functions, is obvious. When judicial power is exercised by an authority normally performing executive or administrative functions, this Court would require to be satisfied that the decision has been reached after due consideration of the merits of the dispute, uninfluenced by extraneous considerations of policy or expediency. The Court insists upon disclosure of reasons in support of the order on two grounds : one, that the party aggrieved in a proceeding before the High Court or this Court has the opportunity to demonstrate that the reasons which persuaded the authority to reject his case were erroneous; the other, that the obligation to record reasons operates as a deterrent against possible arbitrary action by the executive authority invested with the judicial power."

The aforesaid said judgment has been quoted with approval by the Constitution Bench of the Supreme Court in the case of S.N. Mukherjee Vs. Union of India, AIR 1990 SC 1984. Similar view has been taken by the Supreme Court in the cases of Union of India Vs. Mohan Lal Capoor, AIR 1974 SC 87; Raj Kishore Jha Vs. State of Bihar, (2003) 11 SCC 519; Kranti Associates Private Limited Vs. Masood Ahmed Khan, (2010) 9 SCC 496; Sant Lal Gupta and others v. Modern Cooperative Group Housing Society Limited and others, (2010) 13 SCC 336 and J. Ashoka v. University of Agricultural Science and others, (2017) 2 SCC 609."

23. In view of the aforesaid cases of the Hon'ble Supreme Court as well as this Court, it is clear that the reason is the heartbeat of the order and without reason, the order becomes dead.

24. The administrative order, without any reason, causes prejudice to the person against whom it is passed. The Hon'ble Supreme Court, time and again, has emphasized the importance of recording reason for the decision by the administrative authorities.

25. The Apex Court in the case of ***Secretary & Curator, Victoria Memorial Hall Vs. Howrah Ganatantrik Samity & Others reported in 2010 (3) SCC 732,*** has held as under:-

31. It is a settled legal proposition that not only administrative but also judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of an order and exercise of judicial power by a judicial forum is to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration justice - delivery system, to make known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of principles of natural justice. "The giving of reasons for a decision is an essential attribute of judicial and judicious disposal of a matter before Courts, and which is the only indication to know about

the manner and quality of exercise undertaken, as also the fact that the Court concerned had really applied its mind." [Vide State of Orissa Vs. Dhaniram Luhar AIR 2004 SC 1794; and State of Rajasthan Vs. Sohan Lal & Ors. (2004) 5 SCC 573].

32. Reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, it becomes lifeless. Reasons substitute subjectivity by objectivity. Absence of reasons renders the order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. [Vide Raj Kishore Jha Vs. State of Bihar & Ors. AIR 2003 SC 4664; Vishnu Dev Sharma Vs. State of Uttar Pradesh & Ors. (2008) 3 SCC 172; Steel Authority of India Ltd. Vs. Sales Tax Officer, Rourkela I Circle & Ors. (2008) 9 SCC 407; State of Uttaranchal & Anr. Vs. Sunil Kumar Singh Negi AIR 2008 SC 2026; U.P.S.R.T.C. Vs. Jagdish Prasad Gupta AIR 2009 SC 2328; Ram Phal Vs. State of Haryana & Ors. (2009) 3 SCC 258; Mohammed Yusuf Vs. Faij Mohammad & Ors. (2009) 3 SCC 513; and State of Himachal Pradesh Vs. Sada Ram & Anr. (2009) 4 SCC 422].

33. Thus, it is evident that the recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected may know, as why his application has been rejected.

26. The Apex Court has held that not only the administrative orders but also judicial orders must be supported by reason. If the reason is not assigned, it violates the principles of natural justice.

27. The Hon'ble Supreme Court, in various judgements, has emphasised the importance of recording a reason for decision by the administrative authority and the Tribunal to enable the Courts to exercise the power of review in consonance with the settled principle and the authorities are advised of the consideration underlining the action under review.

28. The Hon'ble Supreme Court has consistently taken the view that recording of reason is an essential feature of dispensation of justice. A litigant, who approaches the Court with a grievance in accordance with law, is entitled to know the reason for grant or rejection of his prayer. An administrative order without reasons causes prejudice to the person against whom it is pronounced, as that litigant is unable to know the ground which weighed with the Authority in rejecting his claim and also causes impediments in his taking adequate and appropriate grounds before the higher Court in the event of challenge to that administrative order.

29. We find that the respondent - Corporation has only recoded its conclusion without assigning any reason. It is a well settled law that the administrative order also must be supported by the reasons recorded in it. The reason is heartbeat of every conclusion. The absence of reason makes an order unsustainable. One of the most important aspects for insisting to record reason is that it substitutes the subjectivity with objectivity. It is also treated as a part of natural justice and fair play.

30. For the reasons mentioned above, we find that the impugned order dated 23.06.2020 passed by the respondent - Corporation cannot be sustained in the eyes of law. Hence, the same is, accordingly, quashed.

31. The writ petition succeeds and is allowed. The matter is remanded back to the respondent - Corporation for passing a fresh reasoned and speaking order with regard to the petitioner's claim after furnishing opportunity of hearing to all the stake holders.

32. It is desirable that the respondent - Corporation may take a decision on the claim of the petitioner, if possible, within a period of two months from the date of production of a copy of this order.

(2020)10ILR A225
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.09.2020

BEFORE

THE HON'BLE PRAKASH PADIA, J.

Writ- C No. 13003 of 2020

C/M, F.R. Islamia Inter College, Bareilly & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ashok Khare, Sri J.P. Singh

Counsel for the Respondents:
C.S.C., Sri Hritudhwaj Pratap Sahi, Sri Samarath Singh, Sri G.K. Singh, Sri Sankalp Narain

A. Committee of management – Scheme of Administration – Convening of Meeting – Prior approval of President – Requirement – Under the clause of Scheme, an extra-ordinary emergent meeting could only be called by the Manager/Secretary with the approval of the President and by written request of at least 1/5 elected members – Word 'and' has been used in the aforesaid clause and not the word 'or' – Both the things are necessary for convening the meeting – Held, the order of DIOS disapproving resolution on the ground that meeting was not convened with the approval of the President absolutely perfect and valid order. (Para 19)

B. Committee of management – Administration – President refused to hold meeting – According to Scheme, a meeting should be convened at least once every quarter by the Manager/Secretary with the approval of the President – The administration of the College has to be carried on in a democratic manner which is object of the constitution of the Committee of Management – Inspite of direction of the High Court, no meeting could be held – Held, the unilateral decision of the President for not holding the meeting of the Committee of Management an abuse of power – Mandamus issued to the President to grant its approval for holding the meeting of the Committee of Management as per the Scheme of Administration. (Para 21, 22, 23, 24 and 25)

Writ Petition disposed off (E-1)

(Delivered by Hon'ble Prakash Padia, J.)

1. Heard Sri Ashok Khare, learned Senior Counsel assisted by Sri J.P. Singh, learned counsel for the petitioners, learned Standing Counsel for respondents no.1 and 2 and Sri G. K. Singh, learned Senior Counsel assisted by Sri Sankalp Narain, learned counsel for the respondent no.3.

2. The petitioners have preferred the present writ petition inter-alia with the prayer to quash the order dated 6.7.2020 passed by the District Inspector of Schools, Bareilly/respondent no.2 with further prayer to issue a mandamus directing the aforesaid respondent to pass fresh order on Management's resolution dated 28.6.2020.

3. The facts in brief as contained in the writ petition are that the institution in question namely F.R. Islamia Inter College, is a recognized and aided Intermediate College, which is a minority institution.

The institution in question is run and controlled by the provisions contained under The U.P. Intermediate Education Act, 1921 and the regulations framed thereunder. There is an approved Scheme of Administration. The last elections of Committee of Management was held on 20.5.2016 in which the petitioner no.2 namely Mahammad Isar Ahmad was elected as Manager/Secretary of the College and the respondent no.3, namely, Mohammad Nafees Ansari was elected as President. The aforesaid election was duly recognized by the respondent no.2/District Inspector of Schools, vide order dated 28.5.2016.

4. Certain disputes arose in the institution in question in respect of financial irregularities committed in the institution. On 15.7.2019 an order was passed by the respondent no.2 attesting the signature of Deputy Manager as Manager for remaining terms. A Writ Petition No.27507 of 2019 (Committee of Management F.R Islamia Inter College and another vs. State of U.P. and 3 others) was filed before this Court, challenging the order dated 15.7.2019 passed by the District Inspector of Schools, Bareilly. The writ petition was duly entertained and an interim protection was granted by a Coordinate Bench of this Court on 18.9.2019. By the aforesaid order, the operation of the order dated 15.7.2019 passed by the District Inspector of Schools, Bareilly was stayed. Further Management of the institution in question was directed to call a meeting of the Committee of Management between 25.9.2019 and 1.10.2019 after service of notice upon the respondent no.3 and 4 along with all other members of the Committee of Management to discuss the special audit report. The order dated 18.9.2019 passed in the aforesaid writ petition is reproduced hereinbelow :-

"Heard Sri J.P. Singh, learned counsel for the petitioners, Sri G.K.Singh, learned Senior Counsel assisted by Sri Chandra Prakash Yadav, learned counsel for the respondents No.3 and 4 and learned Standing Counsel for the respondent-State.

The petitioner has assailed the order dated 15.07.2019 passed by the District Inspector of Schools, Bareilly, approving the removal of the petitioner. The petitioner is a manager of the institution.

Sri J.P. Singh, learned counsel for the petitioner, contends that the order of the District Inspector of Schools, Bareilly has been passed in violation of the principles of natural justice. The petitioner upon receipt of notice made a requisition to the District Inspector of Schools, Bareilly for relevant documents including the resolution passed against the petitioner on the foot of which he was removed. The relevant documents were not provided to the petitioner and the impugned order was passed relying on the aforesaid documents. The defence of the petitioner was disabled by the procedure adopted by the petitioner.

It is specifically asserted that the meeting allegedly called to remove the petitioner was convened in breach of the scheme of administration. The persons, who had called the meeting, did not have the authority to convene the meeting. He further contends that the final audit report does not indict the petitioner. The petitioner had pointedly raised a query to the District Inspector of Schools, Bareilly indicating the finding against the petitioner regarding misutilization of the funds. The District Inspector of Schools, Bareilly did not respond to the aforesaid request. It is lastly asserted that an audit report is at best an opinion of the auditor. It is not a finding of a competent authority.

The matter needs consideration.

Learned counsel for the respondents as well as learned Standing Counsel pray for and are granted four weeks' time to file counter affidavit.

List thereafter.

Till further orders of this Court, the effect and operation of the order dated 15.07.2019 passed by the District Inspector of Schools, Bareilly, shall remain stayed.

The respondents shall not interfere in the functioning of the petitioner as manager of the institution.

The petitioner is directed to call a meeting of the committee of management between 25.09.2019 to 01.10.2019 after service of notice upon the respondents No.3 and 4 along with all other members of the committee of management to discuss the special audit report. The committee of management is shall pass a resolution in accordance with law. The notices of the meeting shall be sent by registered post AD. It shall also be published in a local newspaper having wide circulation.

This order does not prohibit the competent authority to investigate the allegations of misutilization of funds if any."

5. On 13.2.2020 only six members submitted an application before the Manager of the institution in question namely petitioner no.2 for convening the meeting of the Committee of Management to discuss regarding forged resolution dated 28.7.2018. After receiving the aforesaid letter petitioner no.2 contacted the respondent no.3- President of the Committee of Management for giving permission to issue agenda. The respondent no.3 refuse to issue the same. In the aforesaid circumstances on 22.2.2020 a agenda was issued fixing 03.03.2020 for meeting of the Committee of Management.

6. On 29.2.2020 the respondent no.3/President of the institution wrote a letter to the petitioner no.2 referring Clause 9 of the Scheme of Administration which provides that meeting of the Committee of Management can be convened only after permission/approval of the President.

7. The meeting of the Committee of Management was held on 03.03.2020. In the aforesaid meeting a resolution was passed that an explanation be sought from the President/Respondent no.3 and in the meantime, the office of the President was handed over to one Dr. Shakir Ali.

8. On 7.3.2020 the petitioner no.2 wrote a letter to the respondent no.4/Incharge Principal intimating him that in the meeting of the Committee of Management dated 19.4.2019 an enquiry committee was constituted to enquire into the serious irregularities committed by him and in this regard a show cause notice was issued to him on 29.4.2019. Since no reply was given by him he was directed to submit his explanation and to handover charge of the post of Principal to one Sri Tauqir Siddiqui pending enquiry. In the meanwhile, he was further directed to work on his original post of Lecturer.

9. Vide letter dated 12.3.2020 petitioner no.2 wrote a letter to the District Inspector of Schools, Bareilly intimating him in detail regarding management decision for removal of Sri Javed Khalid pending enquiry and to appoint Tauqir Siddiqui Lecturer (Math) as officiating principal. A request was also made for attesting the signature of Tauqir Siddiqui as officiating Principal so that the salary bills of the college be passed timely. The District Inspector of Schools, Bareilly vide order dated 20.3.2020 disapproved the resolution of the management dated 3.3.2020 on the ground that the resolution was passed contrary to Clause 9 of the Scheme of Administration. He also proceeded to reject

the request of the management for attesting the signatures of newly appointed officiating principal namely Tauqir Siddiqui. It is further observed by him in his order that if the manager wants to convene a meeting he should send agenda of the meeting to the President by registered post in terms of the Clause 9 of the approved Scheme of Administration and the President should take cognizance of the concern agenda and only thereafter take the appropriate proceedings for holding meeting of the management. Copy of the order dated 20.3.2020 is appended as annexure 16 to the writ petition.

10. The petitioner no.2 accepted the observations of the District Inspector of Schools, Bareilly/respondent no.2 and thereafter, send a letter dated 21.5.2020 to the President/respondent no.3 by registered post intimating him that in view of the written request of the members dated 20.5.2020 it has now became necessary to convene the meeting of the Managing Committee. A reply was given by the respondent no.3 vide his letter dated 26.5.2020. In the aforesaid letter it is stated by him that in view of the guidelines issued by the Government of India agenda cannot be approved. The respondent no.3 cited on going lock-down and the guidelines issued by the Ministry of Home Affairs suggesting all the persons above 65 to stay in their homes.

11. Thereafter, again on 1.6.2020 the petitioner no.2 send a letter to the respondent no.3 inviting his attention that meeting of the Managing Committee is necessary. It is further stated in the aforesaid letter that all Government offices has been opened even for the evaluation of answer books. In the circumstances, a request has been made by the petitioner no.2 from respondent no.3 to convene a meeting after following the norms of social distancing. In response to the same, again a letter dated 5.6.2020 was written by the respondent no.3 to the petitioner no.2 intimating him that in view of the guidelines issued by the Government of India, the agenda in the meeting of the Committee of Management cannot be approved.

12. On 10.6.2020 the petitioner no.2 replied the aforesaid letter of the respondent no.3 and along-with reply agenda was also send to him by registered post for his approval. Copy of the aforesaid letter was also forwarded in the office of the respondent no.2 for intimation. A reply was given by the respondent no.3 vide letter dated 15.6.2020 again refusing his permission/approval citing Covid-19. In the meanwhile, on 18.6.2020 six members of the managing committee wrote a letter to the petitioner no.2 for convening the meeting of the committee of management. On 19.6.2020 a agenda was issued for the meeting to be held on 28.6.2020. On 22.6.2020 the respondent no.3 issued a letter cancelling the meetting dated 28.6.2020 citing the guidelines issued by the Government of India. It further appears from perusal of the record that the meeting of the Committee of Management was held on 28.6.2020 and in absence of the approval of the President resolution passed in the aforesaid meeting was forwarded by the petitioners before the respondent no.2. The respondent no.2 passed an order on 6.7.2020 discarding/disapproving the management resolution dated 28.6.2020 on the sole ground that the meeting in question was not convened with the approval of the President. It is further stated in the aforesaid order that the meeting dated 28.6.2020 is contrary to the provisions

contained in the Scheme of Administration, therefore, the same is illegal. While passing the aforesaid order the respondent no.2 referred Clause 9(ii) of the Scheme of Administration, copy of the order dated 28.6.2020, which is appended as annexure 37 to the writ petition. Aggrieved against the aforesaid decision taken by him the petitioners have preferred the present writ petition.

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

14. The institution in question namely F.R. Islamia Inter College, is a recognized and aided Intermediate College run and controlled by the provisions contained under the U.P. Intermediate Education Act, 1921 and the regulations framed thereunder. The institutuon in question is run and controlled by Scheme of Administration, which was approved by the competent authority. The powers and duties of the President has been mentioned under Clause 15 of the scheme of administration. The same is reproduced hereinbelow :-

"Powers and duties of Office-Bearers.

The powers and duties of office-bearers shall be as follows :

(I) President- (a) To preside at the Meetings of the Committee.

(b) To approve the dates for holding meetings and to postpone or adjourn them.

(c) To see that this Scheme of Administration is faithfully carried out by all concerned.

(d) To sign jointly with the Manager all agreements relating to the College and all deeds of transfer, contract and other documents relating to the immovable property of the institution.

(e) To incur expenditure upto a maximum of Rs. 150/- in anticipation of the Committee.

(f) To the extent he is so authorised by a resolution of the Committee, to act on its behalf in emergencies when a meeting cannot be called and to report forthwith to the Committee the action taken by him.

(g) To exercise such other powers and to perform such other duties as are conferred or imposed on him by this Scheme or by any rule or law for the time being in force."

15. Apart from the same, the relevant paragraph merely paragraph 9 deals with the meeting of the committee is reproduced below :-

". Meeting of the Committee.

(i) Ordinary Meetings - An ordinary meeting of the Committee shall be called by the Manager/Secretary at least once every quarter with the approval of the President.

(ii) Extra ordinary or Emergency Meetings - The Manager/Secretary (with the approval of the President) may when necessary and shall on the written requisition of at least once fifth of the elected members containing the resolution of specific subject for consideration, call an emergent meeting of the Committee.

(iii) Notice of the Meeting- At least seven clear days notice shall be given for an ordinary meeting of the Committee and three clear days notice for an emergent or extra ordinary meeting. Provided that in case of sending of notice by Post at the last known address of the member nine days before the date of an emergent meeting shall be deemed sufficient service on him in due time. The notice shall contain the agenda and specify the place, date and time of the meeting.

(iv) Quorum and adjourned meeting- Six members or one third of the total number of the then members, whichever is greater, shall form the quorum for the meeting. In the absence of the required quorum upto 30 minutes after the time fixed for the commencement of the meeting, the same shall stand adjourned and may be held again the same day or the next day at a time announced by the President at the expiry of the said 30 minutes. No quorum or any other notice shall be required for an adjourned meeting, but no matter shall be taken up there which was not included in the agenda of the meeting which was adjourned for want of quorum."

16. From the combined reading of the aforesaid clauses it is clear that extra-ordinary or emergent meeting could only be called with the approval of the President and only after written requisition of at least 1/5 of elected members.

17. It is argued by Sri Ashok Khare, learned Senior Counsel that in case there was no approval of the President then a request can be made by the 1/5 of the elected members and the meeting could be convene.

18. On the other hand Sri G. K. Singh, learned Senior Counsel contended that in order to hold the meeting as per Clause 9 of the approved Scheme of Administration both the things are necessary, i.e., the approval of the President as well as written request of at least 1/5 of the elected members.

19. The Court is of the opinion that Clause 9 (ii) of the scheme are absolutely clear. It is clearly stated in the aforesaid clause that an extra-ordinary emergent meeting could only be called by the Manager/Secretary with the approval of the President and by written request of at least 1/5 elected members. From perusal of the same, it is clear the word "and" has been used in the aforesaid clause and not the word "or". From perusal of the same it is clear that both the things are necessary for convening the meeting. After taking into consideration the aforesaid clause of the Scheme of Administration the order has been passed by the respondent no.2 on 6.7.2020. The Court is of the opinion that the aforesaid order is absolutely perfect and valid order and does not call for any interference by this Court.

20. It further appears from perusal of the record that under Clause 9(i) of the Scheme of Administration it is provided that the meeting of the Committee of Management shall be called by the Manager/Secretary at least once in every quarter with the approval of the President. It appears from perusal of the record that though time and again the Manager of the institution in question wrote letters to the President to call for a meeting but due to Covid-19 objections were raised by the President not to convene the meeting. It further appears from perusal of the last paragraph of the order impugned that a direction was given to hold the meeting of the general body after following the guidelines issued by the State Government.

21. The every institution is run and controlled by the provisions of the Scheme of Administration. It is provided under sub-Clause 1 of Clause 9 of the Scheme of Administration that a meeting of the Committee of Management should be called by the Manager/Secretary at least every quarter with the approval of the President. It appears from perusal of the

record that from last so many months no meeting was convened due to Covid-19. It further appears that though the steps were taken by the Manager of the institution to convene the meeting the same could not be held due to the fact that the approval was not given by the President. No institution could run without holding the meeting of the Managing Committee. Time and again the President again refused to hold the meeting by taking a shelter of Covid-19. According to sub-clause (i) of clause 9, a meeting should be convened at least once every quarter by the Manager/Secretary with the approval of the President.

22. This Court, by order dated 18.9.2019 passed in Writ Petition No.27 of 2019 has directed the Manager of the Committee of Management to call a meeting of the Committee of Management between 25.09.2019 to 01.10.2019 after service of notice upon the respondent nos.3 & 4 of aforesaid writ petition along with all other members of the Committee of Management to discuss the special audit report.

23. From the record it appears that the aforesaid direction of this Court has not been complied with and no meeting of Committee of Management, as directed by this Hon'ble Court had been held.

24. As per Clause 9(1) of the Scheme of Administration it is mandatory to hold the meeting of Committee of Management in every quarter. The President of the Committee of Management, on one pretext or the other, is neither granting approval for holding meeting of the Committee of Management nor the requisition for holding emergent meeting of the Committee of Management is being approved by the President of the Committee of Management. The administration of the College has to be carried on in a democratic manner which is object of the constitution of the Committee of Management. The unilateral decision of the President of the Committee of Management for not holding the meeting of the Committee of Management is infact abuse of power. The ground taken by the President of the Committee of Management for not grating approval for holding the meeting of the Committee of Management is the guidelines issued by the State Government in view of Covid-19. The college is an Intermediate College. There must be sufficient space for holding meeting of the Committee of Management following the guidelines issued by the State Government for holding a meeting, i.e., social distance.

25. Thus, taking in view of the entire fact and circumstances of the case including the abuse of power by the President, a mandamus is issued directing the President of the Committee of Management to grant its approval for holding the meeting of the Committee of Management as per Clause 9 of the Scheme of Administration. The petitioner no.2 is directed to send a requisition for holding a meeting of Committee of Management to the respondent no.3, i.e., President of the Committee of Management. The President of the Committee of Management is directed to grant its approval for holding meeting of the Committee of Management following the norms issued by the State Government regarding Covid-19.

26. The intimation of the meeting along with agenda of the Committee of Management be send to all the members of the Committee of Management and the meeting of the Committee of Management

be positively held within a period of six weeks from today. It is further provided that the Manager will ensure that all the Protocols as prescribed under the guidelines and norms issued by the State Government and Central Government with regard to Covid-19 are followed.

27. With the aforesaid observations the writ petition is disposed off.

(2020)10ILR A232
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.09.2020

BEFORE

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

Writ- C No. 13366 of 2020

Smt. Priya Verma & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Sabhajeet, Nishad Ramjanki

Counsel for the Respondents:
C.S.C.

A. Constitution of India – Article 21 – Marital right to live together – Where a boy and a girl are major and they are living with their free will, then, nobody including their parents, has authority to interfere with their living together – Held, the petitioners are at liberty to live together and no person shall be permitted to interfere in their peaceful living. (Para 9 and 10)

Writ Petition partly allowed (E-1)

Cases relied on :-

1. Gian Devi Vs The Suptd., Nari Niketan, Delhi & ors. (1976) 3 SCC 234

2. Lata Singh Vs St. of U.P. & anr.; (2006) 5 SCC 475

3. Bhagwan Dass Vs. St. (NCT of Delhi); (2011) 6 SCC 396

4. Deepika & anr. Vs St. of U.P. & ors.; 2013 (9) ADJ 534

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

1. Heard learned counsel for the petitioners and learned Standing Counsel for the State. Learned counsel for the petitioner is permitted to amend the prayer clause. He may do so during the course of the day.

2. Petitioners have preferred this writ petition for a direction upon the respondents not to interfere in their married life and also for protection of their life and liberty.

3. The petitioners claim that they are adults and living together out of their own freewill. It is stated that for the said reason, the private respondent and his other family members have got annoyed and there is serious danger to the life of the petitioners as they are being threatened and harassed.

4. In support of their age, petitioners brought on record their high school certificates which show that they are major. They have also brought on record the complete online application for registration of their marriage.

5. The petitioners have averred in the writ petition that they are living as wife and husband. It is stated that they have apprehension that private respondent can eliminate them for the honour of his family. In case this Court does not grant them protection, their life may be endangered.

6. Learned Standing Counsel for the State has submitted that there is already an F.I.R. pending and petitioner No.2 has been alleged to have committed offence under POSCO Act and, therefore, he may not be granted protection.

7. As against this, learned counsel for the petitioners has submitted that the F.I.R. was lodged when the petitioners have first eloped but now they have entered into a wedlock and petitioner No.1 is now major as per her high school certificate and, therefore, the F.I.R. not being recent but of 2018, cannot come in their way of getting married and protection by this Court.

8. Heard learned counsel for the petitioners and learned Standing Counsel for the State. In view of the order proposed to be passed, there is no need to issue notice to private respondent. With the consent of learned counsel appearing for the parties, this writ petition is being disposed of finally at this stage in terms of the Rules of the Court.

9. The Supreme Court in a long line of decisions has settled the law that where a boy and a girl are major and they are living with their free will, then, nobody including their parents, has authority to interfere with their living together. Reference may be made to the judgements of the Supreme Court in the cases of **Gian Devi v. The Superintendent, Nari Niketan, Delhi and others, (1976) 3 SCC 234; Lata Singh v. State of U.P. and another, (2006) 5 SCC 475; and Bhagwan Dass v. State (NCT of Delhi), (2011) 6 SCC 396,** which have consistently been followed by the Supreme Court and this Court, as well as of this Court in **Deepika and another v. State of U.P. and others, 2013 (9) ADJ 534.** The Supreme Court in **Gian Devi (supra)** has held as under:

"7. ... Whatever may be the date of birth of the petitioner, the fact remains that she is at present more than 18 years of age. As the petitioner is sui juris no fetters can be placed upon her choice of the person with whom she is to stay, nor can any restriction be imposed regarding the place where she should stay. The court or the relatives of the petitioner can also not substitute their opinion or preference for that of the petitioner in such a matter."

10. Having regard to the facts and circumstances of the case, I of the view that the petitioners are at liberty to live together and no person shall be permitted to interfere in their peaceful living. In case any disturbance is caused in the peaceful living of the petitioners, the petitioners shall approach the concerned police authority with a certified copy of this order, who shall provide immediate protection to the petitioners.

11. A liberty is granted to private respondent that if the documents brought on the record are fabricated or forged, it will be open to him to file a recall application for recall of this order.

12. It is made clear that this Court has not adjudicated upon the alleged marriage of the petitioners and this order in no way expresses opinion about the validity of their marriage and genuineness of their marriage certificate, if any.

13. It is also made clear that this is a petition seeking protection against harassment. It is not to be construed as if this Court has entered into merits of the sessions case pending at Kanpur Nagar having arisen out of Case Crime No.102 of 2018. This petition is not to be construed as if this Court has condoned the act of petitioner No.2 who is facing criminal

proceedings as this Court has not gone into any other aspect. This petition shall also not be construed as can be stated to be statement of prosecutrix of the said matter as situation which arises now is based on unaffirmed documents and on the oral statement of the girl that she is major and seeks protection.

14. It goes without saying that all these observations are made only for the purpose of direction to the respondents to grant protection of life and liberty of the petitioners who claimed to be major and have entered into a wedlock.

15. With the aforesaid rider, the police authority may grant protection from harassment to the petitioners.

16. The writ petition is partly allowed. No order as to costs.

(2020)10ILR A234
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.09.2020

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE JAYANT BANERJI, J.

Writ- C No. 13916 of 2020

Pooja ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ganesh Shanker Srivastava, Sri Om Prakash Kannaujia

Counsel for the Respondents:
A.G.A.

A. Constitution of India – Article 226 – Writ – Alternative Remedy – Cancellation of caste certificate – The impugned order has been passed by the District Magistrate cancelling the caste certificate – Against the impugned order, the petitioner has a right of appeal before the Divisional Level Appellate forum as provided in paras 2 and 3 of the Government Order dated 27.01.2011 – Leaving open to the petitioner to file appeal, the Court directed the appellate authority to decide appeal without raising any objection as to the limitation. (Para 4, 5, 6 and 8)

Writ Petition dismissed (E-1)

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
& Hon'ble Jayant Banerji, J.)

1. Heard learned counsel for the petitioner and Sri S.N. Mishra, learned standing counsel for the respondents.

2. On 17.09.2020, this Court has passed the following order:-

"By the impugned minutes of the meeting of the District Level Committee dated 29.07.2020, the petitioner's caste certificate of Schedule Tribes was cancelled and the impugned consequential order dated 30.07.2020 has been passed by the District Magistrate, Mirzapur cancelling the caste certificate.

Sri S.N. Shukla, learned standing counsel submits that against the impugned order, the petitioner has a right of appeal before the Divisional Level Committee under the Government Order dated 27.01.2011. He prays for a day's time to produce the Government Order dated 27.01.2011.

As prayed by learned standing counsel, put up tomorrow as a fresh case at 10 A.M. for further hearing."

3. Today, learned standing counsel has produced two Government Orders dated 27.01.2011 and 28.02.2011, which are reproduced below:

Government Order No. 428 / 26-3-2011 dated 27.01.2011

"संख्या-428 / 26-3-2011

प्रेषक,

अतुल कुमार गुप्ता,
मुख्य सचिव,
उत्तर प्रदेश शासन

सेवा में,

1. समस्त प्रमुख सचिव / सचिव, उत्तर प्रदेश शासन।

2. समस्त विभागाध्यक्ष / प्रमुख कार्यालयाध्यक्ष, उत्तर प्रदेश।

3. समस्त मण्डलायुक्त, उत्तर प्रदेश।

4. समस्त जिलाधिकारी, उत्तर प्रदेश।

समाज कल्याण अनुभाग-3

लखनऊ, दिनांक, 27 जनवरी, 2011

विषयः- जाति प्रमाण पत्रों के सत्यापन / जांच हेतु मण्डल स्तर पर अपीलीय फोरम गठित किया जाना।

महोदय,

राज्याधीन सेवाओं में जाति प्रमाण पत्रों के सत्यापन के संबंध में शासनादेश संख्या-22/16/92-का-2/1996- टी०सी०-III दिनांक 5 जनवरी, 1996 द्वारा दिशा निर्देश जारी करते हुए प्रमुख सचिव समाज कल्याण विभाग, उ०प्र० शासन की अध्यक्षता में स्कूटनी कमेटी का गठन किया गया है, जो जाति प्रमाण पत्रों के सत्यापन के साथ मा० उच्च न्यायालय के समक्ष प्रस्तुत जाति संबंधी विवादों में पारित आदेशों के आधार पर निर्देशित मामलों की सुनवाई का अवसर देते हुए निर्णय पारित करती है।

2- जाति प्रमाण पत्र की वैधानिकता के संबंध में मा० उच्च न्यायालय खण्डपीठ लखनऊ में दायर रिट पिटीशन संख्या- 1611 (एम०बी०)/2008 तारामुनि थारू बनाम उ०प्र० राज्य व अन्य में मा० न्यायालय के निर्णय दिनांक 23-9-2010 में मा० न्यायालय द्वारा यह उल्लेख किया गया है कि जिलाधिकारियों द्वारा जारी किये जाने वाले जाति प्रमाण पत्रों के संबंध में न्यायालय के समक्ष बहुतायत संख्या में वाद दाखिल किये जाते है। इसी मामले में मा० न्यायालय द्वारा यह संवीक्षण किया गया है कि संविधान के अनुच्छेद 226 के अधीन व्यक्ति/ नागरिक को अपने प्रकरणों को गम्भीरतापूर्वक रखे जाने हेतु चूंकि कोई उचित फोरम नही है। अतः राज्य सरकार द्वारा इस हेतु एक अपीलीय फोरम की व्यवस्था निर्धारित किये जाने के लिए उचित व्यवस्था करें ताकि स्थानीय स्तर पर ही जाति प्रमाण पत्र को लेकर उत्पन्न विवाद का निराकरण हो सके।

4- अतः मा० न्यायालय के उक्त संवीक्षण के दृष्टिगत शासन द्वारा सम्यक विचारोपरान्त मण्डल स्तर पर मण्डलायुक्त की अध्यक्षता में निम्नलिखित मण्डलीय अपीलीय फोरम गठित किये जाने का निर्णय लिया गया है-

1. मण्डलायुक्त
अध्यक्ष

2. संबंधित जिलाधिकारी या उनका प्रतिनिधि जो अपर जिलाधिकारी
सदस्य
के स्तर से कम न हो

3. मण्डलायुक्त द्वारा नामित अनुसूचित जाति/अनुसूचित जनजाति/ सदस्य
अन्य पिछडा वर्ग का मण्डलीय स्तर का एक अधिकारी

4. उपनिदेशक समाज कल्याण (अनुसूचित जाति / अनुसूचित जनजाति
सदस्य सचिव
के मामले में)

अथवा

उपनिदेशक, पिछडा वर्ग कल्याण (अन्य पिछडा वर्ग के मामले में)

5- इस अपीलीय समिति के समक्ष जिलाधिकारी/उपजिलाधिकारी/तहसीलदार अथवा अन्य सक्षम अधिकारी द्वारा जारी किये गये जाति प्रमाण पत्र के निस्तारण संबंधी निर्णय से क्षुब्ध कोई व्यक्ति उक्त निर्णय के अधिकतम 90 दिनों के भीतर अपील कर सकेगा तथा उक्त अपीलीय समिति द्वारा उसको सुनवाई का समुचित अवसर प्रदान करते हुए तथा आवश्यकतानुसार जॉच कराकर विलम्बतम 30 दिनों में संबंधित प्रकरण का निर्णय करते हुए निस्तारित करेगी। उक्त फोरम के गठन के फलस्वरूप राज्य स्तर पर गठित स्क्रूटनी कमेटी अपने दायित्वों का यथावत निर्वहन करती रहेगी। उक्त समिति का निर्णय के विरूद्ध राज्य स्तर पर गठित स्क्रूटनी कमेटी के समक्ष पक्ष प्रस्तुत किया जा सकेगा।

भवदीय,
ह०अपठनीय
(अतुल कुमार गुप्ता)

मुख्य सचिव

संख्या- 428(1)/26-3-2010 तददिनांकः

प्रतिलिपि निम्नलिखित को सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषितः-

1. प्रमुख सचिव, महामहिम श्री राज्यपाल उत्तर प्रदेश।
2. प्रमुख सचिव मा० मुख्यमंत्री, उत्तर प्रदेश।
3. प्रमुख सचिव, कार्मिक विभाग, उत्तर प्रदेश शासन।
4. रजिस्ट्रार जनरल, उच्च न्यायालय, इलाहाबाद, उ०प्र०।
5. निदेशक, समाज कल्याण, उ०प्र०, लखनऊ।
6. निदेशक, जनजाति विकास, उ०प्र०, लखनऊ।
7. निदेशक, पिछडा वर्ग कल्याण, उ०प्र०, लखनऊ।
8. निदेशक, अनु०जाति/अनु०जनजाति शोध एवं प्रशिक्षण संस्थान उ०प्र०, लखनऊ।
9. निबंधक मा० उच्च न्यायालय, इलाहाबाद खण्डपीठ, लखनऊ।
10. निदेशक, प्रशिक्षण एवं सेवायोजन, उ०प्र०।
11. सचिव, लोग सेवा आयोग, उ०प्र०, इलाहाबाद।
12. सचिव, विधान सभा सचिवालय/विधान परिषद सचिवालय, उ०प्र०, लखनऊ।
13. राज्य के समस्त उपक्रमों/ निगमों के अध्यक्ष/ प्रबंध निदेशक/कार्यकारी अधिकारी, उ०प्र०।
14. प्रदेश के समस्त विश्वविद्यालयों के निबंधक।
15. सचिवालय के समस्त अनुभाग।
16. गार्डफाइल।

आज्ञा से,

ह०अपठनीय
(बलविन्दर कुमार)
प्रमुख सचिव"

Government Order No. 428 / 26-3-2011 dated 28.02.2011

"संख्या-685 / 26-3-2011

प्रेषक,

बलविन्दर कुमार,
प्रमुख सचिव,
उत्तर प्रदेश शासन

सेवा में,

1. समस्त प्रमुख सचिव / सचिव, उत्तर प्रदेश शासन।
2. समस्त विभागाध्यक्ष / प्रमुख कार्यालयाध्यक्ष, उत्तर प्रदेश।
3. समस्त मण्डलायुक्त, उत्तर प्रदेश।
4. समस्त जिलाधिकारी, उत्तर प्रदेश।

समाज कल्याण अनुभाग-3

लखनऊः दिनांकः 28, फरवरी, 2011

विषयः- जाति प्रमाण पत्रों के सत्यापन हेतु जनपद स्तर पर जाति प्रमाण पत्र सत्यापन समिति का गठित किया जाना।

महोदय,

राज्याधीन सेवाओं में जाति प्रमाण पत्रों के सत्यापन के संबंध में मा० उच्चतम न्यायालय द्वारा माधुरी पाटिल बनाम एडिशनल कमिश्नर ट्राइबल नामक वाद में पारित आदेश संख्या-1994 (6) एस०सी०सी० 241 दिनांक 02 सितम्बर, 1994 के परिप्रेक्ष्य में शासनादेश संख्या-22/16/92-का-2/1996- टी०सी०-III दिनांक 5 जनवरी, 1996 द्वारा प्रमुख सचिव, समाज कल्याण की अध्यक्षता में राज्य स्तर पर स्कूटनी कमेटी का गठन किया गया है, जो जाति प्रमाण पत्रों के सत्यापन के साथ मा० उच्च न्यायालय के समक्ष प्रस्तुत जाति संबंधी विवादों में पारित आदेशों के आधार पर निर्देशित मामलों की सुनवाई का अवसर देते हुए निर्णय पारित करती है।

2- जाति प्रमाण पत्रों के सत्यापन और उनकी वैधानिकता की जांच करने तथा इस संबंध में पारदर्शी व्यवस्था बनाने एवं जाति प्रमाण पत्रों के फर्जी बनाये जाने एवं उसके दुरूपयोग को रोकने हेतु मा० उच्चतम न्यायालय के उपरोक्त निर्णय के अनुपालन में जारी उक्त शासनादेश दिनांक 05 जनवरी, 1996 के अनुक्रम में जाति प्रमाण पत्रों के बनाये जाने और उसके सत्यापन संबंधी मामलों की बहुतायत संख्या को देखते हुए शासनादेश संख्या-428/26-3-2011, दिनांक 27-1-2011 द्वारा जाति प्रमाण पत्रों के मण्डल स्तर पर सत्यापन हेतु मण्डलायुक्त की अध्यक्षता में अपीलीय फोरम गठित किया गया है, जिसमें जनपद स्तर पर राजस्व अधिकारियों द्वारा बनाये जाने वाले जाति प्रमाण पत्रों के संबंध में आ रही कठिनाईयों से क्षुब्ध व्यक्ति अपील दायर कर सकते है।

3- इसी संदर्भ में दायर रिट याचिका संख्या-1396/2011 (पी०आई०एल०) थारू शक्ति समिति महराजगंज व अन्य बनाम उ०प्र० राज्य व अन्य में जाति प्रमाण पत्रों के सत्यापन के संबंध में मा० उच्च न्यायालय के आदेश दिनांक 12-1-2011 में दिये गये संवीक्षण के परिप्रेक्ष्य में जाति प्रमाण पत्रों के सत्यापन की व्यवस्था को और अधिक पारदर्शी तथा सुगम बनाये जाने हेतु जनपद स्तर पर भी निम्नानुसार समिति गठित की जाती हैः-

1. जिलाधिकारी
अध्यक्ष
2. जिलाधिकारी द्वारा नामित
सदस्य
एक अपर जिलाधिकारी स्तर का अधिकारी
3. जिलाधिकारी द्वारा नामित
सदस्य
एक उप जिलाधिकारी
4. जिला समाज कल्याण अधिकारी
सदस्य सचिव
(अनु० जाति / अनु० जनजाति हेतु)
एवं
जिला पिछड़ा वर्ग कल्याण अधिकारी
(अन्य पिछड़ा वर्ग हेतु)

उपरोक्त समिति के समक्ष यथास्थिति अभ्यर्थी के द्वारा स्वयं, उसके माता-पिता या अभिभावक द्वारा किसी शैक्षिक संस्था में प्रवेश हेतु अथवा किसी सेवा में नियुक्ति के लिए जाति प्रमाण पत्रों के सत्यापन हेतु आवेदन प्रस्तुत किया जायेगा, जिस पर समिति द्वारा सत्यापन की पुष्टि विलम्बतम 15 दिन में कर दी जायेगी।

4- इसके अतिरिक्त उक्त समिति द्वारा जाति प्रमाण पत्रों के संबंध में निम्न प्रकार के मामलों का भी निस्तारण किया जायेगाः-

1. किसी नियुक्ति के पश्चात सेवायोजक द्वारा सेवक के जाति प्रमाण पत्र के सत्यापन/पुष्टि हेतु प्रस्तुत किये गये मामले।

2. किसी व्यक्ति अथवा व्यक्तियों के समूहों के संबंध में जाति प्रमाण

पत्रों के न बनाये जाने संबंधी शिकायतों के मामले।

3. जाति प्रमाण पत्रों के फर्जी होने अथवा त्रुटिपूर्ण जाति प्रमाण पत्र

बनाये जाने संबंधी मामले।

4. जाति प्रमाण पत्रों के संबंध में किसी अन्य विसंगति के मामले।

5- समिति उपरोक्त प्रस्तर-4 में उल्लिखित ऐसे सभी मामलों का निस्तारण विलम्बतम 30 दिनों के भीतर कर देगी और समिति के निर्णय से क्षुब्ध कोई व्यक्ति उक्त निर्णय, के अधिकतम 90 दिनों के भीतर शासनादेश संख्या-428/26-3-2011, दिनांक 27-1-2011 द्वारा मण्डलायुक्त की अध्यक्षता में गठित मण्डलीय अपीलीय फोरम के समक्ष अपील कर सकेगा। उक्त समिति की बैठक माह में कम से कम एक बार अवश्य की जायेगी। जनपद स्तरीय उक्त समिति के गठन के फलस्वरूप मण्डलीय अपील समिति तथा राज्य स्तर पर गठित स्कूटनी कमेटी अपने दायित्वों का यथावत निवर्हन करती रहेगी।

भवदीय,
ह०अपठनीय
(बलविन्दर कुमार)
प्रमुख सचिव

संख्या- (1)/26-3-2011 तददिनांकः

प्रतिलिपि निम्नलिखित को सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषितः-

1. प्रमुख सचिव, महामहिम श्री राज्यपाल उत्तर प्रदेश।

2. प्रमुख सचिव मा० मुख्यमंत्री, उत्तर प्रदेश।

3. प्रमुख सचिव, कार्मिक विभाग, उत्तर प्रदेश शासन।

4. रजिस्ट्रार जनरल, उच्च न्यायालय, इलाहाबाद, उ०प्र०।

5. निदेशक, समाज कल्याण/जनजाति विकास/पिछडा वर्ग कल्याण विभाग, उ०प्र०, लखनऊ।

6. निदेशक, अनु० जाति एवं अनु० जनजाति शोध एवं प्रशिक्षण संस्थान, उ०प्र०, लखनऊ।

7. निबंधक, मा० उच्च न्यायालय, इलाहाबाद खण्डपीठ, लखनऊ।

8. सचिव, लोक सेवा आयोग, उ०प्र०, इलाहाबाद।

9. राज्य के समस्त उपक्रमों/निगमों के अध्यक्ष/प्रबंध निदेशक/कार्यकारी अधिकारी, उ०प्र०।

10. प्रदेश के समस्त विश्वविद्यालयों के निबंधक।

11. सचिवालय के समस्त अनुभाग।

12. वेवमास्टर, समाज कल्याण/गार्डफाइल।

आज्ञा से,

ह०अपठनीय
(शशि कमल गोस्वामी)
अनु सचिव"

4. As per impugned minutes of the meeting of the District Level Committee dated 29.07.2020, a decision has been taken in terms of the aforequoted Government Order dated 28.02.2011. The impugned consequential order dated 30.07.2020 has been passed by the District Magistrate cancelling the caste certificate of the petitioner.

5. Against the impugned order, the petitioner has a right of appeal before the Divisional Level Appellate forum as provided in paras 2 and 3 of the aforequoted Government Order dated 27.01.2011.

6. Since the petitioner has alternative remedy of appeal as provided in the aforequoted Government Order dated 27.01.2011, therefore, we dismiss the present writ petition, leaving it open to the petitioner to file an appeal before the appellate authority.

7. With the aforesaid observations, the writ petition is **dismissed.**

8. If such an appeal is filed before the appellate authority within four weeks from today alongwith a copy of this order, then the same shall be entertained by the appellate authority without raising any objection as to the limitation.

(2020)10ILR A239
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.10.2020

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.

Writ- C No. 15757 of 2020

Mohd. Meherban Ansari ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Madhusudan Dixit

Counsel for the Respondents:
C.S.C., Sri Satyam Singh

A. Civil Law -U.P. Urban Planning and Development Act, 1973 – Section 14 & 15 – Prior approval of Vice-Chairman – Necessity – A co-joint reading of Section 14 and 15 of the Act leaves an inescapable conclusion that no development, defined in Section 2(e) to include with its grammatical variations carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in any building or land, and includes re-development, can be undertaken without the prior approval of the Vice-Chairman. (Para 6)

B. Civil Law -Compounding Scheme, 2020 – Permitting the acts prohibited under the Act, 1973 – Validity – The authorities of State cannot frame scheme which is in teeth of express provisions of the Act and goes wholly contrary to the objects enumerated of planned development of urban areas – The authorities of the State Government are expected to act in furtherance of the object of the Act, so as to stop illegal constructions and not to encourage such illegal constructions upon payment of hefty amount – This would clearly discourage the honest citizens who ensure compliance of laws by obtaining prior permission as per the Act of 1973 – Personal affidavit of Additional Chief Secretary called upon, interim order issued. (Para 12, 14, 15 and 16)

Petition kept pending (E-1)

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. Petitioner is accused of having raised constructions without obtaining prior sanction from the Vice Chairman in terms of Section 14 and 15 of the U.P. Urban Planning and Development Act, 1973, and consequently an order sealing the premises has been passed against him, which has also been affirmed in appeal. Aggrieved by these two orders petitioner is before this Court.

2. Learned counsel for the petitioner states that the State Government has issued a new Compounding Scheme, 2020, as per which various constructions otherwise not permissible in the building bye-laws have also been made compoundable. It is submitted that petitioner intends to avail of benefit under the compounding scheme, and therefore the authorities be directed to

examine his claim with reference to such scheme and till then no further proceedings be undertaken.

3. Learned Standing Counsel has been heard for the State Authorities while Sri Satyam Singh, Advocate, has been heard for the Saharanpur Development Authority (hereinafter referred to as "the authority'). I have perused the materials placed on record and have also perused the Compounding Scheme, 2020, notified on 15th July, 2020. This scheme is apparently enforced for a period of six months.

4. Records brought before this Court in the present writ petition raise serious concern for planned urban development in the State of Uttar Pradesh, and therefore, the Court is constrained to call upon the State Government upon the issues noticed hereinafter.

5. The U.P. Urban Planning and Development Act, 1973 (hereinafter referred to as the "Act of 1973') has been enacted with the object of ensuring development of certain areas of Uttar Pradesh according to plan and for matters ancillary thereto. Chapter- III of the Act of 1973 provides for hierarchy of plans i.e. Master plan, Zonal Development plan, Building Bye-laws and lay-out plan etc. All development in the notified area of the authority is required to be carried out strictly in accordance with such plan(s). Section 14 of the Act of 1973 clearly mandates that no development within the development area of the authority can be allowed without prior approval of the Vice Chairman of the authority. Section 14(1) and (2) reads as under:-

"14. Development of land In the developed area.-

(1) After the declaration of any area as development area under Section 3, no development of -land shall be undertaken or carried out or continued in that area by any person or body (including a department of Government)- unless permission for such development has been obtained in writing from the [Vice-Chairman) in accordance with the provision of this Act.

(2) After the coming into operation of any of the plans in any development area no development shall be undertaken or carried out or continued in that area unless such- development is also in accordance, with such plans."

6. Section 15 of the Act of 1973 specifies the manner of obtaining such permission. A co-joint reading of Section 14 and 15 of the Act leaves an inescapable conclusion that no development, defined in Section 2(e) to include with its grammatical variations carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in any building or land, and includes re-development, can be undertaken without the prior approval of the Vice-Chairman.

7. The Vice-Chairman can also permit development only in accordance with the plans referred to in Part III, III-A & IV of the Act of 1973 and the building bye-laws framed thereunder. This scheme under the Act is explicitly warranted for ensuring planned development of the area notified for the respective authority. Section 16 of the Act of 1973 prohibits any development contrary to the plan.

8. The Act of 1973 also provides for the consequences that arise in the event development is undertaken contrary to

Section 14 of the Act of 1973. Various measures including penalty, demolition, sealing etc. have been provided for in Chapter-VIII of the Act of 1973. Some of such violations also constitute offence under the Act for which proceedings can be drawn as per the Act of 1973. Section 32 of the Act of 1973 provides for composition of offences. This provision apparently has been invoked for framing the Compounding Scheme, 2020, and is therefore reproduced hereinafter:-

"32. Composition of Offences.-

(1) Any offence made punishable by or under this Act may either before or after the institution of proceedings, be compounded-by the [Vice-Chairman (or any officer authorised by him in that behalf by General or Special order)] on such terms, including any term as regards payment of a composition fee, as the [Vice-Chairman) (or such officer) may think fit.

(2) Where an offence has been compounded, the offender, if in custody, shall be discharged and no further proceedings shall be taken against him in respect of the offence compounded."

Power to frame bye-laws is otherwise conferred upon the authority under Section 57 of the Act of 1973 which can only be in furtherance of the provisions contained in the Act of 1973.

9. The Compounding Scheme, 2020, which is relied upon by the petitioner and is Annexure-4 to the writ petition outlines its necessity and objectives. Clause 1.1 states that private capital has been invested in illegal constructions undertaken in urban areas of which demolition is neither practicable nor is desirable from human considerations. Clause 1.2 states that most of such illegal constructions are not compoundable as per the compounding bye-laws of the authority and therefore there is a need to regularize such illegal constructions under a special compounding scheme. Clause 4 provides for compounding of illegal constructions made till the issuance of the scheme. 20% additional construction has been made permissible over and above what is permissible in the building bye-laws in plots measuring upto 300 Sq. metres, covering entire constructions in the side and rear and 50% of the front set-back. 15% additional constructions in Group Housing, Commercial, Institutional and Multi-storied buildings is also made permissible/compoundable over and above the building bye-laws. Additional floor area ratio (FAR) has also been allowed while compounding the illegal constructions. Various other impermissible developments (constructions) in the building bye-laws have also been made compoundable in the scheme.

10. Clause 5 specifies the amount payable for compounding the developments/constructions made contrary to the Act of 1973. Huge amounts upto the extent of 100% of the land cost needs to be paid for compounding constructions which are otherwise wholly impermissible in law.

11. What is being made permissible in the compounding scheme, 2020, prima facie, shows that the aims and objectives underlying the Act of 1973 have been given up by the State and activities prohibited by law is being permitted upon payment of huge sums to the authority/State.

12. Merely because large number of persons have invested private capital for raising constructions contrary to the Act cannot be a ground to surrender the interest of planned development for which the Act

of 1973 itself has been enacted. The authorities of State cannot frame scheme which is in teeth of express provisions of the Act and goes wholly contrary to the objects enumerated of planned development of urban areas. Substantial public interest is involved in securing planned development of urban areas in accordance with the Act of 1973 which cannot be sacrificed by a statutory scheme which is otherwise not referable to any provision contained in law.

13. Another aspect that arises for consideration is the ambit and scope of powers under Section 32 of the Act of 1973. Prima facie, it only permits compounding of offences under the Act of 1973 and cannot be stretched to permit legalizing such constructions which are in teeth of the Act of 1973. The permissible norms of construction in the building bye-laws also cannot be relaxed while framing a scheme for compounding by the State. No express provision under the Act of 1973 has otherwise been enumerated in the compounding scheme, 2020, whereunder it is formulated.

14. A prima facie perusal of the compounding scheme, 2020 would go to show that the illegalities committed by violating the provisions of the Act of 1973 by raising illegal constructions are sought to be regularized upon payment of huge composition fee. The authorities of the State Government are expected to act in furtherance of the object of the Act, so as to stop illegal constructions and not to encourage such illegal constructions upon payment of hefty amount. This would clearly discourage the honest citizens who ensure compliance of laws by obtaining prior permission as per the Act of 1973, inasmuch as they are subjected to stricter norms provided in the building bye-laws, while those who violate the law are allowed to raise much larger constructions, which is not even permissible in the building bye-laws. The compounding scheme, 2020, otherwise appears to be wholly beyond the scope of the Act of 1973 including Section 32. Section 32 only permits composition of offences and not permits raising of constructions contrary to the building plan. The compounding of development undertaken contrary to the Act of 1973 is therefore, prima facie, found to be clearly contrary to the aims, objectives and the provisions of the Act of 1973.

15. The Additional Chief Secretary of the department concerned shall file his personal affidavit justifying the Compounding Scheme, 2020, in light of the above observations. Put up this matter in the additional cause list, once again, on 20.10.2020.

16. As substantial damage to the aim and objectives of planned development is likely to occur if the compounding scheme, 2020 is given effect to, therefore, the State Government as also all development authorities within the State of Uttar Pradesh are restrained from compounding any illegal constructions pursuant to the compounding scheme, 2020, notified by the State Government on 15.7.2020. Till the next date of listing the petitioner's constructions shall also not be demolished and he shall be restrained from raising any further constructions. The State Government is further directed to communicate this order to all the

development authorities in the State for necessary compliance.

(2020)10ILR A243
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.08.2020

BEFORE

THE HON'BLE J.J. MUNIR, J.

Writ- C No. 30660 of 2000

Duncans Industries Ltd.(Fertiliser Div.), Panki Kanpur ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri B.K. Mukerjee, Sri P.K. Mukerjee, Sri S. Chatterjee

Counsel for the Respondents:

Sri S.M.A. Kazmi, Sri D. Chauhan, Ms. Bushra Maryam, Sri Pankaj Srivastava, Sri Rakesh Kumar, Sri Rohit Shukla, S.C. Vikram, Sri Vikram D. Chauhan, Sri Sanjay Singh Yadav

A. Labour law – Industrial Dispute Act, 1947 – Regularization of workmen – Continuous service for 240 days in a calendar year – Its relevance – Factum of continuous service for 240 days in a calendar year is relevant under Section 6-N of the Act, which relates to retrenchment of a workmen. It is absolutely irrelevant to a workman's right to claim regularization – However, consideration of one irrelevant factor by the Industrial Tribunal does not detract from the overall soundness of the conclusion, considering other relevant factors that have entered judgment – Held, the Labour Court has reasonably concluded that from the date the workmen have been engaged by the Employers, they are in their regular and continuous employment; the workmen were retained by the Employers to do work of a perennial nature. (Para 38, 39 and 40)

B. Labour law – Regularization of workmen – Principle relating to the State service – It's applicability to Non-state service – The decision of MP Housing Board's case and Umadevi's case laying down the proposition that Courts, by exercise of the judicial power, cannot thrust regularization upon the executive; etc. are bedrocks of support for the proposition that Employers canvass – These principles are not open to question in the field of service law, where employment is either under the State or a State Instrumentality – These principles, however, may not apply in cases of industrial disputes, where the Employers are an industry, who are not in any way the State or a State Instrumentality – Held, if the Industrial Tribunal were to find the action of the Employer continuing their workmen under a facade as casuals to do work of a permanent nature, an unfair labour practice, there is no principle that forbids the Tribunal under the Act from undoing that injustice. (Para 44, 45 and 46)

C. Labour law – Industrial Tribunal – Finding of facts – Unfair labour practice – **I**ndustrial Tribunal has recorded a positive finding that it is case of unfair labour practice by the Employers on the facts and circumstances that show that the Employers have retained the workmen as casual hands to do work of a perennial nature – The said finding is a pure finding of fact, based on appreciation of evidence, about which there is no demonstrable or manifest illegality – Held, no illegality, much less a manifest illegality, can be found in the impugned award. (Para 48 and 60)

Writ Petition dismissed (E-1)

Cases relied on :-

1. Chandra Shekhar Azad Krishi Evam Prodyogiki Vishwavidyalaya Vs United Trades Congress & anr., (2008) 2 SCC 552.

2. M.P. Housing Board & anr. Vs Manoj Shrivastava, (2006) 2 SCC 702

3. Secretary, St. of Kar. & ors. Vs Umadevi (3) & ors.,(2006) 4 SCC 1

4. Indian Drugs & Pharmaceuticals Ltd. Vs Workmen, Indian Drugs & Pharmaceuticals Ltd., (2007) 1 SCC 408

5. Maharashtra State Road Transport Corporation & anr. Vs Casteribe Rajya Parivahan Karmchari Sanghatana, (2009) 8 SCC 556

6. U.P. State Road Transport Corporation, Kanpur & anr. Vs Roadways Karamchari Sanyukt Parishad & ors., 2013 SCC OnLine All 13737

7. M/s. Hindustan Tin Works Pvt. Ltd. Vs Employees of M/s. Hindustan Tin Works Pvt. Ltd. & ors., (1979) 2 SCC 80

8. Workmen of Bhurkunda Colliery of Central Coalfields Ltd. Vs Bhurkunda Colliery of Central Coalfields Ltd., (2006) 3 SCC 297

9. Harjinder Singh Vs Punjab State Warehousing Corporation, (2010) 3 SCC 192

10. Bharat Bank Ltd., Delhi Vs Employees of the Bharat Bank Ltd., Delhi, AIR 1950 (37) SC 188

11. State of Maharashtra & anr. Vs R.S. Bhonde & ors., (2005) 6 SCC 751

12. Divisional Manager, Aravali Golf Club & anr. Vs Chander Hass & anr., (2008) 1 SCC 683

(Delivered by Hon'ble J.J. Munir, J.)

1. The petitioners are Employers disillusioned with an award of the Presiding Officer, Industrial Tribunal (3), U.P., Kanpur passed in an industrial dispute between them and their workmen. The original petitioners were a certain Duncans Industries Limited (formerly known as Chand Chhap Fertilizer and Chemicals Limited, Fertilizer Division, Panki, Kanpur). It appears that due to losses suffered in business by Duncans they became sick and were declared a sick industrial company by the Board of Industrial and Financial Reconstruction (for short, 'the BIFR'), under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 vide order dated 21.07.2007. The State Bank of India were appointed the operating agency to explore avenues for revival of the sick industrial company. In proceedings before the BIFR, a certain M/s. Kanpur Fertilizer and Cement Limited proffered to work in joint venture for revival of the sick industrial company. The operating agency acting on the said offer, drew up and presented a draft Rehabilitation Scheme on January the 16th, 2012 to the BIFR. This scheme was sanctioned by the BIFR in terms that the fertilizer undertaking of Duncans would be transferred to and vest in M/s. Kanpur Fertilizers and Cement Limited, as a going concern. The sanctioned Rehabilitation Scheme also transferred all liabilities of Duncans to M/s. Kanpur Fertilizers and Cement Limited, including pending legal proceedings. It is in this manner that the petitioners' name has now been changed to M/s. Kanpur Fertilizers and Cement Limited, Panki, Kanpur.

2. M/s. Kanpur Fertilizers and Cement Limited sought impleadment in place of Duncans through Civil Misc. Application No. 199844 of 2012. This application was allowed by an order of the Court dated 22.08.2012. The petitioners, originally called Duncans Industries Limited (Fertilizer Division), Panki, Kanpur, have since been virtually substituted as M/s. Kanpur Fertilizers and Cement Limited, Panki, Kanpur. The petitioners have been impleaded under their new name and style, rather incongruously as petitioner No. 1/1. The petitioners ought to have been impleaded as M/s. Kanpur Fertilizers and Cement Limited, with their particulars, after striking out the name of Duncans from the array. Nevertheless, that need not detain this Court any further, except for a remark that M/s. Kanpur Fertilizers and Cement Limited, Kanpur, Panki are and shall be the sole petitioner of this writ petition in place of Duncans.

3. The Employers have moved this Court praying for a writ, order or direction

in the nature of certiorari to quash the award of the Presiding Officer, Industrial Tribunal (3), U.P., Kanpur (Published on 10.05.2000) passed in Adjudication Case No. 162 of 1989 between the Employers and their twenty-seven workmen, twenty-four of whom are arrayed here as respondent nos. 6 to 29. The respondents-workmen are hereinafter referred to as 'the workmen'. Four of the workmen are dead and have been substituted by their heirs and legal representatives vide an order of this Court dated 10.09.2018. The future reference to workmen, shall include those legal representatives. The award passed by the Labour Court, last mentioned, shall hereinafter be called "the impugned award'.

4. It must be recorded here that in the writ petition, challenge was laid to the vires of the provisions of Section 4-E (2) and (3) of the Uttar Pradesh Industrial Disputes Act, 1947. This challenge, however, was given up by the learned Counsel for the Employers, during the hearing on 11.02.2020. The challenge is, therefore, confined to the validity of the impugned award.

5. Proceedings before the Labour Court commenced on a reference made under Section 4-K of the U.P. Industrial Disputes Act vide order dated 28.09.1989, in the following terms (translated into English from Hindi vernacular):

"Whether the Employers are obliged to declare 38 workmen detailed in the attached schedule, permanent? If yes, from what date and with what particulars?"

6. It appears that an industrial dispute was raised by the Fertilizer Workers Union, Kanpur, impleaded here as respondent no.5 (for short, 'the Union'), acting on behalf of the workmen. The reference aforesaid led to registration of Adjudication Case No.162 of 1989 on the file of the Presiding Officer, Industrial Tribunal (3), U.P. Kanpur. He issued notice to the parties asking them to put in their pleadings. The Employers put in their written statement dated 01.02.1990. They further filed an amended written statement. The workmen filed a written statement through the Union, dated 29.11.1989. A reply to the amended written statement was filed by the workmen on 28.10.1994. The Employers filed a rejoinder statement dated 27th March, 1990 and the workmen filed their rejoinder statement dated 16th September, 1997.

7. In support of the Employers' case, four witnesses were examined, that is to say, Captain Chopra, Mrs. P. Ganguli, Daud Khan and Captain Tripathi. Likewise, on behalf of the workmen four persons, to wit, Chhotelal, Jaspal, Binda Prasad and A.K. Srivastava were examined as witnesses. The testimony of the Employers' witnesses and the workmen's witnesses is on record as Annexures to this petition. The documentary evidence, which finds mention in the impugned award, has not been placed before the Court, either by the Employers or the workmen. These documents have been noticed in the award as EW-1 to 9 and W-12 to 28, which appear to be the Employees State Insurance identity cards. There is also Exhibit W-10-11 relating to M/s. Dev Kumar and Narain Dixit, respectively, that is said to be the log book showing their dates of employment as 20.08.1985 and 12.11.1982, in that order. Exhibits E-1 and E-2 relate to Sobhnath, who was retained as a casual hand. These are two applications dated 01.12.1985 and 26.08.1986 relating to his employment as a casual hand. Likewise, Exhibits E/3, 4 and 5 relate to Rampyare. It is a form dated

26.08.1986 for his casual employment. Likewise, there are Exhibits E-6 to E-24 all relating to different workmen, being applications and other documents all of which appear to be evidence about the date of their employment. There is one Exhibit E/5, which is an internal advertisement relating to some post described as a GC in the packing plant. This reference to evidence has been drawn from the description of it in the impugned award. There is no mention of this documentary evidence in the writ petition or the other pleadings of parties before this Court. The Labour Court, after hearing parties, passed the impugned award, answering the reference in favour of the workmen, in terms that the Employers were ordered to appoint the workmen as permanent with effect from the date of the award and to pay them wages, besides other benefits admissible to permanent workmen. It has been brought to the notice of this Court, through the third Supplementary Affidavit, sworn on 7th February 2019, that of the 38 workmen whose dispute was referred to the Adjudication of the Labour Court, eleven were excluded from Adjudication proceedings on account that some of them died whereas others joined other establishments.

8. It is pointed out that the adjudication proceedings went ahead in relation to 27 workmen alone. Of them it is said in paragraph no.5 of the affidavit under reference that 24 workmen, who were parties to the adjudication case and were interested in the matter, got themselves impleaded personally.

9. It has also been asserted in this affidavit in paragraph nos.6, 7, 8 and 9 that of the 24 workmen who have sought individual impleadment, the Union aside impleaded as respondent no.5, five have settled their dispute with the Employers, withdrawing their gratuity and other dues. In addition, of the remainder, seventeen workmen have attained the age of superannuation according to their provident fund declaration Forms 9, annexed as Annexure 9 to the writ petition. It is the stand of the Employers that 9 workmen alone wish to contest these proceedings in *presenti.*

10. This Court does not think so. No doubt photostat copies of the affidavits in relation to the five workmen who are said to have settled with the Employers outside Court have been annexed along with two earlier supplementary affidavits, but no such stand has been taken before this Court by the learned Counsel appearing for them. The fact that these five workmen have settled could be true or untrue. So long as the five workmen do not file their affidavits before this Court that they have settled, this Court cannot act on photostat copies of documents annexed to the Employers affidavit. As for those eight workmen, who are said to have retired, it does not mean that their rights under the award have been extinguished. If the award were to be enforced, the benefit of it would enure to them, their superannuation notwithstanding.

11. There is an added reason for this Court to believe that the workmen shown to have compromised, may not have done so. This is for the reason that the workmen, arrayed as respondent nos. 6, 15, 22 and 26, have died pending this petition and their widows have come forward to seek substitution, that has been granted by an order of this Court dated 10.09.2018. The Employers have placed on record a photostat copy of an affidavit of Smt.

Balwanti, widow of late Toofani, impleaded to the writ petition as respondent no. 6. A copy of the affidavit filed along with the supplementary affidavit dated 24.07.2017, shows it to be one sworn on 10th March, 2017. The fact that Smt. Balwanti has pressed for substitution and secured it on 10.09.2018, does not support a case of settlement prima facie. This Court is, therefore, not inclined to accept a case about any kind of a settlement, in the absence of the concerned workmen saying so before this Court on their affidavit. The Labour Court has recorded a specific finding, in relation to eleven of the thirty-eight workmen, at whose behest this industrial dispute was raised, that they have opted out or otherwise become disassociated with the present industrial dispute. The names of the workmen, who have disassociated or exited the industrial dispute, are detailed in paragraph 8 of the impugned award. They are:

Sr. No.Names	**Reason of disassociation**
1. Shiv Singh Negi	Opted out of the dispute
2.Anil Kumar Srivastava	Opted out of the dispute
3. Allauddin	Opted out of the dispute
4. Jagdish Kumar	Opted out of the dispute
5. H.K. Dwivedi	Left service and joined KETELCO
6. Ramdas	Left service and joined KETELCO
7. Ram Lal	Left service and joined KETELCO
8.Ashok Kumar (II)	Died
9. Ayodhya Prasad	Died
10. Gajadhar	Retired
11. Dukh Haran	Retired

The circumstances, in which these workmen have abandoned their rights in the instant industrial dispute, have been enumerated in the impugned award. Accordingly, this writ petition is being heard on the basis that of all the thirty-eight workmen, at whose instance this industrial dispute was raised by the Union, twenty-seven alone continue to be parties. This figure of twenty-seven largely accounts for the twenty four, who have become parties to this writ petition.

12. To put the record straight, of all the thirty-eight workmen, at whose instance this industrial dispute was raised, it is the twenty-seven workmen, detailed hereinafter (the heirs and legal representatives of the deceased workmen included), whose case shall be considered by this Court, regarding them as the parties to the industrial dispute. The names of these workmen are indicated below, along with the employment dates shown against their respective names:

Sr. No.	**Name Date of Engagement**
1. Tufani	14.04.1985
2. Narayan Kumar (I)	24.01.1984
3. Jaspal Kumar	25.01.1984
4. Binda Prasad	24.01.1984
5. Krishna Kumar	15.03.1983
6. Narayan (Retired)	25.01.1984
7. Babu Lal	24.01.1984
8. Umesh Kumar	31.01.1984
9. Uma Shankar	26.01.1984
10. Dev Kumar	20.08.1985
11. Deen Dayal	14.06.1985
12. Anant Lal	17.09.1981
13. Asha Ram	27.08.1982
14. Sri Narayan Dixit	12.11.1982
15.Chhotey Lal	12.06.1985
16. Bange Lal	28.08.1986
17. Vijay Lal	26.11.1986
18. Jagdev	28.08.1986
19. Ganesh	28.08.1986
20. Vishram	28.08.1986

21. Chaunhar	28.08.1986
22. Jhinaku Yadav	28.08.1986
23. Sobhnath	28.08.1986
24.Robbin Bruth	16.04.1982
25.Ram Pyarey	27.08.1986
26.P.K. Dutta	06.02.1984
27.Chandrabhan Prasad	24.01.1984

13. Heard Sri S. Chatterjee, learned Counsel for the Employers and Ms. Bushra Maryam, learned Counsel appearing for the workmen.

14. The Labour Court has recorded findings to the effect that Exs. W/1 - W/28 show that the workmen have been employed with effect from the dates, indicated against their respective names, claimed by them. These dates of retention for the different workmen are also corroborated by the Employers' documents, filed as Exs. E/1 - E/24. There is then a remark by the Labour Court that these documents indicate that the workmen have been in continuous employment from their date of retention and have put in 240 days of service in the Employers' establishment, each year. The Labour Court has gone on to say that the Employers have urged that these workmen were retained as casual labourers, according to exigencies of work from time to time. They cannot, therefore, ask for regularization.

15. It is noted further by the Labour Court that the contra submission advanced on behalf of the workmen is that they have been retained to do work in the establishment of a perennial nature. They have been doing that work continuously since their engagement, putting in 240 days' service each year. They are, therefore, entitled to be made permanent. The Labour Court has taken note of a certain Employers' witness, who testified as EW-4 and acknowledged during his cross-examination that casual hands are retained in place of workmen, who are absent from duties.

16. The Labour Court has remarked that the Employers have not furnished any particulars, indicating which of the workmen were retained as casual hands to discharge duties, of which of the named absenting permanent workmen. It is also said by the Labour Court that the Employers have not testified to the effect whether the workmen are in continuous employment, from the date of their retention. The Labour Court has drawn an inference that from the evidence of this witness, it cannot be said that the workmen are not in continuous employment from the dates of their engagement. The Labour Court has then proceeded to hold that in view of all this evidence and circumstances, it would be incorrect to say that the workmen have been retained as casual hands, from time to time, according to exigencies of work. This stand of the Employers was found unacceptable.

17. The Labour Court has also noticed that the documents brought on record show that prior to engagement as casual hands by the establishment, these workmen were also retained by the Employers as workmen of a Labour Contractor. For the period of engagement, that the services of workmen were hired through the Labour Contractor, they have been disowned by the Employers as the Contractor's employees, with whom they had no kind of privity or relationship of Employer and Employee. The Labour Court has remarked that the Employers cannot forsake their obligations towards the workmen by dubbing them as the Labour Contractor's men, inasmuch as during the relevant period of time, these workmen worked for the Employers in their

establishment, under their direct control. As such, the Employers were their principal Employer and the Labour Contractor, an agency for engagement alone.

18. The Labour Court has held that in these circumstances, during time that the workmen were engaged through the Labour Contractor, they would be considered to be retained by the Employers and part of their establishment. There is then an added remark that even if it be assumed that the period of time, during which the services of the workmen were secured through the Labour Contractor, is to be discounted, it would have no bearing on the workmen's rights here. This is so, because the relevant dates of retention in service, on the basis of which the workmen claim rights, are those when the workmen entered into direct engagement with the Employers de hors the agency of a Labour Contractor. It is quite another matter, the Labour Court says, that they have been shown by the Employers as casual hands, who have been paid on a daily-wage basis. In the opinion of the Labour Court, the continued description of the workmen as casual hands and their remuneration on daily-wages, cannot be said to be proper.

19. The Labour Court has gone on to say that it was the Employers' obligation to show by production of relevant records that the workmen did not render regular services in the establishment, and that they were hired from time to time, according to exigencies of work. But, the Employers have not proved anything to that effect. To the contrary, the workmen's witnesses have clearly testified to the fact that they have regularly worked in the Employers' establishment since their retention, and that during each year they have put in more than 240 days of service. It is also remarked that this testimony of the of the workmen's witnesses is corroborated by the Employers' evidence. There is no evidence by the Employers in rebuttal of this fact.

20. The Labour Court has also taken note of a submission advanced on behalf of the Employers that the workmen for themselves had accepted casual employment, which is indicated from their applications, and once the workmen had accepted casual engagement, they had no right to claim permanent status. The Labour Court has discarded this submission by holding that the Employers cannot shake off their constitutional obligations, falling back on what the workmen had said in their applications at the time of their first engagement. The Labour Court has remarked that whatever the workmen have said in their applications, at the time of their initial engagement, cannot work to deprive them perpetually of their rights, that otherwise accrue.

21. There is then a rather odd finding by the Labour Court, which says that according to general rule and law, if a workman is employed to do work of a permanent nature that he does regularly, and further puts in 240 days of service in a calendar year with the establishment, he cannot be deprived of regular pay scale. The Labour Court has gone further on to hold that it is true for a fact that the workmen have put in work in the same manner as permanent employees in the establishment, and that there is no difference between the work done by these workmen and the other permanent workmen.

22. The Labour Court has, accordingly proceeded to hold that the action of the Employers in retaining these

workmen as casual hands, to undertake work of a perennial nature, is demonstrative of *mala fides* on the part of the Employers and a clear instance of unfair labour practice, which by any standard cannot be approved. The Labour Court has also said that the aforesaid action of the Employers is an exemplar of *mala fides*, *vis-a-vis* these workmen. Again at this stage, the Labour Court has reverted to its finding, that this Court has earlier called rather odd, that the workmen having put in 240 days of service during twelve calendar months continuously and more, they are entitled to the same benefit and pay scale as permanent workmen. The action of the Employers has been condemned as one contrary to social justice.

23. The Labour Court has held further on, that bearing in mind the facts, circumstances and evidence on record, it is clear that the workmen have been employed with effect from the dates shown against their respective names to undertake work of a permanent character, and that their work or conduct has never been found to be one that may occasion any complaint or demonstrate deficiency. There is no dearth of work with the Employers and, therefore, there is no reason to deprive them of any benefit.

24. The conduct of the Employers has, in substantial measure, been criticized by the Labour Court about the dilatory tactics adopted by them before that Court. The particulars of those tactics have been recorded. In conclusion, the Labour Court has awarded that the workmen be declared permanent by the Employers and that they are entitled to be declared permanent with effect from the date of the award. They have also been held entitled to consequential benefits.

25. Mr. Chatterjee, learned Counsel for the Employers has severely criticized the award. He submits that the impugned award is serious flawed, because the Labour Court has gone all wrong about inferring a claim for permanency on the basis of the workmen putting in 240 days of continuous work in each calendar year. He submits that the law relating to 240 days of continuous work, in a calendar year, is one that is relevant to a case of retrenchment and to judge the legality thereof. It is relevant under Section 6-N of the Uttar Pradesh Industrial Disputes Act, 1947 (for short, "the Act'), but not at all relevant for the purpose of judging a claim to be declared permanent by a workman, or even regular, by a casual hand. In support of his contention, he places reliance on the decision of the Supreme Court in **Chandra Shekhar Azad Krishi Evam Prodyogiki Vishwavidyalaya vs. United Trades Congress and another, (2008) 2 SCC 552.** He has drawn the attention of the Court to paragraph 12 of the report in **C.S. Azad Krishi Evam Prodyogiki Vishwavidyalaya** *(supra)*, where it is held:

"12. A feeble attempt, however, was made by the learned counsel appearing on behalf of Respondent 2 to state that he had been appointed against a permanent vacancy. In his written statement, he did not raise any such contention. It does not also appear from the records that any offer of appointment was given to him. It is inconceivable that an employee appointed on a regular basis would not be given an offer of appointment or shall not be placed on a scale of pay. We, therefore, have no hesitation in proceeding on the premise that Respondent 2 was appointed on daily wages. The Industrial Court in passing the impugned award proceeded on the premise that Respondent 2 had been working for

more than 240 days continuously from the date of his engagement. It is now trite that the same by itself does not confer any right upon a workman to be regularized in service. Working for more than 240 days in a year was relevant only for the purpose of application of Section 6-N of the U.P. Industrial Disputes Act, 1947 providing for conditions precedent to retrench the workmen. It does not speak of acquisition of a right by the workman to be regularized in service.(Emphasis by Court)

26. Mr. Chatterjee has further submitted that a workman, in order to acquire the status of a permanent workman, must be appointed in terms of the relevant rules. He submits that for the Employers the relevant rules, for a workman to acquire the status of permanency, find place in Clause 6.1 of the Recruitment Policy, that is part of the registered settlement dated 16.12.1985. He again emphasizes that merely working for a long period of time, and 240 days in each calendar year, has no legal basis to confer upon the workman the status of permanency. That status can only be acquired in terms of the relevant rules, detailed hereinbefore. In support of this contention, learned Counsel for the Employers has placed reliance on a decision of the Supreme Court in **M.P. Housing Board and another vs. Manoj Shrivastava, (2006) 2 SCC 702.** He has drawn the attention of the Court to paragraphs 10 and 15 of the report in **M.P. Housing Board** *(supra),* where it has been held by their Lordships:

"10. It is one thing to say that a person was appointed on an ad hoc basis or as a daily-wager but it is another thing to say that he is appointed in a sanctioned post which was lying vacant upon following the due procedure prescribed therefor.

15. A daily-wager does not hold a post unless he is appointed in terms of the Act and the Rules framed thereunder. He does not derive any legal right in relation thereto."

27. Learned Counsel for the Employers has buttressed the proposition canvassed by him that mere long continuance as a casual hand or a temporary would not entitle the workmen to claim permanency. He has drawn support for the proposition from the Constitution Bench decision of the Supreme Court in **Secretary, State of Karnataka and others vs. Umadevi (3) and others, (2006) 4 SCC 1.** He has invited the attention of this Court to paragraphs 45 and 47 of the report in **Umadevi** *(supra),* where it is held:

"45. While directing that appointments, temporary or casual, be regularized or made permanent, the courts are swayed by the fact that the person concerned has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with open eyes. It may be true that he is not in a position to bargain--not at arm's length--since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining

power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succour to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution.

47. When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognised by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in cases concerned, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post."

28. Mr. Chatterjee has emphasized that the right to declare permanent, a casual hand is essentially an executive function, or so to speak the Employers' function. It cannot be done by judicial interpose or fiat. In support of his contention on this score, Mr. Chatterjee places reliance on the decision of the Supreme Court in **Indian Drugs & Pharmaceuticals Ltd. vs. Workmen, Indian Drugs & Pharmaceuticals Ltd., (2007)** 1 SCC 408. Learned Counsel for the Employers has drawn this Court's attention to paragraphs 37, 40, 43 and 44 of the report, where it has been held:

"37. Creation and abolition of posts and regularisation are purely executive functions vide *P.U. Joshi v. Accountant General* [(2003) 2 SCC 632: 2003 SCC (L&S) 191]. Hence, the court cannot create a post where none exists. Also, we cannot issue any direction to absorb the respondents or continue them in

service, or pay them salaries of regular employees, as these are purely executive functions. This Court cannot arrogate to itself the powers of the executive or legislature. There is broad separation of powers under the Constitution, and the judiciary, too, must know its limits.

40. The courts must, therefore, exercise judicial restraint, and not encroach into the executive or legislative domain. Orders for creation of posts, appointment on these posts, regularisation, fixing pay scales, continuation in service, promotions, etc. are all executive or legislative functions, and it is highly improper for Judges to step into this sphere, except in a rare and exceptional case. The relevant case-law and philosophy of judicial restraint has been laid down by the Madras High Court in great detail in Rama Muthuramalingam v. Dy. Supdt. of Police [AIR 2005 Mad 1] and we fully agree with the views expressed therein.

43. In view of the above observations of this Court it has to be held that the rules of recruitment cannot be relaxed and the court/tribunal cannot direct regularisation of temporary appointees dehors the rules, nor can it direct continuation of service of a temporary employee (whether called a casual, ad hoc or daily-rated employee) or payment of regular salaries to them.

44. It is well settled that regularisation cannot be a mode of appointment vide *Manager, Reserve Bank of India v. S. Mani* [(2005) 5 SCC 100: 2005 SCC (L&S) 609: AIR 2005 SC 2179] (AIR para 54)."

29. Learned Counsel for the Employers has supplemented his contentions by urging that sickness of the industry in the hands of the Employers is also a relevant consideration, while judging a claim of the present kind. He submits that the Labour Court ought to have taken into account the fact that a sick company, running into heavy losses, may not have any post to accommodate a workman, ordered to be made permanent. Again, Mr. Chatterjee relies on the decision of the Supreme Court in **Indian Drugs & Pharmaceuticals Ltd.** *(supra)*, where it has been held:

"54. In the present case, the appellant is a sick company which has been running on huge losses for many years, and is practically closed down. There are no vacancies on which the respondents could have been appointed. While we may have sympathy with them, we cannot ignore the hard economic realities, nor the settled legal principles."

30. Ms. Bushra Maryam, learned Counsel for the workmen, repelling the contentions of the learned Counsel for the Employers, submits that in case of an industrial dispute, decided under the labour laws by a competent Tribunal, considerations very different from those governing an adjudication of a service matter by this Court, under Article 226 of the Constitution or by their Lordships of the Supreme Court, under Article 32, apply. She urges that the principles evolved by the Constitution Bench in **Umadevi** *(supra)* have scant or no application in the context of an industrial dispute decided by a Labour Court under the Act. In support of her submissions, learned Counsel for the workmen has placed reliance upon a decision of the Supreme Court in **Maharashtra State Road Transport Corporation and another vs. Casteribe Rajya Parivahan Karmchari Sanghatana, (2009) 8 SCC 55**6. She has invited the attention of the Court to the

decision in **Maharashtra State Road Transport Corporation** *(supra)*, where it is held:

"30. The question that arises for consideration is: have the provisions of the MRTU and PULP Act been denuded of the statutory status by the Constitution Bench decision in **Umadevi** (3) [(2006) 4 SCC 1: 2006 SCC (L&S) 753]? In our judgment, it is not.

31. The purpose and object of the MRTU and PULP Act, inter alia, is to define and provide for prevention of certain unfair labour practices as listed in Schedules II, III and IV. The MRTU and PULP Act empowers the Industrial and Labour Courts to decide that the person named in the complaint has engaged in or is engaged in unfair labour practice and if the unfair labour practice is proved, to declare that an unfair labour practice has been engaged in or is being engaged in by that person and direct such person to cease and desist from such unfair labour practice and take such affirmative action (including payment of reasonable compensation to the employee or employees affected by the unfair labour practice, or reinstatement of the employee or employees with or without back wages, or the payment of reasonable compensation), as may in the opinion of the court be necessary to effectuate the policy of the Act.

32. The power given to the Industrial and Labour Courts under Section 30 is very wide and the affirmative action mentioned therein is inclusive and not exhaustive. Employing badlis, casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent employees is an unfair labour practice on the part of the employer under Item 6 of Schedule IV. Once such unfair labour practice on the part of the employer is established in the complaint, the Industrial and Labour Courts are empowered to issue preventive as well as positive direction to an erring employer.

33. The provisions of the MRTU and PULP Act and the powers of the Industrial and Labour Courts provided therein were not at all under consideration in *Umadevi* (3) [(2006) 4 SCC 1: 2006 SCC (L&S) 753]. As a matter of fact, the issue like the present one pertaining to unfair labour practice was not at all referred to, considered or decided in *Umadevi* (3) [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] . Unfair labour practice on the part of the employer in engaging employees as badlis, casuals or temporaries and to continue them as such for years with the object of depriving them of the status and privileges of permanent employees as provided in Item 6 of Schedule IV and the power of the Industrial and Labour Courts under Section 30 of the Act did not fall for adjudication or consideration before the Constitution Bench.

34. It is true that *Dharwad Distt. PWD Literate Daily Wages Employees' Assn.* [(1990) 2 SCC 396: 1990 SCC (L&S) 274: (1990) 12 ATC 902] arising out of industrial adjudication has been considered in *Umadevi* (3) [(2006) 4 SCC 1: 2006 SCC (L&S) 753] and that decision has been held to be not laying down the correct law but a careful and complete reading of the decision in *Umadevi* (3) [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] leaves no manner of doubt that what this Court was concerned in *Umadevi* (3) [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] was the exercise of power by the High Courts under Article 226 and this Court under Article 32 of the Constitution of India in the matters of public employment where the employees have been engaged as contractual,

temporary or casual workers not based on proper selection as recognised by the rules or procedure and yet orders of their regularisation and conferring them status of permanency have been passed.

35. *Umadevi* (3) [(2006) 4 SCC 1: 2006 SCC (L&S) 753] is an authoritative pronouncement for the proposition that the Supreme Court (Article 32) and the High Courts (Article 226) should not issue directions of absorption, regularisation or permanent continuance of temporary, contractual, casual, daily wage or ad hoc employees unless the recruitment itself was made regularly in terms of the constitutional scheme.

36. *Umadevi* (3) [(2006) 4 SCC 1: 2006 SCC (L&S) 753] does not denude the Industrial and Labour Courts of their statutory power under Section 30 read with Section 32 of the MRTU and PULP Act to order permanency of the workers who have been victims of unfair labour practice on the part of the employer under Item 6 of Schedule IV where the posts on which they have been working exist. *Umadevi* (3) [(2006) 4 SCC 1: 2006 SCC (L&S) 753] cannot be held to have overridden the powers of the Industrial and Labour Courts in passing appropriate order under Section 30 of the MRTU and PULP Act, once unfair labour practice on the part of the employer under Item 6 of Schedule IV is established."

31. Learned Counsel for the workmen has also called attention to a decision of this Court in **U.P. State Road Transport Corporation, Kanpur & Ann. vs. Roadways Karamchari Sanyukt Parishad and others, 2013 SCC OnLine All 13737**, where following the decision of the Supreme Court in **Maharashtra State Road Transport Corporation** *(supra)*, it has been held:

"19. These decisions are not applicable in the instant case, inasmuch as, these decision relates to power of the High Courts under Article 226 of the Constitution of India.

20. In the case of ***Maharashtra State Road Transport Corporation*** (AIR 2009 SC (Supp) 2656) *(supra)*, the Supreme Court held that the labour court is not denuded with its powers to order permanency of the workers, who had been a victim of unfair labour practice. The labour court could create new rights and obligations between the Employers and its workers.

21. In the light of the aforesaid, this Court finds that when permanent vacancies were existing, the petitioner, being an instrumentality of the State, was under a legal obligation to fill up the post instead of getting the work done through part time employees. The work done by the workman was that of a full time workman. The practice adopted was a clear case of unfair labour practice and considering the facts that has been brought out in the instant case, the labour court was justified in holding that since the workman was working continuously for years and in the light of permanent post being available, rightly directed regularization of the service of the workman."

32. Learned Counsel for the workmen has argued that so far as factors about the health or the hard time faced by the Employers is concerned, if that be a relevant consideration in judging entitlement of the workmen to relief, it would be very iniquitous to smother the workmen out of existence for the slight inconvenience of the better endowed Employers. In support of her contention, Ms. Bushra Mariyam has placed reliance on the decision of the Supreme Court in

M/s. Hindustan Tin Works Pvt. Ltd. vs. Employees of M/s. Hindustan Tin Works Pvt. Ltd. and others, (1979) 2 SCC 80. She has drawn the attention of the Court to paragraph 13 of the report, where it is held:

"13. Now, if a sacrifice is necessary in the overall interest of the industry or a particular undertaking, it would be both unfair and inequitous to expect only one partner of the industry to make the sacrifice. Pragmatism compels common sacrifice on the part of both. The sacrifice must come from both the partners and we need not state the obvious that the labour is a weaker partner who is more often called upon to make the sacrifice. Sacrifice for the survival of an industrial undertaking cannot be an unilateral action. It must be a two-way traffic. The management need not have merry time to itself making the workmen the sacrificial goat. If sacrifice is necessary, those who can afford and have the cushion and the capacity must bear the greater brunt making the shock of sacrifice as less poignant as possible for those who keep body and soul together with utmost difficulty."

33. Learned Counsel for the workmen has also placed reliance on a decision of the Supreme Court in **Workmen of Bhurkunda Colliery of Central Coalfields Ltd. vs. Bhurkunda Colliery of Central Coalfields Ltd., (2006) 3 SCC 297** in aid of her submission that in cases of regularization under the Industrial Jurisprudence, different principles than those that govern regularization in service matters properly so called, apply.

34. Learned Counsel for the workmen has further placed reliance on a decision of the Supreme Court in **Harjinder Singh vs. Punjab State Warehousing Corporation, (2010) 3 SCC 192** to buttress her submission that the ill-effects of relief to workmen on the financial health of the employer alone should not lure the Court into eschewing relief, to which the workman is otherwise entitled. She has relied on the following observations of their Lordships in **Harjinder Singh** *(supra)*:

"30. Of late, there has been a visible shift in the courts' approach in dealing with the cases involving the interpretation of social welfare legislations. The attractive mantras of globalisation and liberalisation are fast becoming the *raison d'être* of the judicial process and an impression has been created that the constitutional courts are no longer sympathetic towards the plight of industrial and unorganised workers. In large number of cases like the present one, relief has been denied to the employees falling in the category of workmen, who are illegally retrenched from service by creating by-lanes and side-lanes in the jurisprudence developed by this Court in three decades. The stock plea raised by the public employer in such cases is that the initial employment/engagement of the workman/employee was contrary to some or the other statute or that reinstatement of the workman will put unbearable burden on the financial health of the establishment. The courts have readily accepted such plea unmindful of the accountability of the wrong doer and indirectly punished the tiny beneficiary of the wrong ignoring the fact that he may have continued in the employment for years together and that micro wages earned by him may be the only source of his livelihood.

31. It need no emphasis that if a man is deprived of his livelihood, he is

deprived of all his fundamental and constitutional rights and for him the goal of social and economic justice, equality of status and of opportunity, the freedoms enshrined in the Constitution remain illusory. Therefore, the approach of the courts must be compatible with the constitutional philosophy of which the directive principles of State policy constitute an integral part and justice due to the workman should not be denied by entertaining the specious and untenable grounds put forward by the employer--public or private."

35. As a closing note to her submission, learned Counsel for the workmen has referred to a Constitution Bench decision of the Supreme Court, rendered in the infant years of our Republic in Bharat Bank Ltd., Delhi vs. Employees of the **Bharat Bank Ltd., Delhi, AIR 1950 (37) SC 188.** In **Bharat Bank Ltd.** *(supra)*, B.K. Mukherjea, J. (as His Lordship then was) held about the scope and amplitude of powers conferred on an Industrial Tribunal, besides the nature of an industrial dispute and the nature of the Tribunal's jurisdiction, thus:

"61. We would now examine the process by which an Industrial Tribunal comes to its decisions and I have no hesitation in holding that the process employed is not judicial process at all. In settling the disputes between the Employers and the workmen, the function of the Tribunal is not confined to administration of justice in accordance with law. It can confer rights and privileges on either party which it considers reasonable and proper, though they may not be within the terms of any existing agreement. It has not merely to interpret or give effect to the contractual rights and obligations of the parties. It can create new rights and obligations between them which it considers essential for keeping industrial peace. An industrial dispute as has been said on many occasions is nothing but a trial of strength between the Employers on the one hand and the workmen's organization on the other and the Industrial Tribunal has got to arrive at some equitable arrangement for averting strikes and lock-outs which impede production of goods and the industrial development of the country. The Tribunal is not bound by the rigid rules of law. The process it employs is rather an extended form of the process of collective bargaining and is more akin to administrative than to judicial function. In describing the true position of an Industrial Tribunal in dealing with labour disputes, this Court in *Western India Automobile Association v. Industrial Tribunal, Bombay, 1949 F. C. R. 321 at p.345: A.I.R. (36) 1949 F.C. 111)* quoted with approval, a passage from Ludwig Teller's well known work on the subject, where the learned author observes that

"industrial arbitration may involve the extension of an existing agreement or the making of a new one or in general the creation of new obligations or modification of old ones, while commercial arbitration generally concerns itself with interpretation of existing obligations and disputes relating to existing agreements".

The views expressed in these observations were adopted in its entirety by this Court. Our conclusion, therefore, is that an Industrial Tribunal formed under the Industrial Disputes Act is not a judicial tribunal and its determination is not a judicial determination in the proper sense of these expressions."(Emphasis by Court)

36. Learned Counsel for the workmen submits that given the wide powers of the Labour Court/ Industrial Tribunal to resolve

industrial disputes under the Act, no exception can be taken to the impugned award, which has granted permanency to the workmen.

37. This Court has keenly considered the submissions advanced on behalf of both sides.

38. A perusal of the award does show that the Labour Court has time and again mentioned 240 days of continuous work done by the workmen during a calendar year, which it has considered to be some kind of a basis to infer a right to be declared permanent. This Court has no manner of doubt that 240 days of continuous work is a fact that is entirely irrelevant when considering a claim to be declared permanent. The factum of continuous service for 240 days in a calendar year is relevant under Section 6-N of the Act, which relates to retrenchment of a workmen. It has no relevance, so far as the right to claim a permanent status is concerned. As a proposition of law, continuous work for 240 days in a calendar year is absolutely irrelevant to a workman's right to claim regularization. The right to be declared permanent is but a facet of regularization. This question is no longer *res integra* in view of the decision of the Supreme Court in **Chandra Shekhar Azad Krishi Evam Prodyogiki Vishwavidyalaya** *(supra)*.

39. The question, however, is that the Labour Court having taken into consideration one irrelevant factor, is it enough to vitiate findings on the more substantial issue that the workmen having been retained in service continuously for varying and long periods of time by the Employers to do work of a perennial nature, are victims of unfair labour practice. In order to assess the Employers' plea that the workmen were hired merely as casual hands to work in place of permanent workmen, the Labour Court has considered the Employers' case and evidence about this issue. It has been held that the Employers have not furnished any particulars, indicating which of the workmen were retained as casual hands to discharge duties, of which of the named absenting permanent workman. The Labour Court has also taken note of the fact that the Employers have not testified to the fact that the workmen have not been in their continuous employment from the date that they were initially retained. The Labour Court has, therefore, inferred that the Employers' case about the workmen, being retained on a casual basis, according exigencies of work, is not at all acceptable. The Labour Court has also taken into account the fact that prior to their direct engagement by the Employers, the workmen had been hired through a Labour Contractor and that during their engagement on contract also, they were under the direct control of the Employers. The Labour Court has concluded and reasonably so, that from the date these workmen have been engaged by the Employers, they are in their regular and continuous employment. It would be noticed that until date of reference of the industrial dispute, the longest of the serving workman had put in about eight years of service, whereas others had done seven years, six years, five years or four years, but no one less than three. There is no straitjacket formula about time to infer retention of a workman to do work of a perennial or permanent nature. It has to be gathered from the circumstances.

40. Here, in this Court's opinion, the Industrial Tribunal, from the Employers'

case and evidence, the stand of the workmen and the attending circumstances, has drawn a reasonable conclusion that the workmen were retained by the Employers to do work of a perennial nature. They were not hired casually to fill in for absenting permanent workman or otherwise to cope with exigencies of work. The fact that the Industrial Tribunal has been, particularly, fascinated by the figure of 240 days of work, put in during each calendar year, by the workmen, no doubt an irrelevant consideration, does not detract from the overall soundness of the conclusion, considering other relevant factors that have entered judgment.

41. So far as this conclusion of the Industrial Tribunal is concerned, there is a further finding by the Industrial Tribunal to support it. It is about the failure of the Employers to produce records about the workmen's engagement that would demonstrate it to be casual, in broken spells and one resorted to meet the exigencies of work. This failure of the Employers to show by their records that the workmen were not in continuous employment, has been rightly accepted by the Industrial Tribunal to find for the workmen, pitted against the workmen's unrebutted testimony that they were in continuous employment during the entire period of time. The continuous engagement of the workmen has also been rightly made the basis of a finding by the Industrial Tribunal that the nature of work that led the Employers to retain the workmen, was of a perennial nature. In the opinion of this Court, no exception can be taken by the Employers, so far as this finding of the Industrial Tribunal goes.

42. The most formidable question that Mr. Chatterjee has posed is about the Industrial Tribunal's jurisdiction to declare a workman permanent by judicial determination. He has castigated the impugned award, on the basis of the principle that the right to regularize is an executive act or the Employer's decision. It is not something that can be thrust upon the Employer by judicial declaration. The said proposition, for a principle, does not brook doubt. The decision of their Lordships of the Supreme Court in **Indian Drugs & Pharmaceuticals Ltd.** *(supra)* is a firm exposition about it, where earlier authority of their Lordships, as also a decision of the Madras High Court has been noticed and approved.

43. The other submission of Mr. Chatterjee, which is again a facet of last forgoing submission, is that appointment to a permanent post cannot be made de hors the rules, by which the Employer is bound to recruit. He submits that regularization of a temporary or casual hand has been held to be unconstitutional and a violation of Articles 14 and 16 of the Constitution. Regularization has been firmly condemned as a backdoor entry to service that derogates from the fundamental right to equality in opportunity of employment to all citizens. Mr. Chatterjee has, in particular, emphasized that the Standing Orders, applicable to the Employer and Clause 6.1 of the Recruitment Policy, part of the registered settlement dated 16.12.1985, exclusively provide for the procedure through which a workman becomes permanent.

44. The reliance placed on behalf of the Employers to dispel the workmen's right to regularization, based on long and continuous engagement, deserves careful consideration. The decisions of the Supreme Court in **M.P. Housing Board**

(supra) and, particularly, the Constitution Bench in **Umadevi** *(supra)* are bedrocks of support for the proposition that Employers canvass. There are, thus, two facets of the proposition: (1) that Courts and Tribunals, by exercise of the judicial power, cannot thrust regularization upon the executive or any Employer which is essentially an executive function. The right to declare some workman or employee permanent is but a facet of the power to regularize; and (2) regular appointment, which includes a permanent appointment, cannot be made de hors the relevant recruitment rules by the competent Authority on the ground of long continuance in service alone.

45. This Court has no manner of doubt that these principles are not open to question in the field of service law, where employment is either under the State or a State Instrumentality or any other Employer, but regulated by statutory rules. In the matter of enforcement of rights of workmen under the labour laws also, these principles would be attracted wherever the Employer, though an industry, is either the State or a State Instrumentality or otherwise governed in its relationship with the workmen by service rules that are statutory or partake of statutory flavour.

46. In cases, however, of industrial disputes, where the Employers are an industry, who are not in any way the State or a State Instrumentality or otherwise governed in their relationship with the workmen by statutory service regulations, the principles under consideration may not apply. The said principles would, particularly, not apply in cases of industrial disputes, where the Employers who are an industry and are not State or a State Instrumentality, or otherwise under statutory regulation governing employment, resort to unfair labour practice by retaining workmen on temporary or casual basis for long periods of time, in order to undertake work of a permanent or a perennial nature. These are cases where the Employers, who are an industry within the meaning of the Act, put up a facade of casual engagement of workmen that they continue for years together in order to eschew their liabilities under the laws, the Standing Orders or settlements, *vis-a-vis* their workmen. In cases like this, if the Industrial Tribunal were to find the action of the Employer continuing their workmen under a facade as casuals to do work of a permanent nature, an unfair labour practice, there is no principle that forbids the Tribunal under the Act from undoing that injustice. It would, of course, take the form of ordering the workman concerned to be regularized or ordered to be made permanent.

47. It must also be remarked that the principle in **Umadevi** *(supra)* that forbids Courts from ordering regularization is one confined to the High Courts and the Supreme Court in the exercise of their writ jurisdiction, under Article 226 or Article 32 of the Constitution. This distinction has been drawn by their Lordships of the Supreme Court in **Maharashtra State Road Transport Corporation** *(supra)*. It has been indicated there that the decision in **Umadevi** *(supra)* does not denude the Labour Court of its powers to abate an unfair labour practice, if proved, and also to take affirmative action. In **Umadevi**, their Lordships were seized of a question about the powers of the Industrial and Labour Courts to grant relief of permanency of status to cleaners employed as temporaries or casuals with the Maharashtra State Road Transport Corporation, under the Maharashtra Recognition of Trade Unions

and Prevention of Unfair Labour Practices Act, 1971. It was held that *"practice on the part of the employer in engaging employees as badlis, casuals or temporaries and to continue them as such for years with the object of depriving them of the status and privileges of permanent employees as provided in Item 6 of Schedule IV and the power of the Industrial and Labour Courts under Section 30 of the Act did not fall for adjudication or consideration before the Constitution Bench" (the Constitution Bench in **Umadevi**).*

48. In the present case also, the industrial dispute is about an unfair labour practice resorted to by the Employers of engaging the workmen for a long period of time in continuous employment to do work of a perennial nature, still dubbing them as casual hands. The Industrial Tribunal has recorded a positive finding that it is case of unfair labour practice by the Employers on the facts and circumstances that show that the Employers have retained the workmen as casual hands to do work of a perennial nature. The said finding is a pure finding of fact, based on appreciation of evidence, about which there is no demonstrable or manifest illegality. Once, it has been found by the Labour Court to be a case of unfair labour practice, there is no embargo upon the jurisdiction of the Industrial Tribunal to take remedial affirmative action, by ordering the Employers to declare the workmen permanent.

49. It must be noticed here that the decisions in **M.P. Housing Board** *(supra)* and **Indian Drugs & Pharmaceuticals Ltd.** *(supra)*, were both rendered in the context of Labour Law Statutes. It, therefore, does need clarification that the principle about non application of the law forbidding regularization by judicial determination laid down in **Umadevi** *(supra)* and **M.P. Housing Board** *(supra)* as well as **Indian Drugs & Pharmaceuticals Ltd.** *(supra)*, in fact, would not apply to decisions of industrial disputes by the Labour Courts/ Industrial Tribunals. The decision in **M.P. Housing Board** *(supra)* arose out of a dispute between the **M.P. Housing Board** and its employees, where the **M.P. Housing Board** was held to be a State within the meaning of Article 12 of the Constitution and found admittedly governed by an Act, the M.P. Grih Nirman Mandal Adhiniyam, 1972. It was also recorded for an undisputed proposition that the terms and conditions of employment under the **M.P. Housing Board** for its employees were governed by a statute, that is to say, the Act of 1972, last mentioned. Of course, to supplement the conditions of work for its employees or employees in general, the State of Madhya Pradesh had enacted the Madhya Pradesh Industrial Employment (Standing Orders) Act, 1961, whereunder also the Board had framed its Standing Orders. What cannot be lost sight of, is the fact that the rights of the workmen in **M.P. Housing Board** were claimed *vis-a-vis* an Employer, who were a State Instrumentality and the terms and conditions of employment were governed by a statute. It was not a case like the present one, where the employer is not remotely the State and there are no statutory rules, regulating the conditions of work, except the Standing Orders, framed under the Industrial Employment (Standing Orders) Act, 1946 (for short, "the Act of 1946').

50. Likewise, in **Indian Drugs & Pharmaceuticals Ltd.**, though the case arose from an industrial dispute, decided by the Labour Court, U.P., Dehradun, it

eloquently figures there that the Employers were a Public Sector Undertaking with a plant located in Rishikesh, where they manufactured pharmaceuticals. Though in the said case, no statutory service rules, governing the relationship between the employer and employee, find mention, but the fact that the Employers were an Instrumentality of the State, bound by the principles, enshrined in Articles 14 and 16 of the Constitution, the rule in **Umadevi** *(supra)* would surely apply to a claim for regularization there. This is certainly not the position in the present case, where the Employers are not remotely a face of the State. The only issue, that has been raised, is that the workmen have not been appointed in accordance with the Standing Orders applicable to the Employers, framed under the Act of 1946, and that, therefore, the principles in **Umadevi** *(supra)*, **M.P. Housing Board** *(supra)* and **Indian Drugs & Pharmaceuticals Ltd.** *(supra)* would work to exclude the Industrial Tribunal's jurisdiction to order regularization of any kind.

51. This question about the statutory force of Standing Orders also arose before their Lordships of the Supreme Court in **Maharashtra State Road Transport Corporation** *(supra)*. The decision in **Indian Drugs & Pharmaceuticals Ltd.** *(supra)* was noticed apart from some others, particularly, those in **State of Maharashtra and another vs. R.S. Bhonde and others, (2005) 6 SCC 751** and **Divisional Manager, Aravali Golf Club and another vs. Chander Hass and another, (2008) 1 SCC 683.** Their Lordships answered the question in **Maharashtra State Road Transport Corporation,** thus:

"45. The question now remains to be seen is whether the recruitment of these workers is in conformity with Standing Order 503 and, if not, what is its effect? No doubt, Standing Order 503 prescribes the procedure for recruitment of Class IV employees of the Corporation which is to the effect that such posts shall be filled up after receiving the recommendations from the Service Selection Board and this exercise does not seem to have been done but Standing Orders cannot be elevated to the (sic status of) statutory rules. These are not statutory in nature.

46. We find merit in the submission of Mr Shekhar Naphade, learned Senior Counsel for the employees that Standing Orders are contractual in nature and do not have a statutory force and breach of Standing Orders by the Corporation is itself an unfair labour practice. The employees concerned having been exploited by the Corporation for years together by engaging them on piece-rate basis, it is too late in the day for them to urge that procedure laid down in Standing Order 503 having not been followed, these employees could not be given status and privileges of permanency. The argument of the Corporation, if accepted, would tantamount to putting premium on their unlawful act of engaging in unfair labour practice.

47. It was strenuously urged by the learned Senior Counsel for the Corporation that the Industrial Court having found that the Corporation indulged in unfair labour practice in employing the complainants as casuals on piece-rate basis, the only direction that could have been given to the Corporation was to cease and desist from indulging in such unfair labour practice and no direction of according permanency to these employees could have been given. We are afraid, the argument ignores and overlooks the specific power given to the Industrial/Labour Court under Section 30(1)(b) to take affirmative action against the erring employer which as

noticed above is of wide amplitude and comprehends within its fold a direction to the employer to accord permanency to the employees affected by such unfair labour practice."(Emphasis by Court)

52. It is, accordingly, held that the principles that forbid regularization by judicial interpose or order, generally in case of Employers and, particularly, in cases where the State is the Employer or the relationship of employer and employee is governed by statute, would have no application in the context of an Employer, who are an industry within the meaning of this Act, but not a State or one of its Instrumentality or one where relationship between the employer and employee is regulated by statute or statutory service rules. In a case of the latter kind, it would always be open for the Labour Court or the Industrial Tribunal to grant regularization, where it finds it to be a case of unfair labour practice.

53. This Court may now consider the last limb of the submission advanced by the learned Counsel for the Employers. It has been submitted that the Employers are a sick industry and due regard must be had to the Employers' economic health before thrusting upon them workmen, with rights of permanency, through industrial adjudication. Inspiration is again drawn for the said submission by the learned Counsel for the Employers from the concluding remarks of their Lordships of the Supreme Court in **Indian Drugs & Pharmaceuticals Ltd.** *(supra)*. This Court may notice that about this particular issue, in a later judgment of the Supreme Court in **Harjinder Singh** *(supra)*, observations of far-reaching import have been made in the context of granting relief of reinstatement to workmen, illegally found retrenched. It is, thus, always a matter of balancing competing interests of the tiny individual workmen with the better endowed Employer.

54. It is true that the Employer is not always in a very comfortable position and reinstatement or regularization thrust upon an Employer, with a tottering economic health, may wreak havoc. But, so far as the facts of the present case go, it has been brought on record by the Employers that out of the twenty-seven workmen, seven have settled during the pendency of the writ petition. This Court has not accepted that plea, earlier in this judgment, looking to the fact that there is no evidence about the settlement and no admission on behalf of the workmen about the said fact. It has also been said that of the remainder seventeen, eight have attained the age of superannuation, whose details are mentioned in paragraph 8 of the third Supplementary Affidavit, dated 7th January, 2019. There are then a number of facts brought on record through this supplementary affidavit saying that nine workmen are still in the working age group, whose details are disclosed in paragraph no.9.

55. It is pointed out that pending this writ petition, the original Employers, Duncans Industries suffered a huge financial loss, resulting in stoppage of production activity in March 2002. Consequently, the entire workmen engaged in production were laid off with effect from 01.07.2002. It is admitted in paragraph 12 of the supplementary affidavit that the workmen (the workmen who are respondents to this petition) were retained as casuals till the stoppage of production activity in 2002. It is further averred that in June, 2005, with the intervention of the

Labour Commissioner, U.P., a tripartite settlement was arrived at between the recognized and majority Union, the Duncans (the original Employers) and the representatives of M/s. Kanpur Fertilizer and Cement Limited (the Employers who took over under the Rehabilitation Scheme later). This settlement was recorded on 21.06.2005 with the intervention of the Labour Commissioner, U.P. and registered with the Additional Labour Commissioner, U.P., Kanpur on 30.08.2005.

56. It is pointed out that by the aforesaid settlement, the workmen were covenanted to be paid 55% of their wages for the period of lay off, in thirty monthly installments. After tracing out details about the facts leading to the Rehabilitation Scheme, the course of proceedings before the BIFR and take over of the original Employers by M/s. Kanpur Fertilizer and Cement Limited, mention of which has been made in the opening part of this judgment, it is averred that M/s. Kanpur Fertilizer and Cement Limited, as the incoming Management, negotiated with the majority Union for the settlement of past dues of all employees of the Fertilizer Unit. A settlement is claimed to have taken place, where all the employees were asked to sign an undertaking that they would accept 25% of their wages for the special leave period between 01.06.2006 to September 2010. It is also said that be maintenance of the closed plant took about three years to recommence production, that involved change from naphtha gas technology to a gas based one. There is a very detailed description about how the Employers' plant became functional again. What is relevant is that production activities commenced in 2013 and the Employers absorbed the entire work force, including casual workmen till the beginning of 2014, when the Employers' plant resumed production. The Employers' claim that all the workmen were asked to sign an undertaking in terms of the settlement dated 06.06.2010 and resume duties. The workmen in general reported and resumed their duties after signing the undertaking in terms of the registered settlement dated 06.06.2010.

57. So far as the workmen (respondents here) are concerned, they refused to resume duty after signing the undertaking and served a legal notice through Shri Rajendra Bhole, Advocate dated 26.05.2014. A copy of that notice has been brought on record, as also the settlement dated 06.06.2010. It is averred on behalf of the Employers that casual workmen who are senior to the workmen (the respondents here) are still working as casuals and have not raised any dispute. It is also averred that there were a total of thirty casual workmen, prior to restart of the Employers' plant, after the transfer of undertaking from Duncans to M/s. Kanpur Fertilizer and Cement Limited. These thirty workmen are working with the Employers in different departments, as casual workmen. No fresh casuals have been engaged by the Employers, after commencement of production. There is a list of area-wise deployment of casual workmen annexed (not the respondents here), deployed in different departments of the Employers.

58. It is not the Employers' case anywhere that they have retrenched any of their casual hands or the workmen. The Employers have retained the workmen, may be after the lay off, during which they went out of production and had a change of Management, post settlement of a Rehabilitation Scheme by the BIFR. The substance of the matter is that requirement

of the Employers is still there and the only disassociation of the workmen, as also their other workmen is during the period of lay off. These workmen have been, thus, part of the Employers' establishment since the decade of 1980s. It cannot, therefore, be gainsaid that the workmen were engaged as casual hands to take care of exigencies of work. They were retained to do work, that is perennial in nature, and have worked there entire lives with the Employers. After revival of production, according to the Employers, their association continues except some workmen, whose names are mentioned in the supplementary affidavit, having superannuated during this period.

59. Given the aforesaid circumstances and, of course, subject to whatever has happened during the layoff when there was no production, it is very difficult to discard the Industrial Tribunal's findings that the workmen are not mere casual hands to take care of exigencies of work. The insistence of the Employers that other workmen are also continuing as casuals, some of them senior to the workmen, because the Employers have not taken in permanent workmen through the procedure prescribed under the Standing Order, is apparently a specious plea. This Court thinks that the abiding retention of the workmen even during economically tumultuous times shows the permanent nature of the work that the workmen are engaged to do. Under these circumstances, to insist that the workmen at this distance of time still continue as casual hands smacks of unfair labour practice.

60. In the opinion of this Court, no illegality, much less a manifest illegality, can be found in the impugned award.

61. In the result, the petition fails and is **dismissed**. No order as to costs.

(2020)10ILR A265
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.10.2020

BEFORE
THE HON'BLE GAUTAM CHOWDHARY, J.

Crl. Misc. Bail Ist Application No. 19743 of 2020

Phool Chand Ali ...Applicant (In Jail)
Versus
Union of India ...Opposite Party

Counsel for the Applicant:
Sri Om Prakash Singh, Sri Rajesh Pratap Singh

Counsel for the Opposite Party:
Sri Ashish Pandey

A. Compliance of Standing Order No. 1 of 989-application-allowed-the clause 2.4 of the Standing Order was not complied and no representative samples were drawn from all the 19 packets recovered by the prosecution allegedly from the car of the applicant-procedure given in clause 2.4 of the Standing Order was required to be followed-mixing of small quantity of the alleged contraband in 19 packets and thereafter taking of sample has caused serious prejudice to the case of the applicant since it cannot be ascertained whether all the 19 packets contained the alleged contraband of ganja or not-guidelines of the Standing Order cannot be blatantly flouted and substantial compliance therewith must be insisted upon so that sanctity of physical evidence in such cases remains intact.(Para 1 to 13)

The application is allowed. (E-6)

List of Cases Cited:

1. Aman Fidel Chris Vs Narcotics Control Bureau, Crl. Appeal No. 1027 of 2015 & Crl. M.B. 511 of 2019 & Crl. M.A. 1660 of 2020

2. U.O.I Vs Ratan Malik (2009) 2 SCC 624

3. U.O.I. Vs Ram Samujh & anr.(1999) 9 SCC 429

4. Sushant Gupta Vs U.O.I (2014) 3 ACR 2564

5. St. of M.P. Vs Kajd (2001) 7 SCC 673

6. U.O.I. Vs. Niyazuddin SK & ors. (2017) AIR SC 3932

7. St. of Ker. & ors. Vs Rajesh & ors. (2020) AIR SC 721

8. Satpal Singh Vs St. of Punj. MANU/SC/0413/2018, (2018) 12 SCC 813

9. Shailendra Kumar Gupta Vs St. of U.P. MANU/UP/0653/2020

10. Mohan Lal Vs St. of Punj., (2018) SCC Online SC 974

11. Noor Aga Vs St. of Punj. & anr.,(2008) 3 JIC 640 SC

12. St. of Ker. & ors. Vs Kurian Abraham(P) Ltd. & anr,(2008) 3 SCC 582

13. U.O.I. Vs Azadi Bachao Andolan (2004) 10 SCC 1

14. U.O.I. Vs Shiv Shankar Keshari, (2007) 7 SCC 798

15. Dataram Singh Vs St. of U.P. & anr., (2018) 3 SCC 22

(Delivered by Hon'ble Gautam Chowdhary, J.)

1. Heard Sri Om Prakash Singh, learned Senior Counsel for the applicant and Sri S.R. Singh, learned counsel holding brief of Shri Ashish Pandey, learned counsel for opposite party.

2. The allegation against the applicant in the complaint filed by opposite party is that on 25.08.2019 Circle Officer, STF, Lucknow informed the Intelligence Officer that two persons namely Shalam Ali and Phool Chand Ali were carrying 150 kg *Ganja* in one Bolero Camper No.AS16B8229 coming from Assam through Gorakhpur to Mau. This information was conveyed to N.C.B., Lucknow who after constituting a team arrested the said applicants on 25.08.2019 from Mau. Applicant disclosed his identity as Phool Chand Ali and Shalam Ali. *Ganja* was found concealed in the secret cavity between middle seat and back seat of the car. After opening of cavity made in the car 14 packets wrapped with white polythene and 5 packets from middle of the seat was found. After weighing all the material total quantity was found to be 149 kg. Thereafter small quantity of *ganja* was drawn from each packet by way of scratching and after mixing them well, two representative samples, each weighing about 24 gms, were drawn and were sealed.

3. Learned Senior Counsel for the applicant has submitted that the general procedure for sampling provided in Standing Order No. 01 of 1989 dated 13.06.1989 has not been complied by the opposite party. He has relied upon clause 2.1 to 2.8 of the aforesaid standing order quoted herein below :-

2.1 All drugs shall be classified, carefully, weighed and sampled on the spot of seizure.

2.2 All the packages/containers shall be numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses (Panchas) and the persons from whose possession the drug is recovered and a mention to this effect should invariably be made in the panchnama drawn on the spot.

2.3 The quantity to be drawn in each sample for chemical test shall not be less than 5 grams in respect of all narcotic drugs and psychotropic substances save in the cases of opium, ganja and charas (hashish) were a quantity of 24 grams in each case is required for chemical test. The same quantities shall be taken for the duplicate sample also. The seized drugs in the packages/containers shall be well mixed to make it homogeneous and representative before the sample (in duplicate) is drawn.

2.4 In the case of seizure of a single package/container, one sample in duplicate shall be drawn. Normally, it is advisable to draw one sample (in duplicate) from each package/container in case of seizure of more than one package/container.

2.5 However, when the packages/containers seized together are of identical size and weight, bearing identical markings and the contents of each package given identical results on colour test by the drug identification kit, conclusively indicating that the packages are identical in all respects the packages/container may be carefully bunched in lots of 10 package/containers except in the case of ganja and hashish (charas), where it may be bunched in lots of, 40 such packages/containers. For each such lot of packages/containers, one sample (in duplicate) may be drawn.

2.6 Where after making such lots, in the case of hashish and ganja, less than 20 packages/containers remain, and in the case of other drugs, less than 5 packages/containers remain, no bunching would be necessary and no samples need be drawn.

2.7 If such remainder is 5 or more in the case of other drugs and substances and 20 or more in the case of ganja and hashish, one more sample (in duplicate) may be drawn for such remainder package/container.

2.8 While drawing one sample (in duplicate) from a particular lot, it must be ensured that representative sample the in equal quantity is taken from each package/container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot.

4. Learned Senior Counsel has submitted that a reading of the above clauses of the standing order aforesaid clearly show that the opposite party was required to draw a sample from each packet allegedly recovered with the help of field testing kit. The mixing of the material from all the packets and then drawing of representative sample is not provided in the Standing Order since if such a course is adopted the sample would seize to be representative sample of the corresponding packet. In the present case 19 packets were allegedly recovered from the possession of the applicant and therefore the procedure given in clause 2.4 of the Standing Order No. 1 of 1989 was required to be followed since there were only 19 packets. He has further submitted that the mixing of small quantity of the alleged contraband in 19 packets and thereafter taking of sample has caused serious prejudice to the case of the applicant since it cannot be ascertained whether all the 19 packets contained the alleged contraband of *ganja* or not.

5. Learned Senior Counsel has relied upon the judgment of Delhi High Court in the case of ***Aman Fidel Chris vs. Narcotics Control Bureau, Crl. Appeal No. 1027 of 2015 & Crl. M.B. 511 of 2019 and Crl. M.A. 1660 of 2020***, in support of his contentions. In this case the conduct of the prosecution of not drawing individual

sample from each packet recovered was considered to be violation of Standing Order aforesaid.

6. Learned counsel for the opposite party, has vehemently opposed the bail application and submitted that bail cannot be granted to the applicant in such cases. He has relied upon the compilation of case laws which are follows:-

1. Union of India vs. Ratan Malik (2009) 2 SCC 624

2. Union of India vs. Ram Samujh and Another (1999) 9 SCC 429

3. Shushant Gupta vs. Union of India 2014 (3) ACR 2564

4. State of M.P. vs. Kajd (2001) 7 SCC 673

5. Union of India vs. Niyazuddin SK and Ors AIR 2017 SC 3932

6. State of Kerala and Ors vs. Rajesh and Ors AIR 2020 SC 721

7. Satpal Singh vs. State of Punjab MANU/SC/0413/2018,(2018) 12 SCC 813

8. Shailendra Kumar Gupta vs. State of U.P. MANU/UP/0653/2020

7. He has submitted that the judgment of the Delhi High Court relied upon by the Senior Counsel for the applicant is in respect of a Criminal Appeal and shall not be applicable to the case where only consideration of bail is involved, in view of Sections 37, 35, 67, 53-A and 54 of N.D.P.S Act. In the case of Hon'ble Delhi High Court only four packets were seized and the goods therein were mixed and two representative samples of 5 grams each were drawn. In the present case samples were drawn from each of the 19 packets and thereafter sample of 24 grams in duplicate were made. The samples were drawn in the presence of Magistrate and certified by him. The Hon'ble Supreme Court in the case of ***Mohan Lal vs. State of Punjab, (2018) SCC Online SC 974*** has upheld such a conduct of prosecution. The Hon'ble Delhi High Court has ignored clauses 2.3, 2.5 and 2.6 of the standing order no. 1 of 1989 which operate as exception to clause 2.4 thereof. However clause 2.4 is only advisory and not mandatory and compulsory providing for drawing one sample each from each packet recovered. In the present case clause 2.8 of the standing order has been complied. The judgments referred by the opposite party have not been considered by the Hon'ble Delhi High Court in the judgment cited. The issue with respect to sampling is beyond the pleadings contained in the bail application and the other legal requirements of panchanama, recording of statements etc., have been fully complied in the present case.

8. After considering the rival submissions this court finds that the argument on behalf of the applicant, that the clause 2.4 of the standing order was not complied and no representative samples were drawn from all the 19 packets recovered by the prosecution allegedly from the car of the applicant is well founded. The reply of the counsel for the opposite party that clause 2.4 of the standing order in only advisory and not mandatory and compulsory has not found in favour with the Apex Court in the case of ***Noor Aga vs. State of Punjab and Another, 2008 (3) JIC 640 (SC).*** The Apex court has held in paragraph nos. 123, 124 and 125 that the standing order in dispute and other guidelines issued by the authority having legal sanction are required to be complied by the subordinate authorities. For ready reference the aforesaid paragraphs are quoted hereinbelow:-

123. Guidelines issued should not only be substantially complied, but also in a case involving penal proceedings, vis-`-vis a departmental proceeding, rigours of such guidelines may be insisted upon. Another important factor which must be borne in mind is as to whether such directions have been issued in terms of the provisions of the statute or not. When directions are issued by an authority having the legal sanction granted therefor, it becomes obligatory on the part of the subordinate authorities to comply therewith.

124. Recently, this Court in ***State of Kerala & Ors. v. Kurian Abraham (P) Ltd. & Anr. [(2008) 3 SCC 582]****, following the earlier decision of this Court in* ***Union of India v. Azadi Bachao Andolan [(2004) 10 SCC 1]*** *held that statutory instructions are mandatory in nature.*

125. Logical corollary of these discussions is that the guidelines such as those present in the Standing Order cannot be blatantly flouted and substantial compliance therewith must be insisted upon for so that sanctity of physical evidence in such cases remains intact. Clearly, there has been no substantial compliance of these guidelines by the investigating authority which leads to drawing of an adverse inference against them to the effect that had such evidence been produced, the same would have gone against the prosecution.

9. The judgment of the Delhi High Court relied upon by the counsel for the applicant is in conformity with the judgment of the Apex Court in the case of **Noor Aga (supra)** which has been reiterated by the Apex Court in the case of ***Mohan Lal vs. State of Punjab, (2018) SCC Online SC 974***. The issue raised by the learned Senior Counsel has not been answered in the compilation of case laws filed by the counsel for the opposite party. They are only related to the question whether bail should be granted to the accused in cases under N.D.P.S Act or not. Liberal approach of the court is unwarranted and bail can be granted only under exceptional circumstances. Learned counsel for the opposite party has not cited any judgment showing the ratio laid down by the Apex Court in the case of **Noor Aga (supra)** in paragraph nos. 123 to 125 is not correct.

10. The second argument of the counsel for the opposite party, that at the stage of consideration of bail application, the judgment passed in criminal appeal is not relevant requires consideration. It is not deniable that the rigorous section 37 of the N.D.P.S Act provides that the court must adopt a negative attitude towards bail and only when it is satisfied that there are reasonable grounds of believing that the accused is not guilty of offence alleged and that he is not likely to commit any offence while on bail, he can be enlarged on bail. In the present case there is non-compliance of the procedure of sampling provided under the standing order which has statutory force and therefore the applicant may not be held guilty after trial. Secondly, there is no prior criminal history of the applicant which may compel this court to take the view that the applicant will commit further offence after being enlarged on bail. This is his first implication.

11. 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.

12. Keeping in view the nature of the offence, argument advanced on behalf of the parties, evidence on record regarding complicity of the accused, larger mandate of the Article 21 of the Constitution of India and the dictum of Apex Court in the case of ***Dataram Singh Vs. State of U.P. and another reported in (2018) 3 SCC 22*** and without expressing any opinion on the merits of the case, the Court is of the view that the applicant has made out a case for bail. The bail application is allowed.

13. Let the applicant, Phool Chand Ali, in N.C.B. Case Crime No.35 of 2019, under Section 8/20/27A/29 of the N.D.P.S Act, 1985, Chalani Police Station- N.C.B. Lucknow, Police Station- Kotwali, District- Mau, 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 applicant will furnish sureties to the satisfaction of the court below within a month after normal functioning of the courts are restored.

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.

11. In case of breach of any of the above conditions, it shall be a ground for cancellation of bail.

(2020)10ILR A271
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.10.2020

BEFORE
THE HON'BLE GAUTAM CHOWDHARY, J.

Crl. Misc. Bail Application No. 29346 of 2020

Babbu ...Applicant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Shiv Bahadur Singh, Sri Rajendra Singh

Counsel for the Opposite Party:
A.G.A., Sri Nafis Ahmad, Sri Devendra Kumar Singh, Sri Sanjay Kumar Yadav

A. Criminal Law - Indian Penal Code, 1860 - Sections 274, 275, 420 & Drugs and Cosmetic Act, 1940 - Sections 18(a)(i), 27-application-allowed-section 27 of the Act would not be attracted-in order to fall within the ambit of this section the accused must manufacture the drugs for sale or stock or exhibit for sale or distribute for the same –there is no evidence to show that he applicant had any shop or that he was a distributing agent –all that has been shown that two bags containing the blood have been recovered from the diggy of the motorcycle, the same was neither sent for the chemical examination nor the bar code of the blood was scanned by the police.(Para 3,4,5)

The application is allowed. (E-6)

List of Cases Cited:-

1. Md. Shabir Vs St. of Mah. (1979) AIR 564, (1979) SCR (2) 997

2. Dataram Singh Vs St. of U.P. & anr. (2018) 3 SCC 22

(Delivered by Hon'ble Gautam Chowdhary, J.)

1. Heard Sri Shiv Bahadur Singh, learned counsel for the applicant, Sri Nafis Ahmad, Sri Devendra Kumar Singh, Sri Sanjay Kumar Yadav, 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 Babbu with a prayer to release him on bail in Case Crime No. 122 of 2020, under Sections 274, 275, 420 IPC and section 18(a)(i) and section 27 of Drugs and Cosmetics Act, 1940, Police Station- Chandauli, District Chandauli during pendency of trial.

3. The contention of learned counsel for the applicant is that no offence under sections 274, 275, 420 IPC, section 18(a)(i) and 27 of Drugs and Cosmetic Act, 1940 is made out against the applicant. Further submission advanced by learned counsel for the applicant is that two bags containing the blood have been recovered from the *diggy* of the motorcycle, the same was neither sent for the chemical examination nor the bar code of the blood was scanned by the police. Lastly argued that the applicant is innocent and has falsely been implicated in this case as there is no evidence to show that the applicant had any shop or he was a distributing agent or he was going to sell it, hence section 27 of the

Act would not be attracted. The applicant is in jail since 4.7.2020.

4. Learned counsel for the applicant has also placed reliance upon the judgment given by the Apex Court in **Mohd. Shabir Vs. State of Maharashtra reported in 1979 AIR 564, 1979 SCR (2) 997** in which it has been held as under :-

"Mr. U. P. Singh appearing in support of the appeal has raised a short point before us. He has submitted that taking the prosecution case at its face value, no offence can be said to have been committed under section 27 (a) (i) or (ii) of the Act. It was submitted that the ingredients required by section 27 have not been proved in this case and therefore, even if, the accused pleaded guilty, that will not enable the prosecution to convict him on his plea of guilty. Section 18 (c) runs thus :

"manufacture for sale, or sell, or stock or exhibit for sale, or distribute any drug or cosmetic, except under, and in accordance with the conditions of, a licence issued for such purpose under this Chapter."

Section 27 is the penal section under which the offence is punishable and this section runs thus:

"Whoever himself or by any other person on his behalf manufactures for sale, sells, stocks or exhibits for sale or distributes-(a) any drug-

(i) deemed to be misbranded under clause (a), clause (b), clause (e), clause (d), clause

(f) or clause (g) of section 17 or adulterated under section 17B; or

(ii) without a valid licence as required under clause (c) of section 18."

shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to ten years and shall also be liable to fine; Provided that the Court may, for any special reasons to be recorded in writing impose a sentence of imprisonment of less than one year;"

It was contended by Mr. Singh that in order to fall within the, ambit of this section the accused must manufacture the drugs for sale or stock or exhibit for sale or distribute the same. There is no evidence in this case to show that the appellant had any shop or that he was a distributing agent. All that has been shown is that the tablets concerned were recovered from his possession. It was urged that possession simpliciter of the tablets of any quantity whatsoever would not fall within the mischief of section 27 of the Act. On an interpretation of section 27, it seems to us that the arguments of Mr. Singh is well founded and must prevail. The words used in section 27, namely, "manufacture for sale", sells, have a comma after each clause but there is no comma after the clause "stocks or exhibits for sale". Thus the section postulate three separate categories of cases and no other. (1) manufacture for sale; (2) actual sale; (3) stocking or exhibiting for sale or distribution of any drugs. The absence of any comma after the word "stocks" clearly indicates that the clause "stocks or exhibits for sale" is one indivisible whole and it contemplates not merely stocking the drugs but stocking the drugs for the purpose of sale and unless all the ingredients of this category are satisfied, section 27 of the Act would not be attracted. In the present case there is no evidence to show that the appellant had either got these tablets for sale or was selling them or had stocked them for sale. Mr. Khanna appearing for the State, however, contended that the word "stock" used in section is wide enough to

include the possession of a person with the tablets and where such a person is in the possession of tablets of a very huge quantity, a presumption should be drawn that they were meant for sale or for distribution. In our opinion, the contention is wholly untenable and must be rejected. The inter pretation sought to be placed by Shri Khanna does not flow from a true and proper interpretation of section 27. We, therefore, hold that before a person can be liable for prosecution or conviction under section 27 (a) (i) (ii) read with section 18 (c) of the Act, it must be proved by the prosecution affirmatively that he was manufacturing the drugs for sale or was selling the same or had stocked them or exhibited the articles for sale. The possession simpliciter of the articles does not appear to be punishable under any of the provisions of the Act. If, therefore, the essential ingredients of section 27 are not satisfied the plea of guilty cannot lead the Court to convict the appellant.

As regards the second charge, it seems to us that the case of the appellant is clearly covered by the language contained in section 18A read with section 28. Section 18A runs thus:

"Every person, not being the manufacturer of a drug or cosmetic or his agent for the distribution thereof, shall, if so required, disclose to the Inspector the same, address and other particulars of the person from whom he acquired the drug or cosmetic."

Section 28 which makes no disclosure of 18A punishable reads thus:

"Whoever contravenes the provisions of section 18A shall be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to five hundred rupees, or with both."

5. Considering the facts, circumstances of the case, submission made by learned counsel for the applicant, learned A.G.A. and from perusal of the material available on record, larger mandate of the Article 21 of the Constitution of India and the dictum of Apex Court in the case of **Dataram Singh Vs. State of U.P. and another, reported in (2018) 3 SCC 22** and without expressing any opinion on the merits of the case, let the applicant involved in the aforesaid crime be released on bail on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned with the following conditions that :-

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. 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.

5. 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.

6. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad.

7. 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.

6. In case of breach of any of the above conditions, it shall be a ground for cancellation of bail.

(2020)10ILR A274
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.10.2020

BEFORE
THE HON'BLE PANKAJ NAQVI, J.
THE HON'BLE SANJAY KUMAR PACHORI, J.

Criminal Misc. Writ Petition No. 6539 of 2020

Rama Shankar Mishra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Dheeraj Kumar Dwivedi, Sri K.K. Tripathi

Counsel for the Respondents:
G.A./A.G.A.

Criminal Law - Code of Criminal Procedure, 1973- Section 164 - Petition seeking Fair investigation-despite statements of the victim u/s164 Cr.P.C. alleging gang rape and prima facie medical opinion indicating sexual assault-Police gave a clean chit to accused-Remand Magistrate mechanically took cognizance of offence u/s 323, 504, 506 IPC only and not u/s 376 D-impugned order of cognizance quashed-disciplinary enquiry against I.O.s and C.O. directed.

Held, Once a police report disclosing commission of a cognizable offence is placed before the Magistrate the latter assumes jurisdiction to take cognizance under Section 190 Cr.P.C. At the stage of Section 190 of the Code, the Magistrate has a very important role to play i.e. he has to take cognizance of the offence on the basis of materials collected during 10 investigation. The word "cognizance" is not a word of semantics alone, rather it connotes judicial application of mind so as to enable the Magistrate to ascertain as to what offences are disclosed on the basis of materials collected during investigation forming part of the police report. This is a provision of immense importance which somehow seems to have been lightly ignored resulting in casual / mechanical acceptance of police reports. We do not intend that a Magistrate should pass a detailed / reasoned order but what we expect from them is that they should exercise due diligence and apply their judicial mind as to what offences are made out on the basis of materials collected during investigation since ultimately he has to take cognizance of the offence not of offender. **para 10(i))** (E-9)

List of Cases cited:

1.Sakiri Vasu Vs St. of U.P. & ors. (2008) 2 SCC 409

2.Sudhir Bhaskarrao Tambe Vs Hemant, Yashwant Dhage & ors., (2016) 6 SCC 277

3. Abhinandan Jha and Others Vs Dinesh 11 Mishra, AIR 1968 SC 117

(Delivered by Hon'ble Pankaj Naqvi, J. & Hon'ble Sanjay Kumar Pachori, J.)

Heard Sri Dheeraj Kumar Dwivedi, learned counsel for the petitioners, Sri Shiv Kumar Pal, the learned Government Advocate assisted by Sri Gambhir Singh / Sri Deepak Mishra, the learned AGA's.

This is informant's petition under Article 226 of the Constitution of India seeking fair investigation in Case Crime No.1070/2019, under Sections 452/323/504/506 IPC, P.S. Meja, Prayagraj.

We are pained and anguished to brazen abdication of the duties of police in conducting investigation in a sensitive

matter like gang-rape, whereby despite statements of the victim under Section 164 Cr.P.C alleging gang-rape, and medical opinion prima facie indicating sexual assault, police gave a clean chit to the accused for gang rape.

Background facts:

1. There appears to be a dispute between the family of the victim and the accused over landed property. The sequence of occurrence can be split into three parts-

GENESIS

(i) The first part came to be generated on 25.12.2019 when 4 named accused i.e. Pawan Kumar Singh, his brother Arun Kumar Singh, Ashish Kumar Singh and Shani Singh, both sons of Pawan Kumar Singh came to the house of the victim at about 6.30 in the morning hurling filthy abuses, taking objection to the conduct of informant therein i.e. brother of the victim and his family in not letting a road to be constructed. Accused after assault serious injuries to the family members of the victim, fled from the scene. An FIR in respect of said incident was registered on 26.12.2019 at 6.27 PM as Case Crime No.1070/2019 under Sections 452/323/504/506 IPC at P.S. Meja, Prayagraj.

1st GANG RAPE

(ii) That on 1.1.2020 at about 8 PM while victim had gone to ease on the rear side of her house, 4 accused named in the first occurrence, along with 4 other unknown were, waiting for the arrival of the victim and when she came, she was dragged in an unnumbered vehicle (Model-Duster) by 8 accused. On hearing cries for help, father of the victim and other family members came out of the house, saw the accused armed, who threatened them with life while the victim was whisked away. An FIR in respect of this occurrence came to be lodged on 2.1.2020 at 1.48 PM as Case Crime No.3/2020 under Sections 147/366 IPC at P.S. Meja, Prayagraj. The FIR also alleged that on 25.12.2019 the accused had extended a threat that the family of the informant would be given a newyear gift.

(iii) That on 8.1.2020, victim was dropped from a vehicle near her house. She was subjected to medical examination in police custody, on 9.1.2020 which indicated that her hymen was torn with slight redness in the region. The doctor opined as follows-

"There is no sign of force or violence. So that sexual violence cannot be ruled out."

(iv) That the statement of the victim under Section 164 Cr.P.C. was recorded on 14.1.2020 which is extracted herein:-

आज दिनांक 14/1/20 को पीड़िता उम्र 19 वर्ष, पुत्री रमाशंकर मिश्रा, निवासी मेहडी दोगारी का पुरा, मेजा, प्रयागराज को द्वारा विवेचक मुन्नालालन मय महिला आरक्षी जागृति सरोज मेरे समक्ष लाया गया। पीड़िता ने सशपथ निम्नलिखित बयान दिया–

घटना 1/1/20 की हैं । मै शाम 8.30 बजे अपने चाचा को खाना देकर घर के पीछे शौचालय जा रही थी। तब मैने तहसीलदार सिंह, अरूण सिंह, आशीश सिंह, सन्नी सिंह को देखा । 3–4 और लोग थे जिन्हे मैने नही पहचाना। तहसीलदार सिंह ने मेरा मुह दबा दिया जिससे मैं बोल नही पाई। फिर मै बेहोश हो गई। जब होश आया तब ऑखे, मुँह और हाथ बंधे थे। ऑख में पट्टी होने के कारण मुझे कुछ नही समझ आ रहा था कि जगह क्या है। ऐसा लगता था किसी कमरे में है। 3–4 दिन खाने को कुछ नही दिया, पानी देते थे। एक दो दिन बाद किसी ने मेरी सलवार उतारी। मेरे साथ गलत काम किया ;बलात्कारद्ध/गलत काम करने के बाद सलवार पहना दी। 2–3 दिन बाद बेहोश करके डिक्की में

रखा गाड़ी की। मुझे नही पता कितने समय डिक्की में थी। ऑखों मे पट्टी बंधी थी। मुझे नही पता गाड़ी मे कितने लोग थे। मेरे साथ 3–4 बार गलत काम ;बलात्कारद्ध किया गया परन्तु किसने किए यह नही पता। 8/1/2020 को मुझे घर के पीछे गाड़ी से उतार दिया गया। जब मुझे छोड़ा तब हाथ खोल कर छोड़ा। तब मैने आंखो की पट्टी खोली और देखा लाल रंग की गाड़ी जा रही थी। नम्बर नही देख पाई। तहसीलदार, अरूणसिंह और उनके बेटो से जमीन का विवाद चल रहा था हमने 25/12/19 को पुलिस बुलाई तब सन्नी सिंह ने कहा था कि बच्ची मैं तुम्हें नए साल के दिन गिफ्ट दूगॉ। जब मै घर गई तब पुलिस थी। इसके अतिरिक्त मुझे कुछ नही कहना।

सुनकर तस्दीक किया

Sd. Victim

जैसा सुना मेरे द्वारा
अक्षरश लिखा गया।

Sd. अस्पष्ट
14/1/20
JM II
Copied by Manish Chandra

(iv) A perusal of the above statement, would prima facie indicate that the victim was subjected to repeated sexual assaults while her hands were tied and eyes blind-folded.

(v) That on 22.1.2020, an application was given to A.D.G of the Zone that police of Police Station Meja was not taking any concrete action including arrest of the accused named in the FIR as it had colluded with the accused, investigation of Case Crime No.3/2020 be transferred to any other police station of the district. After investigation, a charge-sheet came to be submitted on 29.3.2020 in Case Crime No.3 of 2020 only under Sections 323/504/506 IPC only, exonerating all accused at the stage of investigation under Sections 147/366/376-D IPC. The Remand Magistrate mechanically took cognizance of the offence on 1.5.2020 under Sections 323/504/506 IPC only.

2nd GANG RAPE

(vi) That the unfortunate tale of woes for the victim did not end as accused Abhishek @ Shani after being enlarged on bail under Section 323/504/506 IPC started extending threats to the victim so much so that she had to be shifted to the house of her maternal uncle from where she was again abducted in vehicle on 17.5.2020 at about 8 PM while she had gone to ease herself, in respect of which an FIR as Case Crime No.264/2020 under Sections 363/366 IPC came to be lodged against unknown.

(vii) That as the whereabouts of the victim were not known, a Habeas Corpus Writ Petition No. 277/2020 came to be filed by the father of the victim for the recovery of his daughter i.e. the victim. This Court on 16.6.2020 directed the S.S.P., Prayagraj to recover and produce the victim before the court. The corpus / victim was produced before the court on 9.7.2020 and on her statement was handed over to the custody of her parents.

(viii) That subsequently her statement under Section 164 Cr.P.C. in Case Crime No.264/2020 was recorded on 17.8.2020 which is extracted hereunder:-

ब्यानकर्तीमय विवेचक एंव महिला आरक्षी मेरे समक्ष उपस्थित। विवेचक द्वारा ब्यानकर्ती की शिनाख्त की गयी।

बयानकर्ती उम्र 19 वर्ष पुत्री रमाषंकर मिश्रा नि0 लेहड़ी थाना– मेजा मु0 अ0 सं0 264/20, धारा 363, 366, 120बी भ0 द0 सं0 में सषपथ ब्यान दिया कि 1/01/2020 को मेरा आपहरण अरूण सिंह, पवन सिंह उर्फ तहसीलदार, आषीश सिंह, अभिशेक सिंह उर्फ सनी ने किया था। और आठ दिन कर मुझे एक कमरे में रखा। और मेरे साथ जबरदस्ती शारीरिक संबंध बनाया। उस समय आशीश सिंह और अरूण सिंह ने मेरे साथ शारीरिक संबंध बनाया था। इस घटना की थ्त भी हुयी थी। दूसरी बार 17/05/2020 को मेरा आपहरण अमरेन्द्र सिंह उर्फ पंकज, आशीष सिंह ने किया। मैं अपने मामा के घर गयी थी। वहॉ से मेरा

आपहरण किया। एक महिना तक मुझे एक कमरे में बन्द करके रखा। वहॉ पर अरूण सिंह ने मेरे साथ जबरदस्ती शारीरिक संबंध बनाया। एक और आदमी भी आता था लेकिन वो मुंह

यह बयान ब्यानकर्ती के बोलने पर अक्षरशः लिखा गया और ८

Sd. victim

Sd. अस्पष्ट 17/8/2020

C.J. (S.D.) F.T.C.

Prayagraj

(ix) That from a perusal of above statement it transpires that the victim alleged that she was initially abducted on 1.1.2020 by above named accused and again on 17.5.2020 from her maternal uncle's house by accused Amrendra Singh @ Pankaj and Ashish Singh who put her in house arrest for a month, wherein she was sexually assaulted by accused Arun Singh and another unknown who always used to come hiding his face and that at first available opportunity she managed her escape, met a stranger namely Neeraj @ Degree on road who took her to the police station where she was made to sign some papers that she is the wife of one Dharampal which she denied, that Dharampal is aged about 50 years, is already married with whom she has no connection.

2. That this court while entertaining this writ petition on 27.8.2020 had directed the I.O. concerned to file his personal affidavit as to why accused had not been arrested and to conclude investigation. It appears that the petitioner had no knowledge that a charge-sheet had been filed against the accused in Case Crime No.3/2020 under Sections 323/504/506 IPC on 29.3.2020 as this fact was alleged for the 1st time in the personal affidavit dated 22.9.2020 of the IO.

3. We are conscious that when a matter is pending investigation, we are not expected to comment on merit/demerits of the case which may prejudice either of the parties or to direct the police to act in a particular manner. But where materials collected during investigation are such i.e. the statements under Section 164 Cr.P.C. and the medical opinion, prima facie not ruling out sexual assault, then the I.O. cannot be oblivious to the same, followed by mechanical cognizance by Remand Magistrate exonerating the accused for gang rape. In our considered opinion, it is not one of those cases where petitioner should be relegated to avail the option of a protest.

4. The learned Government Advocated / A.G.A. faced with repeated queries as to how the State can justify such an investigation, both the learned G.A / A.G.A. and the S.S.P. present in person along with 2 Investigation Officers had nothing to offer.

5. The learned AGA also informed us that a final report has also been submitted in Case Crime No.264/2020 (2nd gang rape), exonerating the accused from all offences i.e. under Sections 363/366 IPC.

6. We lest not forget that the second alleged gang-rape is connected with the first gang-rape as the victim and the accused are same and the statement of the victim under Section 164 Cr.P.C. and medical opinion in the second gang rape are also on record of the writ petition. We, therefore, find no justification to relegate the petitioner to file a second petition for fair investigation in Case Crime No.264/2020 as relevant materials are on record.

7. We in the light of above are of the considered view that the I.O.'s of Case Crime No.3 & 264, both of 2020 and the Circle Officer concerned, who were vested with the duty to conduct and supervise investigation fairly and to take a call as to under what offences police report is to be filed from the materials emerging from investigation i.e. Section 164 Cr.P.C. statement and the medical opinion not ruling out sexual assault, turned a blind eye, while giving clean chit to accused for gang-rape, warranting a disciplinary action.

8. We clarify that observations made above are only for the limited purposes at this stage i.e. whether there were relevant materials before the Magistrate for taking cognizance for an offence under gang rape and the trial court shall be at liberty to decide without being influenced by any observations made above.

9. We direct:-

(i) The order of cognizance dated 1.5.2020 passed by the Remand Magistrate in Case Crime No.3/2020, under Sections 247/366 IPC, P.S. Meja, Prayagraj is quashed. The learned Jurisdictional Magistrate is directed to take fresh cognizance on available materials at the earliest.

(ii) The Competent Authority is directed to immediately place the I.O.'s of Case Crime No. 3 & 264, both of 2020 and the Circle Officer concerned under suspension and institute disciplinary proceedings against them which shall be conducted by an officer not below the rank of Superintendent of Police. The disciplinary proceedings shall be completed as expeditiously as possible preferably within 2 months and the action taken be apprised to the court in a sealed cover on 18.12.2020.

(iii) The Disciplinary Authority shall not hesitate in invoking the provisions of Section 166-A IPC and other offences, if need be, against the erring police officials.

(iv) The victim shall be provided adequate security (24 x 7) at the expense of the State. She shall be escorted in a police vehicle to record her evidence in the Court and the witness protection scheme formulated by the Apex Court in Mahendra Chawla and Others vs. Union of India and others in Writ Petition (Criminal) No. 156/2016 on 5.12.2018 shall be adhered to.

A word for Magistracy on "cognizance"

10. Magistracy constitutes a very important chain in the criminal administration justice system as it is the court of first instance. The moment an FIR in respect of a cognizable offence is lodged, the Jurisdictional Magistrate assumes competency and power to supervise ongoing investigation with minimal but legitimate interference. Reference may be made to the decision of the Apex Court in **Sakiri Vasu vs. State of U.P. and others and (2008) 2 SCC 409** and **Sudhir Bhaskarrao Tambe v. Hemant, Yashwant Dhage and others, (2016) 6 SCC 277.** Upon conclusion of investigation, the I.O. through the S.H.O is obliged to submit a police report along with all relevant materials collected during investigation under Section 173(2) of the Code before the competent Magistrate, disclosing commission of a particular offence or a closure report, as the case may be.

(i) Once a police report disclosing commission of a cognizable offence is placed before the Magistrate the latter assumes jurisdiction to take cognizance under Section 190 Cr.P.C. At the stage of Section 190 of the Code, the Magistrate has a very important role to play i.e. he has to take cognizance of the offence on the basis of materials collected during investigation. The word "cognizance" is not a word of semantics alone, rather it connotes judicial application of mind so as to enable the Magistrate to ascertain as to what offences are disclosed on the basis of materials collected during investigation forming part of the police report. This is a provision of immense importance which somehow seems to have been lightly ignored resulting in casual / mechanical acceptance of police reports. We do not intend that a Magistrate should pass a detailed / reasoned order but what we expect from them is that they should exercise due diligence and apply their judicial mind as to what offences are made out on the basis of materials collected during investigation since ultimately he has to take cognizance of the offence not of offender.

(ii) Take the example of the present case. The FIR in Case Crime No.3/2020 alleged abduction of the victim, and the same was registered under Sections 147/366 IPC but the charge-sheet came to be submitted under Sections 323/504/506 IPC even after allegation of gang-rape under Section 164 Cr.P.C and medical opinion prima facie in support thereof. A vigilant Magistrate at the stage of Section 190 Cr.P.C is at least expected to go through the FIR and ought to have looked for statement of the victim and medical evidence, if any, which could have enabled him to take cognizance of the offences disclosed on the basis of materials brought before him along with the police report.

(iii) The casual approach of the Magistrate at the stage of Section 190 Cr.P.C is resulting in unscrupulous writ petitions under Section 482 Cr.P.C petitions / Article 226 petitions for further / fair investigation to already overburdened court. We find useful to quote the following paragraph of the judgement of the Apex Court in **Abhinandan Jha and Others vs. Dinesh Mishra, AIR 1968 SC 117.**

16. The use of the words 'may take cognizance of any offence', in sub-s. (1) of s. 190 in our opinion imports the exercise of a 'judicial discretion', and the Magistrate, who receives the report, under s.. 173, will have to consider the said report and judicially take a decision, whether or not to take cognizance of the offence. From this it follows that it is not as if that the Magistrate is bound to accept , the opinion of the police that there is a case for placing the accused, on trial. It is open to the Magistrate to take the view that the facts disclosed in the report do not make out an offence for taking cognizance or he may take the view that there is no sufficient evidence to justify an accused being put on trial. On either of these grounds, the Magistrate will be perfectly justified in declining to take cognizance of an offence, irrespective of the opinion of the police. On the other hand, if the Magistrate agrees with the report, which is a charge-sheet submitted by the police, no difficulty whatsoever is caused, because he will have full jurisdiction to take cognizance of the offence, under s. 190(1)(b) of the Code. This will be the position, when thereport under s. 173, is a charge-sheet.

17. Then the question is, what is the position, when the Magistrate is

dealing with a report submitted by the police, under s. 173, that no case is made out for sending up an accused for trial, which report, as we have already indicated, is called, in the area in question, as a 'final report'? Even in those cases, if the Magistrate agrees with the said report, he may accept the final report and close the proceedings. But there may be instances when the Magistrate may take the view, on a consideration of the final report, that the opinion formed by the police is not based on a full and complete investigation, in which case, in our opinion, the Magistrate will have ample jurisdiction to give directions to the police, under s. 156(3), to make a further investigation. That is, if the Magistrate feels, after considering the final report, that the investigation is unsatisfactory, or incomplete, or that there is scope for further investigation, it will be open to the Magistrate to decline to accept the final report and direct the police to make further investigation, under s. 156(3). The police, after such further investigation, may submit a charge-sheet, or, again submit a final report, depending upon the further investigation made by them. If ultimately, the Magistrate forms the opinion that the facts, set out in the final report, constitute an offence, he can take cognizance of the offence under Section 190(1)(c), notwithstanding the contrary opinion of the police, expressed in the final report.

11. We have no doubt that if the learned Magistrate go by above position of law then it will not only provide expeditious justice to the aggrieved but will also curtail frivolous petitions for further / fair investigation before this Court.

12. The Registrar General is directed to communicate this order to all the Judgeships, in particular the Sessions Judge, Prayagraj, the Director, Judicial Training and Research Institute, Lucknow, the Director General of Police, U.P., Lucknow, the I.G., Prayagraj Zone, Prayagraj, the S.S.P, Prayagraj for necessary action forthwith.

13. Put up for compliance / for further hearing on 13.10.2020.

(2020)10ILR A280
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.08.2020

BEFORE
THE HON'BLE J.J. MUNIR, J.

Second Appeal No. 1711 of 1991

Paras Nath & Ors. ...Appellants
Versus
Vishwanath ...Respondent

Counsel for the Appellants:
Sri V.K. Singh, Sri A.L. Tripathi, Sri Ashok Kumar Jaiswal, Sri Bhagwan Dutt Pandey, Sri Dan Bahadur Yadav, Sri N.K. Singh, Sri Neeraj Shukla, Sri S.K. Singh, Sri Siddharth Jaiswal, Sri V.K. Singh

Counsel for the Respondents:
Sri Shailendra Kumar, Sri Dharmendra Kumar Nirankar, Sri R.P. Ram, Sri Ram Avtar Pandey, Sri Ram Dular Patel, S.M.A. Abdy, Sri Shailendra Kumar Pandey, Sri Vinod Kumar Maurya

A. Civil Law - Specific Relief Act,1963 - Section 16(c)-application-claim for specific performance of a registered agreement to sell of agricultural land-plaintiffs were not ready and willing to perform their part of the suit agreement, so as to entitle them to a decree for

specific performance-all through the trial they set up a case that of the agreed sale consideration-later on, after suffering an adverse judgment in the trial court, the plaintiffs amended the plaint before lower Appellate Court, to plead as an alternative case that they dubbed as a clarification, to show that they were ready and willing-alternative plea, at the appellate stage, show lack of bona fides on the plaintiffs part.(Para 1 to 40)

B. The basic principle behind section 16(c) is that any person seeking benefit of the specific performance of contract must manifest that his conduct has been blemishless throughout entitling him to the specific relief. The provision imposes a personal bar. the question as to whether readiness and willingness has been proved in a particular case, is ultimately a question of fact that has to be judged on the basis of facts, evidence, circumstances and other surrounding factors.(Para 35 to 41)

The appeal is dismissed. (E-6)

List of Cases Cited:-

1. Man Kaur (Dead) by LRs Vs Hartar Singh Sangha,(2010) 10 SCC 512

2. Dheeraj Developers Pvt. Ltd. Vs Om Prakash Gupta & Ors, (2016) 12 SCC 397

3. Pramod Building & Developers Pvt. Ltd. Vs Shanta Chopra,(2011) 4 SCC 741

4. Aniglase Yohannan Vs Ramlatha & ors,(2005) 7 SCC 534

5. Madhukar Nivrutti Jagtap & ors. Vs Smt. Pramilabai Chandulal Parandekar & ors., (2019) SCC Online SC 1026

(Delivered by Hon'ble J.J. Munir, J.)

1. This is a plaintiffs' second appeal arising from a suit for specific performance of contract.

2. Original Suit No. 305 of 1987 was instituted in the Court of the City Munsif, Jaunpur by Parasnath and Smt. Sitawi against Vishwanath. They claimed specific performance of a registered agreement to sell dated 8th March, 1984, executed in favour of the two plaintiffs aforesaid by Vishwanath, the sole defendant. The agreement is about the covenanted sale of an unpartitioned 1/3rd share in agricultural land admeasuring a total of six decimals. The land aforesaid, at the time of execution of the agreement to sell, bore Plot No. 851. During consolidation operations, the plot has been renumbered as 791 with no change to its identity, areas or boundaries. The land, subject matter of agreement, is located at Mauja Deepakpur, Pargana Garhvara, Teshil Machhlishahar, District Jaunpur. One-third unpartitioned share in Plot No. 791, last mentioned, subject matter of agreement to sell dated 08.03.1984 between parties, is hereinafter referred to as "the suit property'. The suit property shall, however, be referred to, about its details mentioned in the plaint, by its full particulars and boundaries, in schedule "Aa' and "Ba' while setting forth the parties' case. The original plaintiffs, who are the two appellants here, died pending appeal. Both the plaintiff-appellants, which includes their respective heirs and legal representatives, shall be referred to hereinafter as "the plaintiffs', except where an individual reference is made to either of them. Vishwanath, the sole defendant to the suit is the sole respondent to this appeal. He shall hereinafter be referred to as "the defendant'.

3. The plaintiffs brought this suit with assertions to the effect that property detailed in schedule Aa is a joint property of the defendant and his brothers numbering two, Bahadur and Jangali. The said property is a *bhumidhari* of the three brothers, held jointly in equal share,

antedating the last *Chakbandi*. During the last *Chakbandi*, it was settled with the defendant and his two brothers. It is averred that in the property described in schedule Aa to the plaint, the defendant holds a 1/3rd share that works out to two decimals. The plaintiffs and the defendant negotiated terms where the plaintiffs settled with the defendant to purchase the suit property (1/3rd share in the land described in schedule Aa) for a sale consideration of Rs.6000/-. The defendant accepted the terms. In accordance with the terms settled between parties, the defendant executed the suit agreement in favour of the plaintiffs on 08.03.1984, agreeing to convey the suit property for a total sale consideration of Rs.6000/- in favour of the plaintiffs. The defendant received an earnest of Rs.2000/- at the time of execution of the suit agreement, leaving a residue of 4000/- that was agreed between parties to be payable at the time of execution of the sale deed. The suit agreement was registered as document No. 693 in Book No. 1, Volume No. 1187 and recorded at page Nos. 255-256 in the Office of the Sub Registrar. The suit agreement carried a covenant that a sale deed would be executed in favour of the plaintiffs within a period of three years of the date of execution of the agreement under reference.

4. The plaintiffs allege that the defendant asked them to pay varying sums of money out of the residue of Rs.4000/- payable towards the agreed sale consideration, at different points of time, which the plaintiffs paid. These part payments, according to the plaintiffs, aggregate to a sum of Rs.2500/-. This sum of Rs.2500/-, paid by the plaintiffs to the defendant, stands appropriated towards the agreed sale consideration which together with the earnest initially paid, left a residue of Rs.1500/- to be made good at the time of execution of the sale deed. It is then pleaded that in the ensuing *Chakbandi*, the property shown in schedule *''Aa'* of which the suit property is a part, has been renumbered as Plot No. 791 carrying with it no change in identity, location or dimensions. The new number assigned to the plot, of which the suit property is a part, is 791 admeasuring six decimals. It is averred that except for the nominal change of the plot number, the defendant and his two brothers continue to be *bhumidhars* of the plot which constitutes their *Chak*. This renumbered plot of the defendant and his brothers, of which the suit property is a part with its new number, has been detailed in schedule *''Ba'* to the plaint.

5. It is then averred in the plaint, as originally framed, that the plaintiffs have always been ready and willing and are still ready and willing to perform their part of the suit agreement, by securing execution of a sale deed and its registration in terms of the agreement, last mentioned, upon payment of the balance sum of Rs.1500/- due to the defendant. It is also averred that the remainder four decimals of land comprising property described in schedule *Aa* to the plaint has been purchased by Smt. Sitawi, plaintiff no. 2 and her son, Shyambihari through a duly executed sale deed. The defendant alone retains the suit property out of the total of six decimals. The defendant is thus left with two decimals. The plaintiffs within the period of three years called upon the defendant, through a notice dated 21.01.1987 sent by registered post, to execute a sale deed in their favour, in accordance with the terms of the suit agreement. The notice aforesaid was served upon the defendant but led to no action on their part; or a reply. The plaintiffs have also pleaded that being

cognizant of the defendant's *mala fides*, the plaintiffs further caused a notice dated 12.03.1987 to be served upon the defendant, through registered post, calling upon him to execute a sale deed in terms of the suit agreement within seven days of receipt. It was indicated that if the demand in the notice was not complied with, they would be compelled to bring action. The notice aforesaid, was served upon the defendant who chose not to respond or comply. The plaintiffs, accordingly, instituted the present suit on 09.04.1987, claiming a decree for specific performance of the suit agreement, upon the defendant, accepting the balance sale consideration of Rs.1500/-, by executing a sale deed in their favour conveying the suit property, out of that described in schedule *''Ba'* to the plaint and to put the plaintiffs in ownership possession. It has also been prayed that in the event of default on the defendant's part to comply with the decree, the decree be executed through process of Court.

6. It must be remarked here that a perusal of the relief clause shows that, coupled with the direction sought requiring execution of the sale deed by the defendant in the plaintiffs' favour, there is a specific prayer asking that the defendant be ordered to deliver possession of the suit property to the plaintiffs. A perusal of the description of the suit property (material part) detailed in schedule *''Ba'* to the plaint reads to the following effect (translated into English from Hindi vernacular):

"1. Details of land comprising schedule "Ba' situate at Mauja Deepakpur, Pargana Garhvara, Teshil Machhlishahar, District Jaunpur:

1/3 part, to wit, -02 decimals towards East in plot no. 791 admeasuring -06 decimals

boundaries- North field of Ramkuber,

South-Pakka Road Balwarganj, Belwar Road,

East-field of Kailash Narayan Singh,

West- remainder of the plot in question"

7. It must also be remarked here that though in the averments carried in the plaint, the suit agreement is clearly about a 1/3rd share in the property described in schedule *Aa*, the remainder of which is held by the defendant's brothers, the boundaries of schedule *''Aa'* property are the same schedule *''Ba'*. The boundaries and the description of the suit property given in schedule *Aa*, read to the following effect (translated into English from Hindi vernacular):

"1. Details of property comprising schedule *Aa* situate at Mauja Deepakpur, Pargana Garhvara, Tehsil Machhalishahar, District Jaunpur:

1/3 part, to wit, two desimals in Arazi No. 851/6/1 towards East, - 06

according to the boundaries indicated in schedule *Ba* above."

8. The defendant filed his written statement traversing the plaint allegations. It was pleaded that the going price of the suit property is about Rs.50,000/-. The defendant is not a literate man. He can sign his name with great difficulty. The defendant was in need of money and asked the plaintiff to loan him a sum of Rs.2000/-. The plaintiffs agreed to give him on loan the required sum of 2000/-, subject to execution of a document described as a *Makfool* (an Arabic word for a security or mortgage bond). It is pleaded that the defendant went to the Sub Registrar's office

at Machhalishahar in order to execute a security bond and sign the document, that lateron turned out to be an agreement to sell. He signed it believing it to be a security bond. The suit agreement was registered. It is averred that the suit agreement was not read out or explained to the defendant. It was secured through a conspiracy between the plaintiffs and the witnesses. The defendant never signed the suit agreement, understanding it to be an agreement to sell. The defendant never received any notice from the plaintiffs. It is also averred that the defendant was never paid a further sum of Rs.2500/-, in parts or installments, by the plaintiffs. The identity of the suit property which the plaintiffs have detailed, is absolutely incorrect. The suit property, as it exists on the spot, is not at all described in the suit agreement. The suit agreement, therefore, does not create any interests in the suit property and does not attach any obligations to it.

9. It must be remarked here that the defendant described the document that he signed as a *Makfool* in paragraph 11 of his written statement. The Trial Court in its judgment, that would be alluded to in due course, has also described the defendant's understanding about the character of the document as a *Makfool*. The lower Appellate Court too has described the defendant's claim, about his understanding of the suit agreement as a *Makfool*. There is absolutely no explanation in either of the two judgments, or elsewhere, about what a *Makfool* means. This Court and the learned Counsel for the parties were clueless about the word. After considerable exertions, this Court was able to find the following meaning of the word *Makfool* in the **Urdu-Hindi Shabdkosh**, compiled by **Mohammad Mustafa Khan ''Maddah' (Second Edition, 1972),** published by **Hindi Samiti, Hindi Bhawan, Mahatma Gandhi Marg, Lucknow**: "मक्फूल (word in Urdu script) अ. वि. - रेहन रखा हुआ, गिरौ, बंधक". This word appears to be one employed in Old Court Language, which has survived in use from the Medieval Era. It is not commonly understood by men of contemporary education. This Court would have appreciated if either of the two Courts below had used a translation of the word, in Hindi or English, or taken care to explain the word, once the defendant had used it in his written statement.

10. The Trial Court on the pleadings of the parties, struck the following issues (translated into English from Hindi vernacular):

"1. Whether the defendant covenanted with the plaintiff to sell the suit property and according to the said covenant executed the agreement to sell dated 08.03.1984?

2. Whether in peformance of the agreement to sell dated 08.03.1984, the defendant received of the plaintiff a sum of Rs.2500/-on different dates piecemeal?

3. Whether the plaintiff has been ready and willing to perform his part of the suit agreement?

4. Whether the plaintiffs got the agreement dated 08.03.1984 executed by the defendant by playing fraud?

5. Whether the suit agreement is not capable of performance in view of the assertions in paragraph 19 of the written statement?

6. Whether the suit is barred by limitation?

7. Whether the suit is barred by Section 16 and 20(2) of the Specific Relief Act?

8. Whether the plaintiffs are entitled to any relief?"

11. It appears that on behalf of the plaintiffs, Parasnath, plaintiff No. 1 entered the witness box and testified as PW-1, whereas one Jumman Khan also testified on behalf of the plaintiffs as PW-2. Documentary evidence was also led on behalf of the plaintiffs that comprises the suit agreement in original, a carbon copy of the notice dated 21.01.1987, a registered postal receipt relative to the said notice, a copy of the notice dated 12.03.1987, a registered postal receipt related to the last mentioned notice, an extract of the Khatauni, a copy of CH Form 41 and an acknowledgment card of delivery by registered post (relative to the notice dated 12.03.1987). On the defendant's side, Vishwanath, the sole defendant entered the box and testified as DW-1. No other evidence, oral or documentary, was led on behalf of the defendant. The Trial Court decided issues nos. 1 and 4, in favour of the plaintiff and against the defendant, in the manner that the execution of the suit agreement was held proved and the case of fraud, on the plaintiff's part in securing the suit agreement, was negated. The second issue was answered against the plaintiff in the negative, holding that the plaintiff had not been able to establish that he paid a sum of Rs.2500/-, from time to time, towards the agreed sale consideration. Issue no. 3 was also decided in the negative, holding that the plaintiff had not proved that he was ready and willing, according to the terms of the suit agreement, to get the sale deed executed. Issue no. 5 was again answered in the negative, against the defendant and in favour of the plaintiff, holding that renumbering of the plot, of which the suit property is a part, did not change its identity at all. It was only a change in its number, with no other change, including boundaries. In answer to issue no. 7 it was held, that plaintiff had not been able to establish his claim to specific performance, in accordance with the Section 16 of the Specific Relief Act. The provisions of Section 20 of the said Act, were not attracted. Issue no. 8 was decided in the manner that the plaintiff was held, not entitled to the relief of specific performance. He was, however, left free to take appropriate proceedings for the recovery of Rs.2000/- paid as earnest. The learned City Munsif, Jaunpur who tried this suit and returned the aforesaid findings, dismissed the suit with costs by his judgment and decree dated 23rd May, 1989.

12. The plaintiffs carried an appeal to the learned District Judge, Jaunpur. The appeal was lodged on 30.05.1989. It was admitted to hearing on the said date and by an interim injunction, the defendant was restrained from transferring the suit property till further orders. The appeal aforesaid was numbered as Appeal No. 136 of 1989 and assigned for determination to the Court of the learned Special Judge/Additional District Judge, Jaunpur. The learned Additional District Judge, Jaunpur proceeded to hear the appeal, framing three points for determination, to wit (translated into English from Hindi vernacular):

"1. Whether the defendant entered into the suit agreement dated 08.03.1984 after understanding its terms?

2. Whether the plaintiff has been ever ready and willing for the performance of his part of his suit agreement?

3. Whether the suit is barred by Section 16 (c) of the Specific Relief Act?"

13. Pending appeal before the lower Appellate Court, the plaintiffs sought amendment to the plaint, seeking to add a

case that they claimed was clarificatory of their stand. This case was to the effect that though they paid a sum of Rs.2500/-, piecemeal to the defendant, post execution of the suit agreement, a fact which the defendant has not denied in response to the notice of demand for performance served upon him by the plaintiffs, but the defendant was ready and willing and are still ready and willing to secure execution of the sale deed in their favour, upon payment of the balance sale consideration of Rs.4000/-. This amendment was allowed by the lower Appellate Court vide order dated 03.03.1990. An additional written statement was filed on 22.03.1990. The plaintiffs entered the witness box, before the lower Appellate Court, in order to support the amended plea.

14. The lower Appellate Court determined the first point in favour of the plaintiffs, holding that the defendant had entered into the suit agreement dated 08.03.1984 understanding its terms, and accepted an earnest of Rs.2000/-. He was not defrauded, in any manner, about the character of the document which the defendant got registered. The second and the third point for the determination, however, were both decided against the plaintiff and in favour of the defendant. The lower Appellate Court, in consequence, ordered the plaintiffs appeal to be dismissed with costs.

15. Aggrieved, the present appeal has been filed.

16. This appeal was admitted to hearing, on a substantial question of law that was formulated by this Court, adopting Question No. (iii) framed in the memorandum of appeal. Thus, this appeal was admitted on the following substantial question of law:-

"(iii) Whether the findings given by the Court below about non-readiness and willingness on the part of the plaintiffs, can be legally sustained, in the facts and circumstances of the present case?"

17. This Court, at the time of hearing the appeal, was of opinion that two further substantial questions of law were involved, which ought to be formulated and the parties heard. Accordingly, on hearing learned Counsel for the parties, this court vide order dated 26.02.2020 proceeded to frame two substantial questions of law, in addition to the one already formulated, which read as follows:

"1. Whether failure by the plaintiff to establish that he has paid the claimed sum of money out of the total sale consideration as accelerated payment, leads to an inference about his failure as to readiness and willingness within the meaning of Section 16(c) Specific Relief Act?"

2. Whether an amendment to the plea regarding readiness and willingness made at the appellate stage, notwithstanding the amendment being granted, can be proved in accordance with the requirement of Section 16(c) Specific Relief Act?"

18. This appeal has been heard on all the three substantial questions of law, that is to say, the one formulated vide order dated 01.11.1991 while admitting the appeal, and the two further substantial questions, framed vide order dated 26.02.2020.

19. Heard Sri B.D. Pandey, learned Counsel for the plaintiffs and Sri S.M.A. Abdy, learned Counsel appearing for the defendant.

20. Sri B.D. Pandey, learned Counsel for the plaintiffs submits that substantial question of law no. (iii) ought to be answered in their favour inasmuch as the findings of both courts below, about the plaintiffs failure to establish their readiness and willingness, are perverse. He has urged that the finding proceeds on the reasoning that the plaintiffs having failed to establish payment of Rs.2500/- post execution of the suit agreement, their case about readiness and willingness fails, because the plaintiffs were not ready and willing to secure execution on payment of the balance sale consideration of Rs.4000/-. Rather, they were ready and willing to pay what they assert to be their remainder liability: a sum of Rs.1500/- only. Learned Counsel submits that this perspective of the courts below is inherently flawed. According to him, it is technical and flimsy, rather than being wholesome and substantial. It is urged by Mr. Pandey that the plaintiffs' case is to be judged on the basis of his amended pleadings. The amendment that he sought to the plaint, before the lower Appellate Court, would relate back to the institution of the suit. The amendment is clarificatory in nature and does not introduce a new or inherently inconsistent case. Therefore, according to Mr. Pandey, the amendments to the plaint ought to be read as an integral part of the plaintiffs' case. The Courts below, according to learned Counsel for the plaintiffs, have committed a manifest error of law in looking at the amendment as a changed stand of the plaintiffs from which they have inferred failure to establish readiness and willingness.

21. Repelling the submissions of the learned Counsel for the plaintiffs, Mr. S.M.A. Abdy, learned Counsel for the defendant has submitted that both courts below have concurrently held that the plaintiffs were not ready and willing to perform their part of the suit agreement, so as to entitle them to a decree for specific performance. He submits that the finding about the plaintiffs, not being ready and willing to perform their part of contract within the meaning of Section 16(c) Specific Relief Act, betray no such fallacy of approach that may vitiate that conclusion. According to learned Counsel for the defendant, the findings on the issue proceed on a correct perspective of the law, on the standards whereof evidence has been evaluated, to draw conclusions that are in no way perverse. Learned Counsel submits, therefore, that substantial question of law no. (iii) does not at all arise.

22. It is also argued that grant of relief of specific performance is discretionary and the discretion is to be exercised not arbitrarily. The court is not bound to grant specific performance, merely because it is lawful to do so. In this case, according to learned Counsel for the defendant, the Courts below have rightly exercised that discretion.

23. It is urged that failure of the plaintiffs to establish readiness and willingness, is evident from the fact that all through the trial they set up a case that of the agreed sale consideration of Rs.6000/-, he paid Rs.2000/- at the time of execution of the suit agreement and Rs.2500/- post execution, piecemeal. Lateron, after suffering an adverse judgment in the Trial Court, the plaintiffs amended the plaint before the lower Appellate Court, to plead as an alternative case that they dubbed as a

clarification, to show that they were always ready and willing and are still ready and willing to pay the entire balance sale consideration in the sum of Rs.4000/-. This, the learned Counsel for the defendant says, introduces a contradiction in the plaintiffs' stand, rather than clarifying it. It does not show the plaintiffs *bona fides* which are essential to be proved in order to entitle the plaintiffs to a decree for specific performance.

24. In support of his contention, learned Counsel for the defendant has placed reliance upon the decision of the Supreme Court in **Man Kaur (Dead) by LRs vs. Hartar Singh Sangha, (2010) 10 SCC 512**. He has drawn the attention of the Court to paragraph 23 of the report, where it is held:

"23. The respondent next relied upon the following observations of this Court in *Aniglase Yohannan v. Ramlatha* [(2005) 7 SCC 534] : (SCC p. 540, para 12)

"12. The basic principle behind Section 16(c) read with Explanation *(ii)* is that any person seeking benefit of the specific performance of contract must manifest that his conduct has been blemishless throughout entitling him to the specific relief. The provision imposes a personal bar. The court is to grant relief on the basis of the conduct of the person seeking relief. If the pleadings manifest that the conduct of the plaintiff entitles him to get the relief on perusal of the plaint he should not be denied the relief."

This Court further held that the averments relating to readiness and willingness are not a mathematical formula which should be expressed in specific words and if the averments in the plaint as a whole, do clearly indicate the readiness and willingness of the plaintiff to fulfil his part of the obligations under the contract, the fact that the wording was different, will not militate against the readiness and willingness of the plaintiff. The above observations cannot be construed as requiring only a pleading in regard to readiness and willingness and not "proof" relating to readiness and willingness. In fact, in the very next para, this Court clarified that Section 16(c) of the Act mandates the plaintiff to aver in the plaint and *establish the fact by evidence aliunde* that he has always been ready and willing to perform his part of the contract. Therefore, the decision merely reiterates the need for both pleadings and proof in regard to readiness and willingness of the plaintiff."

25. Learned Counsel for the defendant has further placed reliance on the decision of the Supreme Court in **Dheeraj Developers Private Limited vs. Om Prakash Gupta and others, (2016) 12 SCC 397**. He has drawn support from the following remarks of their Lordships of the Supreme Court in **Dheeraj Developers Private Limited** *(supra)*:

"4. We have referred to the factual matrix only to a very limited extent for the reason that the High Court apparently has gone wrong in decreeing the suit only on the basis of the finding on genuineness of Ext. P-1 document. It should have been borne in mind that the suit was for specific performance and obviously there were also several other aspects of the matter including the aspect of readiness and willingness which required consideration by the High Court."

26. This Court has considered the submissions advanced by learned Counsel and perused the record. The question, about

readiness and willingness of the plaintiffs to perform their part of the contract, is a *sine qua non* for the Court to grant specific performance. The proposition is too well settled to brook doubt that specific performance is not to be granted, merely because it is lawful to do so. This principle of law has developed in the face of a presumption engrafted in explanation (i), appended to Section 10 of the Specific Relief Act, 1963 (as it stood prior to amendment by Act 18 of 2018, which governs this suit). Section 10 of Specific Relief Act *(supra)*, is quoted in *extenso*:

"10. Cases in which specific performance of contract enforceable.--Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the court, be enforced--

(a) when there exists no standard for ascertaining the actual damage caused by the non performance of the act agreed to be done; or

(b) when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief.

Explanation.--Unless and until the contrary is proved, the court shall presume--

(i) that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money; and

(ii) that the breach of a contract to transfer moveable property can be so relieved except in the following cases--

(a) where the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market;

(b) where the property is held by the defendant as the agent or trustee of the plaintiff."

27. The principle that holds that specific performance cannot be granted merely because it is lawful to do so, is largely built on the edifice of Section 16 (c) and the explanation (i) appended to Section 10 of the Specific Relief Act. Section 16(c) is extracted infra:

"16. Personal bars to relief.-

(a) x x

(b) x x

(c) [who fails to prove] that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

Explanation.- For the purposes of clause (c),-

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;

(ii) the plaintiff [must prove] aver performance of, or readiness and willingness to perform, the contract according to its true construction.

28. The principle engrafted in Section 16(c) has been introduced in the statute as a personal bar to relief. This implies that the bar to relief envisaged under Section 16(c), is something extraneous to the contract and personal to the parties. It is not a bar arising from the terms of the contract *per se* but about the manner in which the parties act and conduct themselves, in reference to the contract. This statutory feature, that governs the remedy of specific performance, has its origins in equity that was administered at one point of time in England as a separate branch of the legal system with all its Courts and principles

different from the common law and the Courts where the latter was administered. Since long, the distinction between law and equity has ceased to exist in England, and so far as our country is concerned, principles, both of common law and equity, are all expressed through statutes enacted by the competent legislature. Nevertheless, like many other telltale watershed, the principles developed in the old equity jurisdiction in England, can be seen peeping behind principles of law, all enmeshed in the same statute. The principles in Section 16(c), or for that matter the remedy of specific performance, have all to be understood as products of the old equity jurisdiction.

29. What the learned Counsel for the plaintiffs here desires to say is that it was their case that out of the agreed total sale consideration minus the earnest of Rs.2000/-, they have paid an additional sum of Rs.2500/- piecemeal. However, implicit in his pleading was his stand that if that case of his be not accepted, he was and is still ready and willing to perform his part of the contract by paying to the defendant the balance sale consideration of Rs.4000/-. He further urges, that in the pleadings initially framed, this implicit stand of the plaintiff was not all that vivid. Therefore, he applied to make it explicit, by introducing it in the plaint through amendment, before the lower Appellate Court. The amendment was granted. The amendment would relate back to the time when he filed his suit. He has also supported the amended plea, by entering the witness box before lower Appellate Court and proving his case regarding readiness and willingness, with reference to the balance sale consideration of Rs.4000/-.

30. Readiness and willingness are no words of art. Both carry different and well acknowledged connotations. Whereas "readiness' implies the financial capacity to discharge one's part of the contract, "willingness' refers to the psychological or mental inclination, to go ahead with the contract. Now, the plaintiffs took a clear stand in the plaint, as originally framed, that the total sale consideration was Rs.6000/-. Of this agreed sale consideration, they paid the defendant earnest in the sum of Rs.2000/- at the time of execution and registration of the suit agreement. They further paid a sum of Rs.2500/-, piecemeal, prior to commencement of action. There is not the slightest plea in the plaint expressing a case that if the sum of Rs.2500/- claimed to be paid by the defendant be not held proved, they were and still are ready and willing to pay the balance sale consideration of Rs.4000/- in performance of their part of the contract. If the said plea had been there in the plaint as an alternate plea, it would clearly indicate the *bona fides* of the plaintiffs about their readiness and willingness. Not only the plaint, the testimony in the dock does not remotely indicate their mind about the alternative above indicated. In his examination-in-chief dated 30.05.1989, PW-1, Parasnath has stated:

"मोयदा के बाद विश्वनाथ को हम लोगो ने २५००ह दो किस्तों में अदा भी किया । अब महज विश्वनाथ को १५००ह देना बाकी है जिसको मैं देने को तैयार हूँ"

31. All through the trial and until judgment, there was not as much as a hint in the plaintiffs' case that they had any time contemplated performing their part of the contract, in any other manner, but by paying the defendant a sum of Rs.1500/-. The plaintiffs, until judgment by the Trial Court never made allowance for the contingency that there claim about further

payment of a sum of Rs.2500/-, post execution of the suit agreement and prior to commencement of action, might not be proved. They had in their firm contemplation always, that the part of the contract left to be performed by them was payment of a sum of Rs.1500/-, and may be, their liability towards expenses of execution and registration, whatever it might have entailed. They never had in mind, that in any contingency they were ready and willing to perform their part of the contract that involved payment of the balance of Rs.4000/- to the defendant. Now, this Court may also remark that the plaintiffs believed that their claim about the further payment of a sum of Rs.2500/- was iron cast and all that they need pay the defendant was a sum of Rs.1500/-. The plaintiffs, therefore, harbored and proceeded on the belief that all that they had to do, to perform the substantial part of their contract, was to pay the defendant a sum of Rs.1500/-.

32. This Court must also remark that the belief was based on very flimsy ground. It was not a reasonable belief, looking to the fact that the plaintiffs had no written acknowledgment or receipt to prove that they had paid the defendant a sum of Rs.2500/-, piecemeal. Both the Courts below did not accept if for a fact, in the absence of any evidence produced by the plaintiffs to prove, that they had paid the defendant a sum of Rs 2500/- from time to time. Once the plaintiffs found that their claim had been negatived by the Trial Court, about payment of the further sum of Rs.2500/-, they introduced, through a very clever amendment, a case that notwithstanding their claim about the further payment of Rs.2500/- they were ever ready and willing to perform their part of the contract by paying the balance of Rs.4000/-. They introduced the said amendment, persuading the lower Appellate Court to accept it, as a clarificatory piece of pleading. In the clear opinion of this Court, the pleading was not at all clarificatory; that is what the the lower Appellate Court has also determined, at the hearing of the appeal. It was clearly a plea that was inherently compatible with the plaintiffs' case originally pleaded and on the basis of which, the trial went through. The amended pleading at the appellate stage brings about a fundamental alteration to the plaintiffs' case going to the root of the matter. This plea, which has been introduced through the amendment, as rightly remarked by the lower Appellate Court, ought to have been done at the earliest stage when the suit was before the Trial Court. It could then be regarded as an alternative plea, made *bona fide,* which had to be supported by evidence in the witness box during trial. Introducing this plea at the appellate stage, shows lack of *bona fides* on the plaintiffs part.

33. Now, this Court's conclusion, that disinclination of the plaintiffs to pay the balance sale consideration as settled and their insistence upon something lesser as good performance, would countervail a case of readiness and willingness on the plaintiffs' part, finds support in the principle laid down by the Supreme Court in **Pramod Building and Developers Private Limited vs. Shanta Chopra, (2011) 4 SCC 741**. The facts giving rise to the suit for specific performance in **Pramod Building and Developers Private Limited** *(supra)* are succinctly set out in paragraphs Nos. 12 and 13 of the report, that read:

"12. The appellant's case is as under: It is a builder. It agreed to purchase

the property for construction of a residential apartment building. The respondent failed to furnish the mutation certificate showing that the property was registered in her name in the records of the Municipal Corporation and failed to produce the up-to-date tax-paid receipts. The appellant therefore demanded that the respondent should give an affidavit and bank guarantee confirming that all municipal taxes had been paid and there were no arrears of municipal taxes. Subsequently, it did not even insist upon the affidavit and required the respondent to give a letter of undertaking and indemnity bond to that effect. The respondent did not comply with the said reasonable demand and refused to clear the tax dues. The respondent was duty-bound to make out a good and satisfactory title and that meant that she had to satisfy the appellant that all municipal taxes had been paid in regard to the property. The respondent failed to discharge this basic obligation and thereby committed breach.

13. The case of the respondent is as under: there was an arbitrary assessment of tax by the municipal authorities in regard to the property and therefore, she had filed a suit (Suit No. 712 of 1976 on the file of the Sub-Judge, First Class, Delhi). The court had decreed the said suit and directed the municipal authorities to make a fresh assessment in the light of its observations. There was no fresh assessment or demand by the Municipal Corporation for payment of tax. Therefore, she could not pay the municipal taxes and produce receipts. She had informed the appellant about the said dispute and had confirmed that in terms of the agreement, if and when the municipal authorities made the final assessment and made a demand in terms of such assessment, she would bear and pay the said taxes up to the date of sale. In this background, the question of her giving any affidavit or other document confirming that all taxes up-to-date were paid did not arise, as the sale agreement itself contained appropriate provision in that behalf. When matters stood thus, though the appellant had secured a demand draft towards the balance price of Rs.34,00,000 and she was ready to attend the Sub-Registrar's office and execute the sale deed by receiving the said sum, the appellant insisted that she should either pay Rs.5,00,000 to it towards municipal taxes or clear all municipal taxes due before the sale, as it apprehended that its construction project was likely to be affected. As she was not agreeable to meet the said illegal demand and pay Rs.5,00,000, the appellant was not ready to proceed with the sale. As the appellant refused to pay the entire balance consideration of Rs.34,00,000 in terms of the agreement and get the sale completed, she had no alternative but to terminate the contract on 22-6-1989."

34. It was in the context of the defendant's stand in **Pramod Building and Developers Private Limited** *(supra)*, regarding abatement of the agreed sale consideration on account of property taxes due, that their Lordships of the Supreme Court held:

"18. As rightly held by the High Court, it was for the plaintiff who approached the Court to prove that he was ready and willing to perform the contract. The plaintiff in a suit for specific performance, cannot obviously succeed unless he proved that he was ready and willing to perform the contract. The exhaustive correspondence between the parties clearly discloses the respective stands of the parties. Even the prayer in the plaint shows that the appellant was not

ready to pay the entire balance of Rs.34,00,000 as agreed under the agreement of sale but that the plaintiff insisted upon the appellant to pay the municipal taxes before the sale, as a condition for sale. If the appellant was not willing to pay Rs.34 lakhs at the time of sale, as specifically agreed under the agreement of sale, the appellant could not claim that it was ready and willing to perform its obligations."

35. The principle discernible in **Pramod Building and Developers Private Limited** *(supra)* comes to no more than this that a plaintiff asking for an abatement to the agreed sale consideration, not covenanted between parties to indemnify against a future property tax liability, demonstrates lack of readiness and willingness. In **Pramod Building and Developers Private Limited** *(supra)*, it was a claimed abatement to the agreed sale consideration on account of the future tax liability that was held to show lack of readiness and willingness. In the present case, the abatement to the agreed sale consideration has been claimed by the plaintiffs on an absolute and positive plea about an accelerated payment of the agreed sale consideration in part, which the plaintiffs have failed to prove. As already noticed, there is no alternate plea initially urged that the plaintiffs would pay the entire unabated balance, in the event of their failure to prove accelerated payment of a further part of the sale consideration. As such, apart from what this Court has said on the strength of the principle in **Pramod Building and Developers Pvt. Limited** *(supra)*, the plaintiffs must be held to have failed in their endeavor to prove readiness and willingness.

36. It is an accepted principle that an amendment once granted, relates back to the date of commencement of action or whenever the amending pleading was initially put in, depending on the nature of the amendment or the cause that has necessitated it. That is what the principle governing pleadings and amendments to the pleadings say. But, here the issue before the Court is about the statutory requirements of readiness and willingness that the plaintiffs must prove without blemish, in order to entitle them to specific performance. The amendment, though technically relates back to the time when the suit was instituted but, what this Court has already said in much detail, the point in time when it has been made and the manner in which it has been sought, besides the terms of the amendment, clearly show it to be a clever manoeuvre of the plaintiffs. Specific performance requires the plaintiffs to show *bona fides vis-a-vis* their claim from the date of the contract and throughout trial of the action. Any manoeuvre or a shifting stand like the one that this case presents, undoubtedly excludes *bona fides* of the plaintiffs, dis-entitling them to specific performance. The view that this Court takes finds support in the authority of their Lordship of the Supreme Court in **Aniglase Yohannan vs. Ramlatha and others, (2005) 7 SCC 534.** It **Aniglase Yohannan** has been held in paragraph 12 of the report:

"12. The basic principle behind Section 16(c) read with Explanation *(ii)* is that any person seeking benefit of the specific performance of contract must manifest that his conduct has been blemishless throughout entitling him to the specific relief. The provision imposes a personal bar. The Court is to grant relief on the basis of the conduct of the person seeking relief. If the pleadings manifest that the conduct of the plaintiff entitles him to get the relief on perusal of the plaint he should not be denied the relief."

37. The question as to whether readiness and willingness has been proved in a particular case, is ultimately a question of fact that has to be judged on the basis of facts, evidence, circumstances and other surrounding factors appearing about the issue. The two Courts of fact below have not gone wrong fundamentally, in applying the law to exclude readiness and willingness. It is not for this Court, therefore, to substitute a possible alternative for what the courts below have concluded. It would be relevant here, again about the principles to judge readiness and willingness to refer to the decision of the Supreme Court in **Madhukar Nivrutti Jagtap and others vs. Smt. Pramilabai Chandulal Parandekar and others, (2019) SCC Online SC 1026**, where it has been held:

"41. The question as to whether the plaintiff seeking specific performance has been ready and willing to perform his part of the contract is required to be examined with reference to all the facts and the surrounding factors of the given case. The requirement is not that the plaintiff should continuously approach the defendant with payment or make incessant requests for performance. For the relief of specific performance, which is essentially a species of equity but has got statutory recognition in terms of the Specific Relief Act, 1963, the plaintiff must be found standing with the contract and the plaintiff's conduct should not be carrying any such blameworthiness so as to be considered inequitable. The requirement of readiness and willingness of the plaintiff is not theoretical in nature but is essentially a question of fact, which needs to be determined with reference to the pleadings and evidence of parties as also to all the material circumstances having bearing on the conduct of parties, the plaintiff in particular. In view of the contentions urged, we have scanned through the record to examine if the finding of the High Court in this regard calls for any interference."

38. This Court, therefore, answer substantial question No. (iii) in the affirmative, in the terms indicated in the body of this judgment. Substantial question no. 1 (framed on 26.02.2020) is answered in the affirmative in terms that where the plaintiff fails to prove his singular case of accelerated payment of the sale consideration, it would be reasonable to infer his failure to establish readiness and willingness within the meaning of Section 16(c) of the Specific Relief Act. Substantial question no. 2 (framed on 26.02.2020) is answered in the negative, in terms that an amendment to the plea regarding readiness and willingness granted at the appellate stage, if one that lacks *bona fides* on the plaintiff's part, cannot be proved in accordance with the requirements of Section 16(c), Specific Relief Act.

39. In view of what has been determined by this Court, the plaintiffs have not been able to make out a case entitling them to relief in this appeal from the appellate decree.

40. In the result, this appeal fails and is **dismissed with costs** in all Courts.

41. Let a decree be drawn up, accordingly.

(2020)10ILR A295
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.09.2020

BEFORE
THE HON'BLE ALOK MATHUR, J.

FAFO Defective No. 171 of 2020

The National Insurance Company Ltd. Lko. ...Appellant

Versus

Sri Ram Prakash & Ors. ...Respondents

Counsel for the Appellants:
Satyajit Banerji

Counsel for the Respondents:

(A) Civil law - mere absence, fake or invalid driving license or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties - onus of proving that the driving license was fake and invalid lay upon the insurance company. (Para -17,18)

Respondents - legal heirs of the deceased - Claim Petition - **claim** has been allowed - National Insurance Company Limited, (Appellant) - directed to pay Rs.4,73,200/- along with interest at the rate of 8 per cent per annum to the opposite parties - award - ground - driver of the motorcycle was not holding valid and effective driving license at the time of the incident - Appellant Insurance company is liable to be absolved of its liability to indemnify the deceased.**(Para-2,3)**

HELD:- The appellant have failed to discharge the onus by adducing any credible evidence to enable this Court to return a contrary finding.**(Para-23)**

First Appeal from order defective dismissed at admission stage. (E-7)

List of Cases Cited:-

1. National Insurance Co. Ltd. Vs Swarna Singh, (2004) 3 SCC 297

2. Nirmala Kothari Vs United India Insurance Company Ltd., (2020) 4 SCC 49

3. Rakesh Kumar Vs United Insurance Company Ltd., (2016) 17 SCC 219

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

1. This appeal has been filed with a delay of 151 days. The delay has been duly explained by the appellant stating that the same has been occasioned on account of obtaining the documents and also on account of on ongoing Pandemic of Covid 19. The delay has been explained satisfactorily. The delay is condoned.

2. National Insurance Company Limited, Lucknow (Appellant) is in appeal against the judgment and order dated 15.1.2020 passed in Claim Petition No.805/2015 which was filed by the respondents, who are legal heirs of the deceased, and the claim has been allowed and the appellant has been directed to pay Rs.4,73,200/- along with interest at the rate of 8 per cent per annum to the opposite parties.

3. The award has been assailed primarily on the ground that driver of the motorcycle was not holding valid and effective driving license at the time of the incident, therefore, Appellant Insurance company is liable to be absolved of its liability to indemnify the deceased.

4. As per undisputed facts of the case, the said incident took place on 15.10.2015 when the deceased Smt. Rajrani alias Ganga Dei was returning from the temple

to her house and was walking along 2 village *kachchi* road when at around 7 p.m, the offending motorcycle bearing No. UP 32 GF 2868 being driven by Sarvesh Kumar Verma who was driving on the wrong side, hit the deceased Smt. Rajrani, who was severely injured and was admitted in Galaxy Hospital where she succumbed to her injuries and died. At the time of the incident the deceased was 45 years old and was earning about Rs.6000/- per month by selling vegetables.

5. Sarvesh Kumar Verma, opposite party No.7 was driver of the motorcycle. By means of the present appeal only solitary point which has been urged by learned counsel for the appellant is that the finding returned by the Tribunal with regard to the validity of the driving license No.RA 2646/UNO issued to respondent No.7 is incorrect and perverse and is liable to be set aside.

6. The Tribunal has held that the license held by the driver was valid from 30.5.2008 to 29.5.2028 and respondent No.7 had also produced information obtained under Right to Information Act before the Tribunal, on the basis of which, the Tribunal concluded that the driving license of Sarvesh Kumar Verma was valid and effective on the date of alleged occurrence.

7. It has been submitted by learned counsel for the appellant that as per the information acquired by the insurance company from its inspector, who conducted the investigation and submitted an inspection report, the said license of Sarvesh Kumar Verma could not be verified. The appellants are solely relying upon this investigation report and have pleaded and vehemently urged that the license of Sarvesh Kumar Verma was 3 invalid and, therefore, insurance company does not have any liability towards the heirs of the deceased.

8. I have heard learned counsel for the appellant at the admission stage and have perused the judgment under appeal.

9. The said issue as raised by the appellant has been dealt with by the Tribunal at issue No.2. Before the Tribunal it was contended by the insurance company that the license produced by Sarvesh Kumar Verma was not valid and the Regional Transport Officer has not issued the said license. The entire contention of the Insurance company was based on the inspection report of Sandeep Kumar Gaur who is stated to have conducted an enquiry and also visited the office of the Regional Transport Officer to verify the driving license. He has stated that the license could not be verified as the dealing clerk after perusing the record informed him orally that the said license is not in their record but refused to give anything in writing.

10. Learned counsel for respondent No.7 submitted a copy of license before the Tribunal and also produced information in evidence obtained under Right to Information Act which was marked as exhibit C-30.

11. A perusal of the reply obtained under Right to Information Act provided by the Regional Transport Officer with regard to the said driving license, clearly indicates that the license was valid and a copy of same was annexed with the said reply. It has been clearly recorded by the Tribunal that the insurance company did not file any objection to the application seeking information under Right to Information Act

filed by Sarvesh Kumar Verma with regard to driving license. He also submits that the said Sarvesh Kumar Verma who was driving the vehicle on the fateful day was in possession of the aforesaid driving license on the date of the incident.

12. The appellant Insurance Company by means of this appeal seeks setting aside of the finding recorded by the Tribunal with regard to the driving license of respondent no. 7 after holding the same to be perverse, and also that sufficient opportunity was not given to them to prove that the said license was fake.

13. Considering the aforesaid factual aspects the Tribunal returned a finding that Sarvesh Kumar Verma was holder of a valid and effective license on the date of the incident.

14. A perusal of the impugned judgement passed by the Tribunal clearly indicates that the burden of proof was duly discharged by respondent no.7 when he produced before the Tribunal a copy of the driving License, as well as a reply obtained under the Right to Information Act, where the said driving lessons was annexed along with the reply which clearly proved beyond doubt the existence of a valid driving license in favour of respondent no.7.

15. In case the appellant insurance company wanted to prove that the said driving licence was fake, then the onus clearly laid upon the Insurance company to place such material and evidence before the Tribunal so as to enable the Tribunal to take a contrary stand, rather than the one on which the claim has been allowed.

16. In this regard, in case of ***National Insurance Co. Ltd. Vs. Swarna Singh, reported in (2004) 3 SCC 297*** a three Judge Bench of Supreme Court has elaborately discussed the issue as under:

(i) that the Parliament deliberately used two different expressions 'effective licence' in Section 3 and 'duly licensed' in sub-section (2) of Section 149 of the Act which are suggestive of the fact that a driver once licensed, unless he is disqualified, would continue to be a duly licensed person for the purpose of Chapter XI of the Act.

(ii) Thus, once a person has been duly licensed but has not renewed his licence, the same would not come within the purview of Section 149 and thus would not constitute a statutory defence available to the insurer in terms thereof. Only in the event of lapse of five years from the date of expiry of the licence, such statutory defence may be raised.

(iii) Once a certificate of insurance is issued in terms of the provisions of the Act, the insurer has a liability to satisfy an award. It has been pointed that a major departure has been made in the 1988 Act insofar as in terms of Section 96 (2) (b) of the 1939 Act all the statutory defences were available in terms of sub-section (3) thereof provided that the policy conditions other than those prescribed therein had no effect; whereas in the new Act, Section 149 (2) (a) prescribes that the policy is void if it is obtained by nondisclosure of material fact. Section 149 (4) confines to only clause (b) and states that the conditions of policy except as mentioned in clause (b) of sub-section (2) are of no effect and, thus, after the amendment, except in cases which are covered under clause (b) of Section 149, the insurance companies are liable to pay to the third parties. In other words, the right of insurer to avoid the claim of the

third party would arise only when the policy is obtained by misrepresentation of material fact and fraud and in no other case.

(iv) Sub-section (1) of Section 149 makes it clear that the insurer should pay first to the third parties and recover the same if they are absolved on any of the grounds specified in sub-section (2) thereof. Reliance, in this connection, has been placed on BIG Insurance Co. Ltd. vs. Captain Itbar Singh and Others [AIR 1959 SC 1331] and New India Assurance Company Vs. Kamla & Others [(2001) 4 SCC 342].

(v) The burden to prove the defence raised by the insurers as regard the question as to whether there has been any breach of violation of policy conditions of the insurance policy has been issued or not, would be upon the insurer.

(vi) The breach on the part of the insured must be a wilful one being of fundamental condition by the insured himself and the burden of proof, therefore, would be on the insurer.

.....

(i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.

(ii) Insurer is entitled to raise a defence in a claim petition filed under Section 163 A or Section 166 of the Motor Vehicles Act, 1988 inter alia in terms of Section 149 (2) (a) (ii) of the said Act.

(iii) The breach of policy condition e.g., disqualification of driver or invalid driving licence of the driver, as contained in subsection (2)(a)(ii) of section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefor would be on them.

(v) The court cannot lay down any criteria as to how said burden would be discharged, inasmuch as the same would depend upon the facts and circumstance of each case.

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/ are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under section 149(2) of the Act.

(vii) The question as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver, (a fake one or otherwise), does not fulfil the requirements of law or not will have to be determined in each case.

(viii) If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance companies would be liable to satisfy the decree.

(ix) The claims Tribunal constituted under Section 165 read with Section 168 is empowered to adjudicate all claims in respect of the accidents involving death or of bodily injury or damage to property of third party arising in use of motor vehicle. The said power of the Tribunal is not restricted to decide the claims inter se between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the claim for compensation and to decide the availability of defence or defences to the insurer, the Tribunal has necessarily the power and jurisdiction to decide disputes inter se between insurer and the insured. The decision rendered on the claims and disputes inter se between the insurer and insured in the course of adjudication of claim for compensation by the claimants and the award made thereon is enforceable and executable in the same manner as provided in Section 174 of the Act for enforcement and execution of the award in favour of the claimants.

(x) Where on adjudication of the claim under the Act the Tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of section 149 (2) read with sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the Tribunal. Such determination of claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable
on a certificate issued by the Tribunal to the Collector in the same manner under Section 174 of the Act as arrears of land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by sub-section (3) of Section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the Tribunal.

(xi) The provisions contained in sub-section (4) with proviso thereunder and sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover amount paid under the contract of insurance on behalf of the insured can be taken recourse of by the Tribunal and be extended to claims and defences of insurer against insured by relegating them to the remedy before regular court in cases where on given facts and circumstances adjudication of their claims inter se might delay the adjudication of the claims of the victims. For the reasons aforementioned, these petitions are dismissed but without any order as to costs."

17. From perusal of the aforesaid judgment it is clear that mere absence, fake or invalid driving license or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of

negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

18. It is relevant to consider the judgment of Supreme Court in Civil Appeal No.s 1999-2000 of 2020 *(**Nirmala Kothari Vs. United India Insurance Company Limited, 2020 (4) SCC 49***) in which in para 8 and 9 it has been held as under:-

*"8. Having set forth the facts of the present case, the question of law that arises for consideration is what is the extent of care/diligence expected of the employer/insured while employing a driver? To answer this question, we shall advert to the legal position regarding the liability of the Insurance Company when the driver of the offending vehicle possessed an invalid/fake driving licence. In the case of United India Insurance Co. Ltd. vs. Lehru & Ors.1 a two Judge Bench of this court has taken the view that the Insurance Company cannot be permitted to avoid its liability on the ground that the person driving the vehicle at the time of the accident was not duly licenced. It was further held that the willful breach of the conditions of the policy should be established. The law with this respect has been discussed in detail in the case of Pepsu RTC vs. National Insurance Co.2 We may extract the relevant paragraph from the Judgment: (Pepsu case, SCC pp. 223-24, para10) 1 (2003) 3 SCC 338 : 2003 SCC (Cri) 641 2 (2013) 10 SCC 217 7 "**In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer.** But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh's case (supra). If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the insurance company is not liable for the compensation."*

9. While the insurer can certainly take the defence that the licence of the driver of the car at the time of accident was invalid/fake however the 8 onus of proving that the insured did not take adequate care

and caution to verify the genuineness of the licence or was guilty of willful breach of the conditions of the insurance policy or the contract of insurance lies on the insurer. "

19. Considering the aforesaid pronouncements of the Hon'ble Apex court it is clearly borne out that the onus of proving that the driving license was fake and invalid lay upon the insurance company. The insurance company was under an obligation to lead sufficient credible evidence before the Tribunal which could show that the diving license off respondent No.7 was fake. A perusal of the impugned judgement would indicate that apart from producing the report obtained by them from their agent, no other evidence was led by the appellant Insurance Company. Even the report only records hearsay evidence of the dealing clerk in the office of the Transport Authority. It was open for the insurance company to have applied for and also obtained and verified the driving licence from the Transport Authority, but they failed to do so nor did they place any evidence before the Tribunal to take any contrary view in the matter.

20. The Insurance Company in its overwhelming zeal to avoid payment of compensation has acted in the most irresponsible manner in the present case by firstly not producing any evidence in support of their contention before the Tribunal and secondly persisting with their untenable stand in the present appeal. With regard to issue No.2 the Tribunal has clearly recorded a finding that the appellant insurance company did not oppose or deny the validity of the licence.

21. In exercise of its appellate powers, this Court can certainly look into questions pertaining to perversity of findings recorded by the Tribunal, and only when examining the record which may indicate existence of overwhelming evidence adduced by one party, and recording of a contrary finding of fact by the Tribunal, this Court would have sufficient powers to reverse such a finding. In the present case not an iota of evidence has been led by the appellant so as to give an occasion to this Court to embark on an exercise for re-examination of the evidence with regard to the driving licence of respondent no.7. This Court after examining the entire record of the case as produced by the appellant in the instant appeal, disposes of the same at the admission stage itself as the Court does not find any material or ground to entertain the appeal.

22. In this regard, it would also be relevant to refer the judgement of the Hon'ble Supreme Court in the case of in **Rakesh Kumar Vs. United Insurance Company Ltd., 2016 (17) SCC 219** wherein in paras 19 and 20 it was held as under:-

"19. In our considered opinion, the Tribunal was right in holding that the driver of the offending vehicle possessed a valid driving license at the time of accident and that the Insurance Company failed to adduce any evidence to prove otherwise. This finding of the Tribunal, in our view, should not have been set aside by the High Court for the following reasons:

20. First, the driver of the offending vehicle (N.A.-2) proved his driving license (Exhibit- R1) in his evidence. Second, when the license was proved, the Insurance Company did not raise any objection about its admissibility or manner of proving. Third, even if any objection had been raised, it would have had no merit because it has come on record that the original driving license was filed

by the driver in the Court of Judicial Magistrate First class, Naraingarh in a criminal case arising out of the same accident. Fourth, in any event, once the license was proved by the driver and marked in evidence and without there being any objection by the Insurance Company, the Insurance Company had no right to raise any objection about the admissibility and manner of proving of the license at a later stage (See Oriental Insurance Company Ltd. Vs. Premlata Shukla & Ors., (2007) 13 SCC 476) and lastly, the Insurance Company failed to adduce any evidence to prove that the driving license (Ex.R1) was either fake or invalid for some reason."

23. Considering the aforesaid judgments the onus clearly lies upon the Insurance Company to prove that driving licensee of Sarvesh Kumar Verma was either fake or invalid. The appellant have failed to discharge the onus by adducing any credible evidence to enable this Court to return a contrary finding. Apart from the report of the investigating officer who seems to have only met the concerned dealing clerk in the office of Regional Transport Officer, who orally told him that the said license was not in his record, no other material has been placed by the appellant so as to return a finding of fact in favour of the appellant.

24. The Tribunal has considered all the evidence, including the evidence adduced by respondent no. 7 with regard to the validity of the driving license and also the information obtained under Right to Information Act from the transport authority which also confirmed the existence of valid and effective driving license, and therefore there is no occasion for this Court to interfere with the judgment passed by the Tribunal.

25. The appeal is without merits and is **dismissed** at the admission stage itself.

(2020)10ILR A302
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.02.2019

BEFORE
THE HON'BLE RAKESH SRIVASTAVA, J.

FAFO No. 691 of 2017

The National Insurance Co. Ltd., Lucknow ...Appellant

Versus

Phoolmati & Ors. ...Respondents

Counsel for the Appellant:
Ramesh Chandra Sharma, Avadhesh Kumar

Counsel for the Respondents:

(A) Civil Law - Motor Vehicles Act, 1988 - Section 146 - necessity for insurance against third party risk , Section 147 - Requirements of policies andlimits of liability, section 163-A - Special provisions as to payment of compensation on structued formula basis - where the owner of the motor vehicle is himself involved in the accident, the provisions of Section 163-A have no application, Section 173 - Appeals - impugned award cannot be sustained .(Para-12)

Respondent no. 1 , father of sarvesh kumar - owner of the said car - car was insured with National Insurance Comapny(Appelant) for the period 31.08.2014 to 31.08.2015 - accident - **car driven by Sarvesh kumar** - suffered grievous injuries and succumbed to his injuries on the way to the hospital - Respondent No. 1, the mother of the deceased and Respondent no. 2, the wife of the deceased - filed an application under Section 163-A of the Act - claiming compensation of Rs. 15,00,000/- (Rupees fifteen lakhs only) - for the death of the deceased. (para-2,3)

HELD:- No liability can be fastened upon the appellants to pay the compensation determined by the Tribunal. The appellant is directed to deposit the said amount with interest at the rate of 7% per annum from the date of the claim petition till the date of deposit with the Tribunal.**(**Para-16,18)

First Appeal from order allowed. (E-7)

List of Cases Cited:-

1. Oriental Insurance Co. Ltd. Vs Jhuma Saha, (2007) 9 SCC 263

2. New India Assurance Co. Ltd. Vs Sadanand Mukhi, (2009) 2 SCC 417

3. Ningamma Vs United India Insurance Co. Ltd., (2009) 13 SCC 710

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

1. The Insurer has filed this appeal under Section 173 of the Motor Vehicles Act, 1988 (for short 'the Act') challenging the judgment and award dated 31.05.2017 passed by the Motor Accident Claims Tribunal/ Additional District Judge, Court No. 4, Hardoi, in Claim Petition No. 306 of 2014 (Smt. Phoolmati and another v. Ram Swaroop and another).

2. On 27.09.2014, Sarvesh Kumar and one Aniruddh Kumar were going to Hardoi by a new car (Alto 800 LXI, Engine No. F8DN5263077 Chassis No. MA3EUA61S00479328, which by then had not been registered) for its servicing. Ram Swaroop, (Respondent No. 1 herein), the father of Sarvesh Kumar, was the owner of the said car. The said car was insured with the National Insurance Company (the appellant herein) for the period 31.08.2014 to 31.08.2015. At the relevant time, the said car was being driven by Sarvesh Kumar. When they reached near Dhatankheda, suddenly a blue bull (nilgay) came in front of the car and in an attempt to save the blue bull the car went out of control and dashed against a tree on the side of the road and fell in a ditch. As a result of the said accident, Sarvesh Kumar suffered grievous injuries and succumbed to his injuries on the way to the hospital.

3. Phoolmati, (Respondent No. 1 herein), the mother of the deceased and Shalini (Respondent no. 2 herein), the wife of the deceased, filed an application under Section 163-A of the Act claiming compensation of Rs. 15,00,000/- (Rupees fifteen lakhs only) for the death of Sarvesh Kumar (the deceased). Ram Swaroop and the appellant were impleaded as respondents in the claim petition. It was alleged that at the time of the accident the deceased was 22 years of age and was earning around Rs. 12000/- per month from selling milk and milk products and from agriculture.

4. In his written statement, the Respondent No. 3, admitted the averments made in the claim petition, including the fact that he was the owner of the car. The appellant also contested the claim on the ground that the deceased, who was driving the car at the time of accident, was the owner of the vehicle and as no other vehicle was involved in the accident, as per the Act and Rules, the deceased could not be treated to be a third party. As such, the claimants were not entitled to get any compensation.

5. Based upon the pleadings of the parties, the Tribunal framed four issues. In support of their claim, the claimants examined Phoolmati as PW 1, Aniruddh Kumar as PW 2 and Vivek Kumar as PW 3. On the other hand, Respondent no. 3 examined himself as DW 1. The Tribunal,

after taking into account the oral and documentary evidence on record, held that the claimants were entitled to compensation of Rs. 4,48,000/- along with interest at the rate of 7% per annum. The Tribunal held that the car was insured under a package policy and concluded that the liability was covered by the insurance policy.

6. Sri Ramesh Chandra Sharma, learned counsel for the appellant has submitted that in order to be entitled for compensation under section 163-A of the Act, the person who has suffered the loss must be a third party. He argued that the deceased was not a third party as he was himself the owner of the car and no other vehicle was involved in the accident.

7. Per contra, Sri S.K. Verma, the learned counsel for the respondent nos. 1 & 2 has supported the award. No one appeared on behalf of respondent no. 3 in spite of sufficient service.

8. Heard the counsel for the parties and perused the record.

9. Section 146 of the Act lays down the requirements for insurance against third-party risk. Where a third-party risk is involved, an insurance policy is required to be mandatorily taken. Section 147 of the Act lays down the requirements of policies and the limits of liability. The Act provides for two types of insurance policy. The first one is statutory in nature and the other is contractual in nature. In case of death or injury to a third party as a result of an accident, the insurance company is bound to compensate the owner or the driver of the motor vehicle in case any person dies or suffers injury as a result of an accident. However, in case where the owner of the vehicle or others are proposed to be covered, an additional premium is required to be paid for covering their life and property.

10. Section 163-A of the Motor Vehicles Act reads thus:

"163-A. Special provisions as to payment of compensation on structured formula basis.--(1) Notwithstanding anything contained in this Act or in any other law for the time being in force or instrument having the force of law, the owner of the motor vehicle of the authorised insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out of the use of motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be.

Explanation.--For the purposes of this sub-section, "permanent disability' shall have the same meaning and extent as in the Workmen's Compensation Act, 1923 (8 of 1923).

(2) In any claim for compensation under sub-section (1), the claimant shall not be required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle or vehicles concerned or of any other person.

(3) The Central Government may, keeping in view the cost of living by notification in the Official Gazette, from time to time amend the Second Schedule."

11. Section 163-A of the Act begins with a *non obstante* clause, and in case of death or permanent disablement due to an accident arising out of the use of motor vehicle, imposes an obligation upon the owner of the vehicle or the authorised insurer to pay to the legal heirs or the

victim, as the case may be, compensation as per the Second Schedule.

12. It is no more res integra that where the owner of the motor vehicle is himself involved in the accident, the provisions of Section 163-A have no application.

13. In *Oriental Insurance Co. Ltd. v. Jhuma Saha, (2007) 9 SCC 263, the Apex Court has held as under:*

"10. *The deceased was the owner of the vehicle. For the reasons stated in the claim petition or otherwise, he himself was to be blamed for the accident. The accident did not involve motor vehicle other than the one which he was driving.* The question which arises for consideration is that the deceased himself being negligent, the claim petition under Section 166 of the Motor Vehicles Act, 1988 would be maintainable.

11. Liability of the insurer Company is to the extent of indemnification of the insured against the respondent or an injured person, a third person or in respect of damages of property. *Thus, if the insured cannot be fastened with any liability under the provisions of the Motor Vehicles Act, the question of the insurer being liable to indemnify the insured, therefore, does not arise.* (emphasis supplied)

14. In *New India Assurance Co. Ltd. v. Sadanand Mukhi, (2009) 2 SCC 417*, the *Apex Court* while holding that the insurance company was not liable to pay the amount of compensation in relation to the accident which occurred by the use of vehicle which was being driven by the son of the insurer, observed as under:-

"15. Contract of insurance of motor vehicle is governed by the provisions of the Insurance Act. The terms of the policy as also the quantum of premium payable for insuring the vehicle in question depends not only upon the carrying capacity of the vehicle but also on the purpose for which the same was being used and the extent of the risk covered thereby. By taking an 'act policy', the owner of a vehicle fulfils his statutory obligation as contained in Section 147 of the Act. The liability of the insurer is either statutory or contractual. If it is contractual its liability extends to the risk covered by the policy of insurance. If additional risks are sought to be covered, additional premium has to be paid. If the contention of the learned Counsel is to be accepted, then to a large extent, the provisions of the Insurance Act becomes otiose. By reason of such an interpretation the insurer would be liable to cover risk of not only a third party but also others who would not otherwise come within the purview thereof. It is one thing to say that the life is uncertain and the same is required to be covered, but it is another thing to say that we must read a statute so as to grant relief to a person not contemplated by the Act. It is not for the Court, unless a statute is found to be unconstitutional, to consider the rationality thereof. Even otherwise the provisions of the Act read with the provisions of the Insurance Act to be wholly rational.

16. Only because driving of a motor vehicle may cause accident involving loss of life and property not only of a third party but also the owner of the vehicle and the insured vehicle itself, different provisions have been made in the Insurance Act as also the Act laying down different types of insurance policies. The amount of premium required to be paid for each of the policy is governed by the Insurance Act. A statutory regulatory authority fixes the norms and the guidelines."

15. In *Ningamma v. United India Insurance Co. Ltd., (2009) 13 SCC 710*, the *Apex Court* has held as under:

"19. In *Oriental Insurance Co. Ltd. v. Rajni Devi* wherein one of us, namely, Hon'ble S.B. Sinha, J. was a party, it has been categorically held that in a case where third party is involved, the liability of the insurance company would be unlimited. It was also held in the said decision that where, however, compensation is claimed for the death of the owner or another passenger of the vehicle, the contract of insurance being governed by the contract qua contract, the claim of the claimant against the insurance company would depend upon the terms thereof.

20. *It was held in Oriental Insurance Co. Ltd. case that Section 163-A of the MVA cannot be said to have any application in respect of an accident wherein the owner of the motor vehicle himself is involved. The decision further held that the question is no longer res integra. The liability under Section 163-A of the MVA is on the owner of the vehicle. So a person cannot be both, a claimant as also a recipient, with respect to claim. Therefore, the heirs of the deceased could not have maintained a claim in terms of Section 163-A of the MVA.*

21. In our considered opinion, the ratio of the decision in *Oriental Insurance Co. Ltd. case* is clearly applicable to the facts of the present case. *In the present case, the deceased was not the owner of the motorbike in question. He borrowed the said motorbike from its real owner. The deceased cannot be held to be an employee of the owner of the motorbike although he was authorised to drive the said vehicle by its owner and, therefore, he would step into the shoes of the owner of the motorbike*. We have already extracted Section 163-A of the MVA hereinbefore. *A bare perusal of the said provision would make it explicitly clear that persons like the deceased in the present case would step into the shoes of the owner of the vehicle.*

22. In a case wherein the victim died or where he was permanently disabled due to an accident arising out of the aforesaid motor vehicle in that event the liability to make payment of the compensation is on the insurance company or the owner, as the case may be as provided under Section 163-A. *But if it is proved that the driver is the owner of the motor vehicle, in that case the owner could not himself be a recipient of compensation as the liability to pay the same is on him. This proposition is absolutely clear on a reading of Section 163-A of the MVA. Accordingly, the legal representatives of the deceased who have stepped into the shoes of the owner of the motor vehicle could not have claimed compensation under Section 163-A of the MVA.* (emphasis supplied)

16. In view of the settled legal position no liability can be fastened upon the appellants to pay the compensation determined by the Tribunal. The impugned award cannot be sustained.

17. However, a perusal of the insurance policy would show that the owner-driver is covered for personal accident. The liability is, however, limited to Rs. 2,00,000/- for the insurance period. This fact is not disputed by Sri Ramesh Chandra Sharma. In the circumstances, the liability of the insurer-appellant is confined to Rs. 2,00,000/- and not any sum exceeding the said amount. The Tribunal has held that the Appellant No. 1, the mother of the deceased is dependent upon

her husband. This fact is not disputed by the Respondents. In the circumstances, out of the compensation awarded, Rs. 20,000/- shall be payable to Phoolmati (Respondent No. 1 herein) and the balance Rs. 1,80,000/- to Shalini (Respondent No. 2 herein) together with proportionate interest.

18. The appellant is directed to deposit the said amount with interest at the rate of 7% per annum from the date of the claim petition till the date of deposit with the Tribunal.

19. The appeal is allowed to the extent mentioned above. No order as to cost.

(2020)10ILR A307
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.01.2020

BEFORE
THE HON'BLE RAKESH SRIVASTAVA, J.

FAFO No. 841 of 2017

Smt. Shail Kumari & Ors. ...Appellants
Versus
The New India General Insurance Co. Ltd. & Ors. ...Respondents

Counsel for the Appellants:
Mukesh Singh

Counsel for the Respondents:
Ashok Kumar Rai, Ashok Mehrotra, Chandra Shekhar Singh Yad, Rakesh K. Tripathi

(A) Civil Law - Motor Vehicles Act, 1988 - Section 166 - Application for compensation - (*National Insurance Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680*) - various heads under which compensation is to be awarded in a death case - loss of consortium - consortium - a compendious term which encompasses "spousal consortium", "parental consortium", and "filial consortium"- right to consortium would include the company, care, help, comfort, guidance, solace and affection of the deceased, which is a loss to his family - With respect to a spouse, it would include sexual relations with the deceased spouse.(Para - 10)

Claimants-appellants filed a claim petition - under Section 166 of the Motor Vehicles Act, 1988 - claim for compensation to the tune of Rs. 25,06,000/- along with interest was made - accident was caused due to the rash and negligent driving of the offending truck which was owned by respondent no. 2. - At the time of his death, the deceased was 35 years of age - earning a sum of Rs. 6,000/- per month. (Para - 2)

HELD:- In view of the above, the compensation to which the appellants are entitled is Rs. 7,46,800/- rounded off to Rs 7,50,000/-. Out of the aforesaid amount of Rs. 7,46,800/-, a sum of Rs 3,75,000/- shall be payable to the wife of the deceased, Rs. 2,25,000/- shall be payable to the minor son and the balance amount of Rs. 1,50,000/- shall be payable to the parents of the deceased in equal proportion. In addition to the amounts mentioned above, the appellants would also be entitled to a sum of Rs. 40,000/- each under the head of loss of consortium. The appellants would also be entitled to proportionate interest at the rate of 7% per annum on the above amounts, from the date of filing of the claim petition till the date of actual payment.(Para-13)

Out of Rs. 3,75,000/- awarded to wife, the Tribunal shall keep Rs 2,00,000/- in a fixed deposit in a nationalised bank, for a period of 5 years, giving highest rate of interest. The interest payable on this amount shall be released on quarterly basis to her. On maturity of the fixed deposit, the maturity proceeds will be paid to her.(Para-14)

First Appeal from order allowed.(E-7)

List of Cases Cited:-

1. National Insurance Co. Ltd. Vs Pranay Sethi, (2017) 16 SCC 680

2. Hem Raj Vs Oriental Insurance Co. Ltd., (2018) 15 SCC 654

3. Magma General Insurance Co. Ltd. Vs Nanu Ram, (2018) 18 SCC 130

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

1. The claimants-appellants have filed this appeal against the judgment and award dated 17.08.2017 passed by the Motor Accident Claims Tribunal/ Additional District Judge, Court No. 1, Faizabad in Motor Accident Claim Case No. 147 of 2016 (Smt. Shail Kumari & Ors. v. The New India Insurance Co. Ltd. & Ors.) seeking enhancement of compensation.

2. On 10.04.2016, at 04.00 a.m. in the morning, a mini truck bearing registration No. UP 14AJ 1765 dashed against the truck bearing registration no. UP 78T 1031 near Prakash Hospital in village Tenua, Police Station Haraiya, District Basti. As a result of the said accident, Ram Jit Yadav and Sanjiv Kumar Srivastava died on the spot. The deceased, Sanjiv Kumar Srivastava, was the husband of the appellant no. 1 and father of appellant no. 2 and son of appellant nos. 3 and 4 herein. The claimants-appellants filed a claim petition under Section 166 of the Motor Vehicles Act, 1988 (for short the "Act') against New India Insurance Company Limited, respondent no. 1, the insurer of the offending truck No. UP 78 T 1031, Yatish Kumar Singh and Vishwanath, the owner and driver of the offending truck, and Iffco Tokio General Insurance Company Ltd. respondent no. 2 herein the insurer of the mini truck no. UP 14 AJ 1765. A claim for compensation to the tune of Rs. 25,06,000/- along with interest was made. They pleaded that the accident was caused due to the rash and negligent driving of the offending truck which was owned by respondent no. 2. At the time of his death, the deceased was 35 years of age and he was earning a sum of Rs. 6,000/- per month. The claim was contested by the respondents.

3. After analyzing the evidence on record, the Tribunal held that the accident was caused due to the rash and negligent driving of truck no. UP 14AJ 1765. While deciding the quantum of compensation, the Tribunal arrived at the conclusion that the income of the deceased was Rs. 4,000/- per month. The Tribunal deducted 1/3rd of his monthly income towards his personal living and expenses and determined the loss of earning to the family as Rs. 32,000/- per annum. The Tribunal then applied the multiplier of 16 and held that the claimants were entitled to a sum of Rs. 5,12,000/- as compensation. The Tribunal further awarded a sum of Rs. 10,000/- to the appellant no. 1, wife of the deceased towards loss of consortium. A sum of Rs. 5,000/- was awarded towards loss of estate and Rs. 3,000/- towards funeral expenses. The Tribunal awarded a total compensation of Rs. 5,30,000/- along with interest at the rate of 7% per annum from the date of the claim petition till the time of actual payment.

4. Sri Mukesh Singh, learned counsel for the appellants has submitted that the appellants were also entitled to future prospects and the Tribunal has committed a manifest error of law in not awarding any amount under the said head. It has been further submitted that the amount awarded under the conventional heads also deserves to be enhanced. The determination of income, the deduction regarding living and personal expenses and the multiplier applied by the Tribunal has not been challenged by the appellants.

5. Sri Ashok Kumar Rai, learned counsel for respondent no. 1 and Sri Ashok Mehrotra, learned counsel for respondent no. 2 have supported the impugned award. No one appeared on behalf of respondent nos. 3 and 4 in spite of sufficient service.

6. The questions regarding addition of future prospects and the addition of non-pecuniary damages towards loss of consortium, loss of estate and funeral expenses are no more res integra. A Constitution Bench of the Apex Court, in *National Insurance Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680*, has comprehensively laid down the law regarding these questions.

7. The Tribunal, in the present matter, has not awarded any amount towards future prospects. In *Pranay Sethi (supra)* the Apex Court has held as under:

"56. .... We are inclined to think that there can be some degree of difference as regards the percentage that is meant for or applied to in respect of the legal representatives who claim on behalf of the deceased who had a permanent job than a person who is self employed or on a fixed salary. But not to apply the principle of standardisation on the foundation of perceived lack of certainty would tantamount to remaining oblivious to the marrows of ground reality. And, therefore, degree-test is imperative. Unless the degree test is applied and left to the parties to adduce evidence to establish, it would be unfair and inequitable. The degree-test has to have the inbuilt concept of percentage. *Taking into consideration the cumulative factors, namely, passage of time, the changing society, escalation of price, the change in price index, the human attitude to follow a particular pattern of life, etc., an addition of 40% of the established income of the deceased towards future prospects and where the deceased was below 40 years an addition of 25% where the deceased was between the age of 40 to 50 years would be reasonable."* (emphasis supplied)

8. In *Hem Raj v. Oriental Insurance Co. Ltd., (2018) 15 SCC 654*, the Apex Court repelled the submission made on behalf of the Insurance Company that in the absence of actual evidence of income the principle of granting compensation on account of future prospects cannot be applied where income is determined by guesswork. It was held that there cannot be any distinction between a case where there is positive evidence of income and where minimum income is determined on guesswork.

9. In so far as conventional heads are concerned, in *Pranay Sethi (supra)*, the Apex Court has held that as a rule of thumb Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- are to be awarded towards loss of estate, loss of consortium and funeral expenses respectively.

10. In so far as consortium is concerned the Apex Court in the case of *Magma General Insurance Co. Ltd. v. Nanu Ram, (2018) 18 SCC 130* has introduced the concept of spousal, parental and filial consortium. The relevant portion of the report is extracted below:

"21. A Constitution Bench of this Court in *Pranay Sethi* dealt with the various heads under which compensation is to be awarded in a death case. One of these heads is loss of consortium. In legal parlance, "consortium" is a compendious term which encompasses "spousal

consortium", "parental consortium", and "filial consortium". The right to consortium would include the company, care, help, comfort, guidance, solace and affection of the deceased, which is a loss to his family. With respect to a spouse, it would include sexual relations with the deceased spouse:

21.1. Spousal consortium is generally defined as rights pertaining to the relationship of a husband-wife which allows compensation to the surviving spouse for loss of "company, society, cooperation, affection, and aid of the other in every conjugal relation.

21.2. Parental consortium is granted to the child upon the premature death of a parent, for loss of "parental aid, protection, affection, society, discipline, guidance and training.

21.3. Filial consortium is the right of the parents to compensation in the case of an accidental death of a child. An accident leading to the death of a child causes great shock and agony to the parents and family of the deceased. The greatest agony for a parent is to lose their child during their lifetime. Children are valued for their love, affection, companionship and their role in the family unit.

* * *

24. *The amount of compensation to be awarded as consortium will be governed by the principles of awarding compensation under "loss of consortium" as laid down in Pranay Sethi. In the present case, we deem it appropriate to award the father and the sister of the deceased, an amount of Rs 40,000 each for loss of filial consortium."*(emphasis supplied)

11. In light of the above mentioned principles, the compensation awarded by the Tribunal needs to be determined again.

12. Since the age of the deceased was less than 40 years, an addition of 40% of the annual income should be made on account of future prospects on the basis of *Pranay Sethi (supra)*. Taking the annual income of Rs. 48,000/-, as determined by the Tribunal, and adding 40% as future prospects, we arrive at the sum of Rs. 67,200/-. After deducting 1/3rd of the income, the contribution of the deceased to his family is assessed as Rs. 44,800/- per annum. By applying the multiplier of 16, the loss of dependency is assessed as Rs. 44,800 x 16 = Rs. 7,16,800/-. In addition to the above, the appellants are also entitled to Rs. 15,000/- towards funeral expenses and Rs. 15,000/- for loss of estate. Furthermore, as per the judgment of the Apex Court in *Magma General Insurance Co. Ltd. (supra)*, an amount of Rs. 40,000/- each is payable to the appellant nos. 1 and 2 towards loss of spousal and parental consortium respectively and Rs. 40,000/- each to appellant nos. 3 and 4 towards filial consortium.

13. In view of the above, the compensation to which the appellants are entitled is Rs. 7,46,800/- rounded off to Rs 7,50,000/-. Out of the aforesaid amount of Rs. 7,46,800/-, a sum of Rs 3,75,000/- shall be payable to the wife of the deceased, Rs. 2,25,000/- shall be payable to the minor son and the balance amount of Rs. 1,50,000/- shall be payable to the parents of the deceased in equal proportion. In addition to the amounts mentioned above, the appellants would also be entitled to a sum of Rs. 40,000/- each under the head of loss of consortium. The appellants would also be entitled to proportionate interest at the rate of 7% per annum on the above amounts, from the date of filing of the claim petition till the date of actual payment.

14. Out of Rs. 3,75,000/- awarded to wife, the Tribunal shall keep Rs 2,00,000/-

in a fixed deposit in a nationalised bank, for a period of 5 years, giving highest rate of interest. The interest payable on this amount shall be released on quarterly basis to her. On maturity of the fixed deposit, the maturity proceeds will be paid to her.

The Tribunal shall keep the entire amount awarded to the minor son in a fixed deposit in a nationalised bank, for a period of 5 years, giving highest rate of interest. The interest payable on this amount shall be released on quarterly basis to the mother of the child. The Tribunal shall keep renewing the amount on these terms till the minor attains majority.

15. In view of the above, the appeal is allowed. The impugned judgment and award stands modified to the above extent.

16. The parties shall bear their respective costs.

17. The record of the case shall be sent back to the Tribunal forthwith.

(2020)10ILR A311
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.09.2020

BEFORE
THE HON'BLE VIVEK AGARWAL, J.

FAFO No. 1360 of 2020

Kaptan Singh & Anr. ...Appellants
Versus
Sri Raj Narayan & Anr. ...Respondents

Counsel for the Appellants:
Sri Shreesh Srivastava

Counsel for the Respondents:
Sri Arvind Kumar

(A) Civil Law - Employees Compensation Act, 1923 - Section 4(1B) - maximum income to be computed for the purposes of compensation - the Central Government may, by notification in the Official Gazette, specify, for the purposes of sub-section (1), such monthly wages in relation to an employee as it may consider necessary - effect of the notification is not retrospective but prospective .(Para-2,3,5,6)

Claimants aggrieved by the award passed by the Commissioner - ground - income of the deceased construed at Rs. 8,000/- (eight thousand rupees) per month - drawing a salary to the tune of Rs. 12,000/- (twelve thousand rupees) - tribunal not taken the income @ minimum wages as applicable on the date of the accident for a skilled labourer i.e., @ Rs. 9,873.08/- (nine thousand eight hundred seventy three rupees and eight paise) per month.(Para-6)

HELD:- In the present case, accident took place on 17.06.2019 and therefore, cap of Rs. 8,000/- (eight thousand rupees) per month as prescribed by the Central Government *vide* S.O. 1258(E) dated 31st May, 2010 fixing monthly wages @ Rs. 8,000/- (eight thousand rupees) per month will be applicable .There is no illegality or arbitrariness in the impugned award in not computing the minimum wages prescribed by the State Government for the purpose of calculation of compensation.(Para - 6)

First appeal from order dismissed. (E-7**)**

List of Cases Cited:-

1. Kerala State Electricity Board & ors. Vs Valsala K. & ors. , (1999) 8 SCC 254

2. K. Shivaraman & ors. Vs P. Sathishkumar & anr. , (2020) 4 SCC 594

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

1. Heard Sri Shreesh Srivastava, learned counsel for the appellants and Sri

Arvind Kumar, learned counsel for the respondent-New India Assurance Co. Ltd.

2. This FAFO has been filed by the claimants being aggrieved by the award dated 14.08.2020 passed by the Commissioner under the Employees Compensation Act, 1923 at Kanpur only on the ground that the income of the deceased has been construed at Rs. 8,000/- (eight thousand rupees) per month whereas he was drawing a salary to the tune of Rs. 12,000/- (twelve thousand rupees), but learned tribunal has not even taken the income @ minimum wages as applicable on the date of the accident for a skilled labourer i.e., @ Rs. 9,873.08/- (nine thousand eight hundred seventy three rupees and eight paise) per month. However, taking into consideration the cap provided under the Employees Compensation Act on the maximum income to be computed for the purposes of compensation at Rs. 8,000/- (eight thousand rupees) per month, compensation has been calculated taking income at Rs. 8,000/- (eight thousand rupees) per month and not even @ of minimum wages prescribed by the State Government for a skilled labourer.

3. Learned counsel for the appellant though vehemently submits that wages should have been computed at least at the minimum wages prescribed by the State authorities, but is not in a position to dispute the fact that an amendment was affected in Section 4 (1B) of the Employees' Compensation Act, 1923 whereby it is provided that "the Central Government may, by notification in the Official Gazette, specify, for the purposes of sub-section (1), such monthly wages in relation to an employee as it may consider necessary."

4. The Central Government has specified for the purpose of sub-section (1), "Eight thousand rupees" as monthly wages, vide S.O. 1258(E), dated 31st May, 2010. It is true that *vide* Gazette Notification published in the Gazette of India dated 3rd January, 2020, S.O. 71(E) has been issued whereby in exercise of its authority provided under Section 4(1)(B), the notification dated 31st May, 2010 has been revised and the monthly wages, with effect from the date of publication of the notification in the Official Gazette has been enhanced to Rs. 15,000/- (fifteen thousand rupees).

5. Hon'ble Supreme Court in case of ***K. Shivaraman and Others vs. P. Sathishkumar and Another*** as reported in ***2020 (4) SCC 594*** has held that the effect of the notification is not retrospective but prospective inasmuch as the amendments enhancing the compensation payable under the 1923 Act confer a benefit upon employees, a corresponding burden is imposed on employers to pay a higher rate of compensation.

6. In case of ***Kerala State Electricity Board and Others vs. Valsala K. and Others*** as reported in ***1999 (8) SCC 254***, it has been held that the benefit of an amendment, enhancing the rate of compensation does not have retrospective application to accidents that took place prior to coming into force of the amendment. Admittedly, in the present case, accident took place on 17.06.2019 and therefore, cap of Rs. 8,000/- (eight thousand rupees) per month as prescribed by the Central Government *vide* S.O. 1258(E) dated 31st May, 2010 fixing monthly wages @ Rs. 8,000/- (eight thousand rupees) per month will be applicable and therefore, there is no

illegality or arbitrariness in the impugned award in not computing the minimum wages prescribed by the State Government for the purpose of calculation of compensation.

7. Therefore, F.A.F.O. deserves to be dismissed and is ***dismissed***.

(2020)10ILR A313
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.09.2020

BEFORE
THE HON'BLE J.J. MUNIR, J.

Habeas Corpus Writ Petition No. 385 of 2020

Rishik Lavania & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Prashant Shukla, Sri Ram Prakash Upadhyay

Counsel for the Respondents:
G.A., Sri Vineet Kumar Singh

(A) Criminal Law - Hindu Minority and Guardianship Act, 1956 - Section 6 - natural guardian of a hindu minor - Section 6(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 - Guardians and Wards Act,1890 - Section 25 - child custody .

Child stays with her **mother** and in her care and custody - mother is a dentist and a well educated woman - She is capable of earning her livelihood, even if for the present, she does not have a job in her home town of Agra - mother and the father are both natural guardians under Section 6(a) of the Hindu Minority and Guardianship Act, 1956. (Para-2,7)

HELD:- If the mother's custody cannot be held unlawful, there is no scope for this Court to issue a writ of habeas corpus ordering the custody of the minor to be hands-changed from the mother to the father. If the father thinks that he has a better right to the minor's custody, it is open to him to bring a duly constituted application under Section 25 of the Guardians and Wards Act, or some other provision of the said statute, as may be advised.(Para - 4,7)

Habeas corpus petition dismissed.(E-7)

List of Cases Cited:-

Tejaswini Gaud & ors. Vs Shekhar Jagdish Prasad Tewari & ors., (2019) 7 SCC 42

(Delivered by Hon'ble J.J. Munir, J.)

1. In compliance with the *rule nisi* issued by this Court vide order dated 16.09.2020, the minor Rishik Lavania has been produced before this Court by Sub Inspector Amit Prasad, posted at P.S. Hariparvat, District Agra. Along with the minor, the mother Dr. Smt. Akanksha Vashishth has also appeared. The minor has been identified before this Court by the Sub Inspector who has brought him here. Smt. Akanksha Vashishth, has appeared in compliance with the order dated 31.08.2020 where it was left elective for her. She has been identified before this Court by Sri Vinit Kumar Singh, learned counsel appearing on behalf of respondent nos. 3, 4 and 5. He has also filed a short counter affidavit. It is taken on record. A supplementary affidavit has been filed on behalf of the petitioner which is also taken on record. Now, that master Rishik Lavania is present in Court along with his mother, Smt. Dr. Akanksha Vashishth, both of them being identified, this Court considers it appropriate for a just disposal of this rule nisi to record the mother's stand in the matter. The Court, accoringly, proceeds to

record the statement of Dr. Smt.Akanksha Vashishth, *verbatim*:

Q. Your name?
A. Dr. Akanksha Vashishth.
Q. Your husband's name?
A. Dr. Sumit Lavania.
Q. What is your occupation?
A. I am BDS, Dentist.
Q. Do you practice your profession?
A. I used to, but presently I am not practicing.
Q. What is your source of livelihood and support in life?
A. Currently my parents are there and before coming to Agra I lived at Mumbai. I was working there.
Q. The son stays in the custody of your parents or your custody?
A. He stays with my parents since I left him at my home town, due to Covid-19. Now, I have left my job at Mumbai and come back to my home town, Agra.
Q. You want the child to stay with you?
A. Yes sir.

2. This Court has considered the statement of the minor's mother Dr. Smt. Akanksha Vashishth, who has categorically stated that the child stays with her and in her care and custody. It is her case that for a brief spell of time due to outbreak of the Covid-19 pandemic, she sent the child from Mumbai where she was in a job, to her parents. During that period of time the child was with the grand parents. It is also her stand that she has given up her job and is back to her home town, Agra. She has indicated her inclination to take care of the child. Now, the father and the mother are both natural guardians under Section 6(a) of the Hindu Minority and Guardianship Act.

3. Sri Vinit Kumar Singh, learned counsel for the respondents has raised an objection that this petition for habeas corpus cannot be utilized as a substitute for settling a custody dispute between two natural guardians. In the event, the father feels that he has a better claim to the minor's custody he can suit his case before the competent forum. It is Mr. Singh's submission that a writ of habeas corpus can issue to restore a minor's custody, where the minor is in unlawful custody; not where he/she is in custody that is pre-eminently lawful.

4. This Court has considered the rival submissions. In the opinion of this Court, there is no cavil that the mother and the father are both natural guardians under Section 6(a) of the Hindu Minority and Guardianship Act, 1956. It cannot be said that a mother, if for some reason like the welfare of the minor is not best suited to hold his custody, her custody is unlawful. If the mother's custody cannot be held unlawful, there is no scope for this Court to issue a writ of habeas corpus.

5. Learned counsel for the petitioner at this stage has placed reliance upon the decision of the Supreme Court in **Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others, (2019) 7 SCC 42.** He has called attention to paragraphs 36 and 37 that are extracted below:

"36. The appellants submit that handing over of the child to the first respondent would adversely affect her and that the custody can be handed over after a few years. The child is only 1 years old and the child was with the father for about four months after her birth. If no custody is granted to the first respondent, the Court

would be depriving both the child and the father of each other's love and affection to which they are entitled. As the child is in tender age i.e. 1 years, her choice cannot be ascertained at this stage. With the passage of time, she might develop more bonding with the appellants and after some time, she may be reluctant to go to her father in which case, the first respondent might be completely deprived of her child's love and affection. Keeping in view the welfare of the child and the right of the father to have her custody and after consideration of all the facts and circumstances of the case, we find that the High Court was right in holding that the welfare of the child will be best served by handing over the custody of the child to the first respondent.

37. Taking away the child from the custody of the appellants and handing over the custody of the child to the first respondent might cause some problem initially; but, in our view, that will be neutralised with the passage of time. However, till the child is settled down in the atmosphere of the first respondent father's house, Appellants 2 and 3 shall have access to the child initially for a period of three months for the entire day i.e. 8.00 a.m. to 6.00 p.m. at the residence of the first respondent. The first respondent shall ensure the comfort of Appellants 2 and 3 during such time of their stay in his house. After three months, Appellants 2 and 3 shall visit the child at the first respondent's house from 10.00 a.m. to 4.00 p.m. on Saturdays and Sundays. After the child completes four years, Appellants 2 and 3 are permitted to take the child on every Saturday and Sunday from the residence of the father from 11.00 a.m. to 5.00 p.m. and shall hand over the custody of the child back to the first respondent father before 5.00 p.m. For any further modification of the visitation rights, either parties are at liberty to approach the High Court."

6. The decision of their Lordships in **Tejaswini Gaud** *(supra)* does not rule out the remedy of a habeas corpus in custody matters but makes it clear that it can issue in a situation where the custody is in unlawful hands. In **Tejaswini Gaud** *(Supra)*, it has been held about maintainability of a petition for a writ of habeas corpus in custody matters, in paragraphs 19 and 20 of the report, 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.

7. It is thus evident that the present proceedings would be open to the parties if the minor were in the custody of an utter stranger or a kindred who had no right whatsoever under the law, or the custody held by a person with no right, or is otherwise illegal. In the present case, this Court finds that the mother is a dentist and a well educated woman. She is capable of earning her livelihood, even if for the present, she does not have a job in her home town of Agra. There is no justification for this Court, therefore, to issue a writ of habeas corpus ordering the custody of the minor to be hands-changed from the mother to the father. This does not mean that the father is remediless. If the father thinks that he has a better right to the minor's custody, it is open to him to bring a duly constituted application under Section 25 of the Guardians and Wards Act, or some other provision of the said statute, as may be advised.

8. So far as the present writ petition is concerned, this habeas corpus petition fails and is **dismissed** subject to liberty given to the father as indicated above.

9. The minor who has been brought by the police, is left free to go with his mother. The Sub Inspector who has brought the minor here is discharged of his assignment.

10. The amount deposited with the Registrar General of this Court shall be remitted by the Registrar General forthwith in the account of Dr. Smt. Akanksha Vashishth, through a bank instrument payable at Agra.

(2020)10ILR A316
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.10.2020

BEFORE
THE HON'BLE J.J. MUNIR, J.

Habeas Corpus Writ Petition No. 484 of 2020

Aisha (Minor) & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Alok Kumar Srivastava

Counsel for the Respondents:
G.A., Sri Adil Jamal

(A) Criminal Law - Mulla's Mahomedan Law - Section 352 - Right of mother to custody of infant children, Section 353 - Right to female relations in default of mother, Section 354 - Females when disqualified for custody,Section 355 - Right of male paternal relations in default of female relations , Section 359 - Legal guardians of property - mother by the personal law of parties is not the natural guardian of the minor - Rather, it is the father who is the natural guardian - under the personal law of parties who are Muslims - there is a distinction made between the natural guardianship that is with the father and the right to custody of the minor that vests in the mother, until the age of puberty in case of a minor girl - In the case of a minor boy that right to

custody for a mother extends until the boy turns seven years.(Para-13)

Petition **filed** for the issue of a writ of habeas corpus - ordering respondent nos. 2,3 and 4 to produce the detenue-petitioner no. 1, before the Court - to set her at liberty by giving her into the custody of the second petitioner, her father and natural guardian - child is a two year old girl - mother and the daughter as they appeared before the Court seem to be inseparable - The mother stays with her family comprising her mother and brothers. **(Para-1,18)**

HELD:- Notwithstanding the fact that the mother has been found better entitled to the minor's custody, the second petitioner, Abdul Azeem is admittedly the minor's father and the natural guardian. He is entitled to meet his daughter and interact with her as she grows up. He would, therefore, be entitled to visitation rights. Welfare of the minor that is of paramount consideration is best secured in the hands of her mother, Smt. Umme Alisha.(para-19,20)

Habeas corpus petition dismissed.(E-7)

List of Cases Cited:-

1. Tejaswini Gaud & ors. Vs Shekhar Jagdish Prasad Tewari & ors., (2019) 7 SCC 42

2. Sahil (Minor) & anr. Vs St. of U.P. and 3 ors., in Habeas Corpus Writ Petition No. 387 of 2020

3. Yashita Sahu Vs St. of Raj. & ors., (2020) 3 SCC 67

4. Imambandi & ors. Vs Sheikh Haji Mutsaddi & ors., (1918-19) 23 CWN 50

5. Rafiq Vs Smt. Bashiran & anr., AIR 1963 Raj 239

6. Mt. Siddq-un-Nissa Bibi Vs Nizam-Uddin Khan(1) Sulaiman, AIR 1932 All 215

7. Mohammad Shafi Vs Shamin Banoo, AIR 1979 Bom 156

(Delivered by Hon'ble J.J. Munir, J.)

1. This petition asks for the issue of a writ of habeas corpus ordering respondent nos. 2,3 and 4 to produce the detenue-petitioner no. 1, Aisha before the Court and to set her at liberty by giving her into the custody of the second petitioner, Abdul Azeem @ Mohd. Azeem, her father and natural guardian.

2. It must be remarked here that respondent nos. 2 and 3 are police officers who are not claimed to be holding the minor in their custody. The relief is, therefore, substantially sought against respondent no. 4, Smt. Umme Alisha d/o Abid Hussain, who is Abdul Azeem's estranged wife and the minor's mother. The 5th respondent, Abid Hussain is Smt. Umme Alisha's father, Abdul Azeem's father-in-law and the minor's grandfather (maternal). In substance, thus, a writ is prayed to be issued against the minor's mother at the instance of her father who claims the mother's custody to be unlawful.

3. Heard Sri Alok Kumar Srivastava, learned counsel for the petitioner, Sri Adil Jamal who appears for respondent nos. 4 and 5 and Sri Gyan Prakash, learned State Law Officer appearing on behalf of the State-respondents.

4. The facts in the backdrop of which this petition has arisen are these: Abdul Azeem, the second petitioner and Smt. Umme Alisha, the 4th respondent were married according to Muslim rites on 28.10.2016. The couple were blessed with a child, a baby girl on 04.09.2018. She has been introduced hereinbefore as Aisha. It is said that Smt. Umme Alisha and her husband Abdul Azeem could not get along together. They parted ways with Smt. Umme Alisha moving out of her matrimonial home. She went back to her

parents and is staying with them. The parties have turned an estranged couple. An FIR also appears to have been lodged by Smt. Umme Alisha on 08.02.2019 against her husband, Mohd. Azeem, her father-in-law, Mohd. Saleem, Mohd. Shanoo and Mohd. Naseem, both brothers-in-law *(jeth)* and Neha @ Baliga, sister-in-law *(nanad)* complaining commission of offences by them punishable under Sections 498-A, 323, 506, 306, 511, 467, 468, 471 I.P.C. and Section 3/4 D.P. Act. It was registered as Case Crime No. 21 of 2019 at P.S. Colonel Ganj, Kanpur Nagar. There is another FIR lodged by Smt. Umme Alisha against Mohd. Azeem, her husband, her father-in-law, Saleem and one unknown offender reporting offences punishable under Section 323, 354B, 452, 504, 506 I.P.C. and Section 4 of the Muslim Women (Protection of Rights on Marriage) Act, 2019, P.S. Colonel Ganj, District Kanpur Nagar. This FIR was lodged on 27.09.2019. Mohd. Azeem has filed a suit for restitution of conjugal rights against Smt. Umme Alisha that has been numbered as Case No. 1287 of 2019 on the file of the learned Principal Judge, Family Court, Kanpur Nagar. It also appears that the location of Smt. Umme Alisha's maternal home and her parents place is a walking distance. The parties are enmeshed in a quagmire of legal proceedings. They have turned utterly warry of each other. The mother holds the parties' child in her custody and the father has no access to the child. It is in the back drop of these facts that the father has moved this Court for a writ of habeas corpus, seeking his minor daughter's custody.

5. It is Mr. Alok Kumar Srivastava's submission that according to the personal law of parties that would govern the right to guardianship and custody, the father is the natural guardian. Both parties are Muslims and by their personal law natural guardianship of a minor is with the father. Learned counsel submits that in the father's presence and the parties being estranged, the mother is obliged to handover the minor child into her father's custody.

6. Mr. Adil Jamal on the other hand says that the father may be the natural guardian under the personal law applicable to the parties but under that law, a mother, notwithstanding the right of the father, is entitled to a minor girl's custody till she attains the age of puberty. Mr. Adil Jamal says that the right to hold custody under the personal law of parties is subject to the overriding provisions of the Guardians and Wards Act, 1890. He further submits that the provisions of the last mentioned Act and the law that has developed on the subject mandates that welfare of the minor is of paramount consideration. If, therefore, the welfare of the minor requires a course of action to be taken that is not in accordance with the personal law of parties, it is the welfare of the minor that has to be given precedence. It is his submission that the minor here is a young girl of two years, who needs the mother and her care the most. Her welfare can alone be secured in the hands of the mother and not the father, who is far less suited to look after the young minor's interest.

7. It is further argued by the learned counsel for the 4th respondent that the mother and the father are both natural guardians. None of them can, therefore, be said to hold custody of the minor unlawfully. As such, a writ of habeas corpus would not be available to the second petitioner claiming custody from the 4th respondent who is the minor's mother and a natural guardian, like the second petitioner.

He submits that in a case where the parents are pitted against each other and seek to establish a better right to custody, the appropriate remedy is to move the Court under Section 25 of the Guardians and Wards Act, 1870. A writ of habeas corpus would be available where the minor is in the custody of an utter stranger or a kindred who is not entitled to it.

8. This Court has thoughtfully considered the rival submissions advanced by parties. It would be apposite to deal with the objections about maintainability of this petition for a writ of habeas corpus in a custody dispute between the mother and the father. This question arose for consideration before the Supreme Court in **Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others, (2019) 7 SCC 42.** It was held in **Tejaswini Gaud** *(supra)* 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."

9. I had occasioned to consider this issue in **Sahil (Minor) & Another vs. State of U.P. and 3 others,** in **Habeas Corpus Writ Petition No. 387 of 2020**, decided on 03.09.2020, where it was held:

20. It would be noticed from a perusal of the decisions of the Supreme Court in Nithya Anand Raghavan (supra) and Syed Saleemuddin (supra) referred to by the Division Bench of this Court in Manuj Sharma that the remedy of a habeas corpus to an estranged parent has not been held unavailable, even against the other

parent. All that appears to be the requirement is to show that the child with the other parent or with some other member of the family is in detention and that detention is unlawful. It is but logical that in a case where one has to judge the legality of the minor's detention by the other parent or some other relative, the nature of the applying parent's right, vis-a-vis the detaining parent or relative's is decisive. The decision of their Lordships of the Supreme Court in Tejaswini Gaud also says that the jurisdiction of the High Court in granting a habeas corpus is limited by the fact whether the detention of the minor is by a person who is not entitled to his legal custody. It is true that the Supreme Court has held in Tejaswini Gaud that habeas corpus can be issued in exceptional cases. It is not that the writ is completely unavailable in matters where a parent claims custody, to which he/ she is lawfully entitled.

21. In this Court's opinion, where there is not much of a debatable right available to the other parent or some other relative, who is detaining the child contrary to the wish of the applying parent, the writ ought to issue. However, if the parent or the other relative detaining the minor has a reasonable right that he/ she can show on affidavits, the parties ought to be left to pursue their remedy under the Guardians and Wards Act. As such, what this Court has concluded hereinabove that this petition is maintainable, proceeds on valid principles.

10. The maintainability of a petition for a writ of habeas corpus in custody disputes between parents recently engaged the attention of the Supreme Court in **Yashita Sahu Vs. State of Rajasthan and others, (2020) 3 SCC 67**, where it has been 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 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.

11. The objection raised by the learned counsel for the respondent that this petition is not maintainable as it relates to a custody dispute between two parents, where custody of either cannot be said to be unlawful, in the sense that it is understood in the jurisdiction for a writ of habeas corpus, cannot be accepted. The validity of a minor's custody with a parent can be examined in a petition for a writ of habeas corpus with reference to the law governing the right to that custody. The question of welfare of minor too, can be examined within the scope of these proceedings. The only limitation appears to be that the inquiry should not involve fine and intricate details, the assessment of which may require such a detailed inquiry which is not traditionally associated with the exercise of the Court's writ jurisdiction.

Where a very detailed inquiry is required to be made, the parties ought to be left free in the first instance to go to the Civil Court.

12. Now, in the facts of the present case it has to be seen whether the custody of the mother is apparently unlawful, so as to entitle the father to ask for a writ of habeas corpus.

13. It is true that the mother by the personal law of parties is not the natural guardian of the minor. Rather, it is the father who is the natural guardian. But under the personal law of parties who are Muslims, there is a distinction made between the natural guardianship that is with the father and the right to custody of the minor that vests in the mother, until the age of puberty in case of a minor girl. In the case of a minor boy that right to custody for a mother extends until the boy turns seven years.

14. It must be noted that under the personal law of parties, there is a distinction about the law relating to guardianship of the minor's person and that of his/her property. A reference in this connection may be made to **Mulla's Principles of Mahomedan Law (Nineteenth Edition) by M. Hidayatullah and Arshad Hidayatullah**. Section 352 of Mulla's Mahomedan Law, which falls under Part B of Chapter XVIII dealing with "Guardians of the Person of a Minor', provides:

"352. Right of mother to custody of infant children. - The mother is entitled to the custody (hizanat) of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues though she is divorced by the father of the child, unless she marries a second husband in which case the custody belongs to the father."

15. Again, sections 353, 354 and 355 that have material bearing on the issue are extracted below:

"353. Right to female relations in default of mother.- Failing the mother, the custody of a boy under the age of seven years, and of a girl who has not attained puberty, belongs to the following female relatives in the order given below:-

(1) mother's mother, how highsoever;

(2) father's mother, how highsoever;

(3) full sister;

(4) uterine sister;

(5) consanguine sister;

(6) full sister's daughter;

(7) uterine sister's daughter;

(8) consanguine sister's daughter;

(9) maternal aunt, in like order as sisters; and

(10) paternal aunt, also in like order as sisters.

354. Females when disqualified for custody.- A female, including the mother, who is otherwise entitled to the custody of a child, loses the right of custody -

(1) if she marries a person not related to the child within the prohibited degrees (ss. 260-261), e.g., a stranger, but the right revives on the dissolution of marriage by death or divorce;

or

(2) if she goes and resides, during the subsistence of the marriage, at a distance from the father's place of residence; or,

(3) if she is leading an immoral life, as where she is a prostitute; or

(4) if she neglects to take proper care of the child.

355. Right of male paternal relations in default of female relations.- In default of the mother and the female relations mentioned in sec. 353, the custody belongs to the following persons in the order given below:-

(1) the father;

(2) nearest paternal grandfather;

(3) full brother;

(4) consanguine brother;

(5) full brother's son;

(6) consanguine brother's son;

(7) full brother of the father;

(8) consanguine brother of the father;

(9) son of father's full brother;

(10) son of father's consanguine brother;

Provided that no male is entitled to the custody of an unmarried girl, unless he stands within the prohibited degrees of relationship to her (ss. 260-261).

If there be none of these, it is for the Court to appoint a guardian of the person of a minor."

16. The vivid difference about the law governing guardianship of the person of a minor and that relating to his/her property can be clearly noticed from how it is set out in **Part C of Chapter XVII of Mulla's Mahomedan Law**. Section 359 of Mulla's Mahomedan Law provides:

"359. Legal guardians of property.- The following persons are entitled in the order mentioned below to be guardians of the property of a minor:-

(1) the father;

(2) the executor appointed by the father's will;

(3) the father's father;

(4) the executor appointed by the will of the father's father."

17. It would be seen that so far as the right to custody of a minor girl under the personal law of parties is concerned, it is provided that it ought to remain with the mother till she attains the age of puberty. Thereafter, in India the Law that has emerged is that custody must be ordered not just by the letter of the personal law but by judging where the welfare of the minor best lies. I had occasion to consider this question in **Sahil (Minor)** *(supra)* where after doing a survey of authority on the point, it was held:

13. This entitlement of the mother to the custody of a minor male child (as well as female, which is not relevant here) fell for consideration of the Privy Council in **Imambandi and ors. vs. Sheikh Haji Mutsaddi and ors., (1918-19) 23 CWN 50**, where it has been held by their Lordships:

"It is perfectly clear that under the Mahomedan law the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. But she is not the natural guardian; the father alone, or, if he be dead, his executor (under the Sunni law) is the legal guardian. The mother has no larger powers to deal with her minor child's property than any outsider or non-relative who happens to have charge for the time being of the infant.…."

"As already observed, in the absence of the father, under the Sunni law the guardianship vests in his executor. It the father dies without appointing an execute or (wasi) and his father is alive, the guardians hip of his minor children devolves on their grandfather. Should he

also he dead, and have left an executor, it vests in him. In default of these de jure guardians, the duty of appointing a guardian for the protection and preservation of the infants' property devolves on the Judge as the representative of the Sovereign (Baillie's "Digest," ed. 1875, p. 689; Hamilton's Heddya, Vol. IV, p. 555). ....."

14. This then is the position about the entitlement to the custody of a minor male child under the Muslim Law. But, it must be remembered that the personal law of parties is not the final word about entitlement to custody or guardianship in India. The right is regulated by statute. The statute is the Guardians and Wards Act, 1890. The principle that the provisions of the Guardians and Wards Act would prevail over the personal law of parties in the matter of appointment or declaration of a guardian of the person or the property of a minor, is a principle that has been accepted without cavil by consistent authority. The point was considered and the law expounded in **Rafiq vs. Smt. Bashiran and another, AIR 1963 Raj 239. In Rafiq** *(supra)*, Jagat Narayan J. after doing a survey of the provisions of Sections 17 and 19 of the Guardians and Wards Act and relying on a decision of this Court in **Mt. Siddq-un-Nissa Bibi v. Nizam-Uddin Khan(1) Sulaiman, AIR 1932 All 215,** held:

"The learned Senior Civil Judge ignored the provisions of Sec. 19 of the Guardians and Wards Act, which runs as follows:--

"Nothing in this Chapter shall authorise the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards, or to appoint or declare a guardian of the person--

(a) of a minor who is a married female and whose husband is not, in the opinion of the Court, unfit to be guardian of her person, or

(b) of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor, or

(c) of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor."

He did not come to a finding that the father is unfit to be the guardian of the person of the minor.

It may be mentioned here that where the provisions of the personal law are in conflict with the provisions of the Guardians and Wards Act the latter prevail over the former. It is only where the provisions of the personal law are not in conflict with the provisions of the Guardians and Wards Act that the court can take into consideration the personal law applicable to the minor in the appointment of a guardian. The provisions of Sec. 19 of the Guardians and Wards Act prevail over the provisions of Sec. 17 which runs as follows:--

(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

(4) The Court shall not appoint or declare any person to be a guardian against his will."

(3) In Mt. Siddq-un-Nissa Bibi v. Nizam-Uddin Khan, ILR 54 All 128 : (AIR 1932 All 215), Sulaiman, Acting C.J. observed at page 134 (of ILR All) : (at p. 217 of AIR): -

"The personal law has been abrogated to the extent laid down in the Act. Where, however, the personal law is not in conflict with any provision of the Act, I would not be prepared to hold that it has necessarily been superseded."

and at page 131 (of ILR All) : (at p. 216 of AIR)--

"There can be no doubt that so far as the power to appoint and declare the guardian of a minor under Sec. 17 of the Act is concerned, the personal law of the minor concerned is to be taken into consideration, but that law is not necessarily binding upon the court, which must look to the welfare of the minor consistently with that law. This is so in cases where Sec. 17 applies. In such cases the personal law has to this extent been superseded that it is not absolutely binding on the court and can be ignored if the welfare of the minor requires that some one else, even inconsistently with that law, is the more proper person to be appointed guardian of the minor. Sec. 19 then provides that "Nothing in chapter shall authorise the Court ..... to appoint or declare a guardian of the person (a) of a minor who is a married female and whose bus-band is not, in the opinion of the court, unfit to be guardian of her, person, or (b)..... of a minor whose father is living and is not, in the opinion of the court, unfit to be guardian of the person of the minor, or (c) of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor." The language of the section, as it stands, obviously implies that when any of the three contingencies mentioned in the sub-clauses exists there is no authority in the court to appoint or declare a guardian of the person of the minor at all; that is to say, the jurisdiction of the court conferred upon it by Sec. 17 to appoint or declare a guardian is ousted where the case is covered by Sec. 19."

(4) There is nothing on record to show that the father of the minor is unfit to be the guardian of her person. As was observed in B.N. Ganguly v. G.H. Sarkar, AIR 1961 Madh-Pra 173 there is a presumption that the parents will be able to exercise good care in the welfare of their children."

15. The entire law about the right of the mother to the custody of her minor children, a son and a daughter, where the parties were an estranged Muslim couple, was considered by the Bombay High Court in **Mohammad Shafi vs. Shamin Banoo, AIR 1979 Bom 156.** It must be remarked that the facts of the case in **Mohammad Shafi** show that it was truly a custody dispute between the estranged parents of the two minors, where the application by the mother for custody appears to be one made under Section 25 of the Guardians and Wards Act. She had asked for the custody of her minor son, aged four years and a minor daughter, aged two and a half years, at the time of commencement of action. The facts of the case founded on pleadings of parties can best be understood by a reference to their statement in paragraph nos.2 and 3 of the report, that read:

"2. An application for appointment of herself as guardian and for

the custody or returning the minors to her custody was filed by Shamim Banu against her husband Mohomed Shafi under sections 7 and 25 of the Guardian and Wards Act. She alleged therein that she was married to Mohomed Shafi and bore three children from respondent Mohomed Shafi, namely Mohomed Raees whose age was given as 4 years, Waheeda Begum, whose age was given as 2½ years and Farooque who was aged 1½ years at the time when this application was presented. She then stated that she was given very cruel treatment by the respondent who wanted to marry another woman and drove her out and at that time snatched Mohomed Raees and Waheeda Begum from her. Farooque was then only a month old and was allowed to be retained with her. She, therefore, filed this application for custody or return of the custody of the minors to herself, namely, Mohomed Raees and Waheeda Begum and for appointment of herself as the guardian under section 7. She also stated in the application that the respondent has married Sajjidabegum after the petitioner was driven away and that the respondent and his newly married wife are living together along with the minors who were, according to her, treated cruelly by the wife, step-mother and the respondent.

3. The respondent filed his written statement to this application and denied that the petitioner was driven away and was treated cruelly. He claimed that he was the natural father of the minor children whose ages were not disputed and was, therefore, entitled to their custody. He contended that the petitioner was divorced by him on 7th November, 1975 and that she was a woman of suspicious character and had connections with others and used to leave the house of the respondent at night in the company of somebody secretly. That she has left him with a view to carry on her affair with her boy friend. In these circumstances and also under the personal law to which the parties belong, namely, Mahomedan Law, he claimed that he was entitled to the custody of the children and was the proper and legal guardian of the minors. It is his claim that the application is motivated by the proceedings which she has commenced under section 125 of the Code of Criminal Procedure against him. He did not deny that he has married a third time, but denied that either the minors were given cruel treatment by him or his new wife. Lastly, he contended that the minors are being properly looked after and that the petitioner who is staying with her father has no means of income as also her parents which could be sufficient to bring up these minor children. That they would be practically starving whereas the respondent has sufficient earnings of his own. That there are other members in his family who come to him and look after his children by the petitioner."

16. After a searching analysis of the provisions of the Guardians and Wards Act and review of well-known authority on the point, R.D. Tulpule, J. held, summarizing the principle:

"33. In my opinion, as pointed out, the provisions of the personal law applicable to the parties stand superseded to the extent to which a provision is made and which is inconsistent or contrary to that personal law in the Guardians and Wards Act. If the definition in section 4(2) is capable of including the person who is not a natural or legal guardian at the moment, but has the care of the minor, then it seems to me that he can maintain an application under section 25 of the Act. If such an application can be maintained and if the minor was in the custody of such person, as in the present case, a legal guardian cannot say if it is in the interest of the minor and

for the welfare of the minor that the custody should be handed over to such guardian as contemplated under section 4 of the Guardians and Wards Act, that such custody should not be granted. It seems to me, therefore, that if it was in the interest of the minor and for its welfare to award the custody to such guardian as defined under section 4(2) to him, its custody should be given. It seems to me that even the personal law applicable to the parties in this case recognises the right to the custody of the mother in spite of the father being a legal and natural guardian during certain period. As I pointed out that could not be upon any other consideration except that the mother is the best person suited to take care of the minor. If that is so, I am inclined to think that she comes within the definition of "guardian' as contemplated under section 4. In that view I do not think particularly in the present circumstances any other conclusion can be reached as regards what is in the interest and welfare of the minors."

17. It is clear from the position of law as it stands that so far as the custody of a minor child is concerned, the mother is entitled to it until the child is of tender age, unless there be a clear disentitlement inferable. This right of the mother to the child's custody is not based on the personal law of parties alone, but on a well acknowledged principle arising from human nature - and if this Court may dare say from the animal nature of man - that the mother is best oriented to look after the welfare of her infant or young child. The mother has always been regarded to be best equipped to take care of the needs of a young child, and secure his/ her welfare compared to a father. This right of the mothers is subject only to known exceptions, like her marriage to a stranger or the mother living a demonstrably immoral life. The mother's right is so well established, that in case of a minor of tender years, any other relative holding the child in his/ her custody while the mother is around, would be unlawful custody. Of course, the principle would not apply if the mother is disentitled under some reputed exception.

18. In the present case, this Court finds that the child is a two year old girl. The mother and the daughter as they appeared before the Court seem to be inseparable at this stage. The mother, Smt. Umme Alisha stays with her family comprising her mother and brothers. It is urged in the petition that Smt. Umme Alisha's brothers are drunkards but there is no tangible evidence about the fact, brought to the Court's notice. Nothing has been brought to the Court's notice that would disentitle the mother of the availability of that strong presumption that she is best suited to look after the welfare of a young child of two years, particularly a girl.

19. Notwithstanding the fact that the mother has been found better entitled to the minor's custody, the second petitioner, Abdul Azeem is admittedly the minor's father and the natural guardian. He is entitled to meet his daughter and interact with her as she grows up. He would, therefore, be entitled to visitation rights.

20. This Court, therefore, finds that welfare of the minor that is of paramount consideration is best secured in the hands of her mother, Smt. Umme Alisha. It is far better secured in her hands than the father, who has asked for the minor's custody through a writ of this Court.

21. It is, however, made clear that whatever has been said in these proceedings is tentative. If the father feels

for the present or at a later stage that he has a better right to the minor's custody, it would always be open to him to institute appropriate proceedings before a Court of competent jurisdiction under the Guardians and Wards Act, 1890 as may be advised. In case, he seeks custody of the minor by moving the Court of competent jurisdiction, nothing said here would affect the rights of either party to establish their case on merits. The Court concerned shall be free to decide the issue of custody of the minor on the basis of evidence led and in accordance with law.

22. In the result, the *rule nisi* issued cannot be made absolute. It is discharged. The petition stands **dismissed**.

23. The second petitioner, Abdul Azeem @ Mohd. Azeem, the minor's father shall have visitation rights in terms that Smt. Umme Alisha d/o Abid Hussain and the minor's grandfather, Abid Hussain shall permit the father, Abdul Azeem to meet the minor Aisha once a month on the second Tuesday between 10:00 a.m. to 01:00 p.m. During these visits, the 4th and the 5th respondent shall extend due courtesy to the father, Abdul Azeem and shall facilitate the meeting.

24. Let this order be communicated to the learned District Judge, Kanpur Nagar and the S.S.P., Kanpur Nagar by the Joint Registrar (compliance).

(2020)10ILR A327
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.10.2020

BEFORE
THE HON'BLE J.J. MUNIR, J.

Habeas Corpus Writ Petition No. 487 of 2020

Bishantak & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ranjeet Kumar Mishra, Sri Rajesh Kumar Singh

Counsel for the Respondents:
A.G.A., Sri Devesh Mishra

(A) Criminal Law - Hindu Minority and Guardianship Act, 1956 - Section 6 - natural guardian of a hindu minor - Section 6(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, Section 13 - Welfare of minor to be paramount consideration - Guardians and Wards Act,1890 - Section 17-matter to be considered by the court in appointing guardian , Section 25 - Title and guardian to custody of ward - law of guardianship - welfare of the minor is of paramount consideration.

Custody of minor child - Both the mother and father are natural guardians - till he is a minor, under Section 6 (a) of the Hindu Minority and Guardianship, Act - Their rights are equal as natural guardians - Court has spoken to the minors who are not only of intelligent years but teenagers, not far away from majority (Para-5,7)

HELD:- This Court has to see where the welfare of the minor is best secured. The stand of the minors does not leave this Court in any doubt that their welfare would be best served with their mother. In fact, it would be a disservice to the minors, if they were asked to stay with the father. (Para-8)

Habeas corpus petition dismissed. (E-7)

List of Cases Cited:-

1. Yashita Sahu Vs St. of Raj. & ors., (2020) 3 SCC 67

2. Githa Hariharan (Ms) & anr. Vs RBI & anr., (1999) 2 SCC 228

(Delivered by Hon'ble J.J. Munir, J.)

1. In compliance with the order dated 1.10.2020, Bishank and Sumit, both sons of Amit Soni, have been produced before this Court, by Constable Raj Kumar Yadav (PNO no.182101843), posted at Police Station-Kotwali Nagar, Banda, District Banda, who has identified both the detenues before the Court.

2. This Court accordingly, proceeds to ascertain their stand in the matter:-

Q. Apka nam kya hai?
A. Bishank.
Q. Aapke pita ji ka nam?
A. Amit Soni.
Q. Aapki aayu?
A. 15 Saal.
Q. Aap kiske sath rahna chahati hain?
A. Maa ke paas.
Q. Aap apane pita ji ke pass kyon nahi rahana chahte; koi khaas vajah?
A. Kyoki vo maa ko mara karate the aur pita ji ko kai bar maine badi maa ke sath apattijanak sthiti me dekha.
Q. Aapka nam?
A. Sumit.
Q. Aapki aayu?
A. 14 saal.
Q. Aap parhte hain?
A. Haan.
Q. Kiss class me?
A. 9th
Q. Aap kiske pas rahana chahte hain?
A. Maa ke pass.
Q. Pita ji ke pass kyo nahi?
A. Kyo ki pita ji ma ke sath atyachar karte the aur badi maa ke sath galat harkate karte hua maine unhe kai bar pakada.

3. Heard Sri Rajesh Kumar Singh, learned counsel for the petitioners, Sri Devesh Misra, learned Counsel for the respondent no.4 and the learned A.G.A. on behalf of the State.

4. Learned counsel for the petitioner has submitted that he is the natural guardian of the minors under Section 6 (a) of the Hindu Minority and Guardianship, Act and that his wife is the natural guardian in his absence alone. It is pointed out that it is in case of minors up to the age of 5 years that the wife has a right to their custody. Learned counsel for the respondent on the other hand submits that the minors have stayed with the wife and are well taken care of. According to the learned counsel for the respondent, both the minors are pursuing their studies in classes 10th and 9th and are being groomed to become good citizens.

5. This Court, has carefully considered the matter and the material that has appeared in this case. It is true that both the mother and father are natural guardians of a child, till he is a minor, under Section 6 (a) of the Hindu Minority and Guardianship, Act. Their rights are equal as natural guardians, particularly, in view of the decision of the Hon'ble Supreme Court in the Case of **Githa Hariharan (Ms) and another vs. Reserve Bank of India and another, (1999) 2 SCC 228,** which has placed the wife at the same pedestal, as the husband in her right as a natural guardian of the minor children. It is not that a minor's mother becomes the natural guardian, once the husband is no more. She

is entitled to that right if for any reason he is not available, like the two becoming estranged and living apart.

6. Now, there is some issue raised by the learned counsel for the respondent that in a custody dispute between the husband and the wife, the remedy of a writ of habeas corpus is not appropriate. It is submitted that both being natural guardians, parties should be relegated to their remedy under Section 25 of the Guardians and Wards Act. It is now settled in view of the decision of the Hon'ble Supreme Court in **Yashita Sahu vs. State of Rajasthan and others, (2020) 3 SCC 67** that a dispute about custody between parents, can be gone into by this Court, in the exercise of its jurisdiction to issue a writ of habeas corpus, where one parent claims that the child is in unlawful custody of the other.

7. What really is of substance in a matter about custody of a minor is his/her welfare. It has become a truism in the law of guardianship that welfare of the minor is of paramount consideration. That is the principle postulated under Section 17 of the Guardians and Wards Act. The principle about welfare of the minor being of paramount consideration in the matter of appointment of a guardian of the person of the minor or in a custody matter is embodied under Section 13 of the Hindu Minority and Guardianship Act, 1956. Thus, this Court has to see where the welfare of the minor is best secured. It is in this context, that the Court has spoken to the minors who are not only of intelligent years but teenagers, not far away from majority. They have expressed themselves eloquently. Much of the words they have said have been recorded hereinabove *verbatim*. In case of minors older in years, particularly teenagers, their views are of prime importance and required to be accorded great weight while judging the question about their welfare in a custody dispute. Unless, the choice of a minor of older years about his guardian or custody be outrageous or demonstrably against his interest the Court ought to give effect to it. If that choice is in favour of one or the other parent, there is very little scope to deny it.

8. The stand of the minors does not leave this Court in any doubt that their welfare would be best served with their mother. In fact, it would be a disservice to the minors, if they were asked to stay with the father.

9. In this view of the matter, this Court does not find any good ground to make the rule absolute. The *rule nisi* is discharged.

10. The petition is **dismissed**.

(2020)10ILR A329
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.04.2020

BEFORE
THE HON'BLE PANKAJ MITHAL, J.
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Habeas Corpus Writ Petition No. 1100 of 2019

Jasbir Maan ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Jyoti Kumar Singh, Sri Ishwar Chandra Tyagi, Sri Rakesh Pande, Sri Vishakha Pande

Counsel for the Respondents:
G.A., Sri Raj Kumari Devi

(A) Criminal Law - The National Security Act,1980 - Section 3 - Power to make orders detaining certain persons - order passed under Section 3 (2) of the Act is not punitive in nature but is only preventive so that the person may inter-alia be prevented to act in a manner prejudicial to the maintenance of public order- Section3(5) - any order made or approved by state govt under this section ,state govt. shall, within seven days, report the fact to the central govt. together with the grounds on which order has been made , Section 8 - Grounds of order of detention to be disclosed to persons affected by the order , Section 10 - Reference to Advisory board , Section 14 - Revocation of detention orders , Section15 - Temporary release of persons detained - 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 - (Para - 24,40)

Petitioner is a builder - constructed multi-storied buildings consisting of 261 flats - transferred/sold about 169 of the said flats by registered deeds to the public at large - construction activities are illegal -FIRs lodged against the petitioner - order of detention passed by the District Magistrate - in exercise of powers under Section 3 (2) of the Act directing for detaining him in order to maintain public order.**(Para -2,3,4,5)**

HELD:- No scope for exercising our discretionary power in the matter at hand so as to disturb the impugned order of preventive detention. However, as primarily the satisfaction has been recorded on apprehension that the activities of the petitioner would affect the "public order", we leave it open for the petitioner to apply for the revocation of the order of preventive detention or for his temporary release in accordance with the provisions of Section 14 and 15 of the Act which may be considered expeditiously subject to conditions as permitted in law.(**Para - 44)**

Habeas corpus petition dismissed. (E-7)

List of Cases Cited:-

1. Ashok Kumar Vs Delhi Administration & ors., AIR 1982 SC 1143

2. Smt. Angoori Devi for Ram Ratan Vs UOI & ors., AIR 1989 SC 371

3. Ayya @ Ayub Vs St. of U.P. , AIR 1989 SC 364

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

1. The petitioner Jasbir Maan through his wife Smt. Anila Maan has preferred this petition for the issuance of a writ of habeas corpus calling upon the respondents to produce the corpus of the petitioner and to release him from the alleged unlawful detention under the National Security Act ***(hereinafter referred to as "Act")***. The petitioner has also prayed for the quashing of the detention order dated 15.10.2019 passed by the District Magistrate, Gautam Buddh Nagar for detaining the petitioner under Section 3 (2) of the Act.

2. The petitioner is a builder having its organisation *Maan Properties and Developers*. He had constructed multi-storied buildings consisting of 261 flats on Khasra No. 35/46/164 in village Shahberi, District Gautam Buddh Nagar sometime in the year 2017-18. He had transferred/sold about 169 of the said flats by registered deeds to the public at large.

3. It is alleged that his construction activities are illegal and that he had raised constructions of the above multi-storied buildings illegally on the land acquired by

the Greater NOIDA Industrial Development Authority ***(hereinafter referred to "GNIDA")*** by unauthorizedly purchasing it from the tenure-holders by using substandard material in violation of the bye-laws without getting the layout/map sanctioned.

4. In connection with the aforesaid activities, it appears that various FIRs were lodged against the petitioner on 16.10.2018 registered as Case Crime No. 968 of 2018; on 23.11.2018 registered as Case Crime No. 1186 of 2018; on 30.09.2019 registered as Case Crime No. 1094 of 2019.

5. The petitioner when in jail in connection with one of the aforesaid cases i.e. Case Crime No. 1094 of 2019 was served with the impugned order of detention dated 15.10.2019 passed by the District Magistrate in exercise of powers under Section 3 (2) of the Act directing for detaining him in order to maintain public order.

6. The detention order was followed by the grounds of detention which were duly communicated to the petitioner as contemplated under Section 8 of the Act to enable him to represent.

7. The grounds of detention are very comprehensive and have been enclosed as Annexure-2 to the writ petition. The aforesaid grounds narrate in detail the facts leading to the passing of the above detention order. It clearly states that the GNIDA in the year 1994 in pursuance to its proclaimed activities started acquisition of land of village *Shahberi*. The acquisition so started on being challenged in the High Court was quashed on 12.05.2011 which order attained finality. Thus, GNIDA restarted fresh acquisition proceedings in the year 2013 whereupon again writ petitions were filed in the High Court and an interim order was passed in one of the writ petitions on 16.10.2014 directing for the maintenance of *status-quo*. The other writ petitions were tagged with it.

8. The aforesaid interim order was well publicized by putting notices but the petitioner illegally went on purchasing the said land from the villagers and raised constructions without getting the land use changed from the agricultural to residential or abadi. At least 431 flats in all were constructed by various builders including the petitioner with substandard material as a result, two of the building/towers of one of the other builders collapsed on 17.07.2018 and 9 people lost their lives. In connection with it, 72 FIRs were lodged against 262 persons. On account of the above incident, there was mass unrest leading to *"dharna pradarshan"* by the public. The builders provoked the people for such *"dharna pradarshan"* which disturbed the peace and tranquility of the area.

9. Insofar as the petitioner is concerned, it has been stated that he constructed 261 flats in village Shahberi on Khasra Nos. 45/40/64 in the year 2017-18. All the said constructions are illegal and substandard. The constructions were raised by him without any sanction and permission of the GNIDA. The petitioner has sold 169 flats without obtaining completion certificates. There is likelihood of these buildings falling down resulting in human casualties as had happened in the case of two other towers mentioned above.

10. It is alleged that in view of the aforesaid acts of the petitioner, the District Magistrate is satisfied that in case

petitioner is released from jail, he would start selling the remaining flats and would provoke the buyers and the people to sit on *"dharna pradarshan"* causing disturbance to public order. Thus, in order to prevent him from acting in any manner prejudicial to the maintenance of public order, it is necessary that he be detained under Section 3 (2) of the Act.

11. The State of U.P. has filed counter affidavit sworn by the Under Secretary (Home), Confidential Department, U.P. Civil Secretariat, Lucknow. It is stated that the detention order dated 15.10.2018 along with the ground of detention and other connected documents on being forwarded by the District Magistrate, Gautam Buddh Nagar, were received on 16.10.2019 by the State Government. The State Government after examining every aspect of the matter, approved the same on 24.10.2019 within 12 days and the approval was communicated to the petitioner on 25.10.2019 through the district authorities, both by letter and radiogram.

12. The copy of the detention order along with grounds of detention and connected documents were also sent to the Central Government by speed-post on 25.10.2019 within 7 days of receiving the approval of the State Government in accordance with Section 3 (5) of the Act.

13. The case of the petitioner was referred to the U.P. Advisory Board (Detention), Lucknow on 25.10.2019 within the stipulated period of three days as required under Section 10 the Act along with all necessary documents. The petitioner appeared for hearing on 08.11.2019 before the Advisory Board. The Advisory Board upon hearing the petitioner in person submitted his report opining that there is sufficient cause for the preventive detention of the petitioner under the Act and accordingly, confirmed the detention order.

14. The petitioner was given full and complete opportunity of making representation against his detention. He submitted his representation on 26.10.2019 which was duly received by the State Government with the covering letter of the District Magistrate. The representation with the comments was also sent to the Central Government. It was examined by the State Government without any delay and was finally rejected on 08.11.2019. The rejection was communicated to the petitioner through the district authorities.

15. In view of the aforesaid facts and circumstances, stated in the counter affidavit of the State, the detention order was passed by the District Magistrate on his satisfaction that the detention of the petitioner is necessary to prevent him from acting in any manner prejudicial to the maintenance of public order. At the same time, the complete procedure specified not only for the passing detention order and in confirming it but in allowing opportunity to the petitioner to make representation and to deal with it swiftly without loss of any time was duly followed.

16. The counter affidavit filed on behalf of respondent No.4, Superintendent (Jail), Gautam Buddh Nagar states that the petitioner was in judicial custody in connection with the Case Crime No. 1094 of 2019 when the detention order dated 15.10.2019 was passed which along with the grounds of detention and relevant material was served upon him on the same day. He was given full opportunity to submit his representation which he

submitted on 26.10.2019. The representation was rejected by the District Magistrate, State Government and Central Government and the petitioner was duly informed of it. The detention order was approved/confirmed by the State Government.

17. The aforesaid facts disclosed in the counter affidavit of respondent No.4 establishes that the entire procedure for approving and confirming the detention order and regarding affording of opportunity to the petitioner to make a representation and for its consideration were duly followed within time specified without causing unnecessary delay.

18. A counter affidavit has also been filed on behalf of Union of India. It apart from other things states that the representation of the petitioner was processed for consideration by the Union Home Secretary who was authorized by the Union Home Minister to decide such representations. Finally the representation was rejected on 20.11.2019 and a wireless message to that effect was sent to the State Government, Superintendent (Jail), Gautam Buddh Nagar and District Magistrate, Gautam Buddh Nagar and the petitioner. The second representation was also rejected and its rejection was also duly informed to petitioner.

19. It is in the above background that we have heard Sri Rakesh Pande, Senior Counsel assisted by Sri Jyoti Kumar Singh for the petitioner, learned A.G.A., Mrs. Raj Kumari Devi, learned counsel for Union of India, respondent No.6 and Ms. Anjali Upadhyay, learned counsel for GNIDA.

20. The primary argument raised by Sri Pande for assailing the detention order is that the detention stands completely vitiated as there is no threat to public order. The apprehension of the District Magistrate in the light of collapse of two towers earlier is baseless. The petitioner alone has been singled out in passing the detention order as despite 72 FIRs and involvement of 262 accused, no other person has been subjected to such preventive detention.

21. Ms. Anjali Upadhyay supporting the contentions put forth on behalf of the State authorities and the Union of India submitted that it is at the behest of the Greater NOIDA that such an action has been taken against the petitioner and that it is necessary to do so as despite all efforts of Greater NOIDA, the petitioner refused to stop his illegal activities and that his actions were likely to disturb the "public order".

22. The argument that the petitioner alone has been singled out has no legs to stand as there is no parity in illegality. If other persons with similar record or likelihood to disturb the public order, have been left out and have not been kept in preventive detention, it does not mean that the petitioner also cannot be detained and be allowed to rome about freely giving him a chance to act in a manner which is prejudicial to the maintenance of the public order.

23. Now, in the light of the respective submissions, the only aspect which requires consideration is whether the impugned order of preventive detention has been passed on the proper satisfaction of the detaining authority/State Government that it is necessary to prevent the petitioner from acting in any manner prejudicial to the maintenance of "public order" inasmuch as the submission is that the

activities of the petitioner may be somewhat illegal but are not in any way affecting the maintenance of "public order".

24. It may be made clear that the impugned order passed under Section 3 (2) of the Act is not punitive in nature but is only preventive so that the person may inter-alia be prevented to act in a manner prejudicial to the maintenance of public order. The order of preventive detention is liable to be passed under Section 3 of the Act inter-alia on three counts if the Central or the State Governments are satisfied that the activities of any person are (i) prejudicial to the security of the State; (ii) prejudicial to the maintenance of "public order"; and (iii) prejudicial to the maintenance of supplies and services essential to the needy.

25. In the case at hand, we are concerned with the preventive detention on the ground of activities of the petitioner prejudicial to the maintenance of the "public order" i.e. one of the three grounds specified under Section 3(2) of the Act.

26. The language used for making such a preventive detention is, if simply put after ignoring the unnecessary part would read as under-:

The State Government, if satisfied with respect to any person that with the view to prevent him from acting in any manner, prejudicial to the maintenance of the public order, if necessary, so to do, make an order that such person be detained.

27. 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. It is in the light of the above language used in Section 3 (2) of the Act that we have to examine if a case of preventive detention of the petitioner is made out from the grounds of detention so as to satisfy the State Government that it is necessary to detain him to prevent him from acting in any manner which may disturb the "public order".

28. 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. The first issue therefore is as to whether the activities of the petitioner are within the realm of the "public order" or "law and order".

29. 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**1, 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 Apex 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."

30. The meaning of "public order" again came up for consideration in **Smt. Angoori Devi**2 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 tranquillity, it may fall within the orbit of "public order".

31. In **Ayya**3, 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.

32. 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.

33. In view of the above, the distinction between "law and order" and "public order" is very fine and at times it may be overlapping.

34. It is in the light of the above legal position that we have been called upon to examine if the acts of the petitioner as disclosed in the grounds of detention are in context with the maintenance of "public order" or they relate to the maintenance of "law and order" situation.

35. The facts and the grounds stated in the grounds of detention communicated to the petitioner by an large may be in connection with the illegalities committed by the petitioner in purchasing the acquired land of the GNIDA, raising unauthorized constructions with substandard material and as such may fall within the ambit of the "law and order" situation but at the same time, the satisfaction of the District Magistrate as to the apprehension that on account of substandard unauthorized constructions, there may be a possibility of some similar incident as had happened in the past in connection with some other building causing some human casualty resulting in public outrage is certainly a matter concerning "public order", affecting the even tempo of public life.

36. Moreover, the likelihood of the petitioner indulging in illegal sale of the remaining flats and in provocating the buyers/public at large to agitate and sit on *"dharna pradharshan"* to get these illegal constructions regularized or compounded, would ultimately disturb the tranquillity and the peace of the locality, and is sufficient enough to make out a case of disturbance of "public order".

37. The relevant part of the impugned order recording the precise ground and satisfaction that the activities of the petitioner are prejudicial to the public order is reproduced hereinbelow for convenience-:

"उपरोक्त facts and circumstances से स्पस्ट है की मा० उच्च न्यायलय के द्वारा यथास्थिति के आदेश के उपरांत भी बिना ग्रेटर नॉएडा प्राधिकरण

के ले.आउट प्लान पास कराये, बिना भवन का नक्शा पास कराये आपके द्वारा भवनों का निर्माण किया गया। अविधिक रूप से बनाये गए फ्लैट्स जो किसी प्रकार की structural stability का प्रमाण पत्र प्राप्त किये बिना इन कमजोर भवनों को वैध और मजबूत बताते हुए निर्दोष एवं आवास आवस्यक्ताओं के कारन विवश खरीदारों को व्यापक स्तर पर बेचे गए है। १७ जुलाई २०१८ जिसमे की इसी क्षेत्र में भवनों के गिरने से ०९ लोगो की मृत्यु हुई है की तरह कभी कोई दुर्घटना व्यापक स्तर पर घट सकती है। आपने लगभग ९२ फ्लैट्स अभिलेखों हिसाब से अभी तक विक्रय नहीं किये है, को जेल से छूटने के बाद इन्हे बेचने का पूरा प्रयास रहेगा। पिछले एक वर्ष से ग्राम शाहबेरी में ऐसी बिल्डिंगो को नियमित करने के लिए वहा के स्थानीय बायर्स द्वारा लगातार आंदोलन किया जा रहा है। यह आंदोलन कई प्रकार से पब्लिक आर्डर को पूरी तरह से डिस्टर्ब करने की स्थिति में भी परिवर्तित होता है। ऐसे भी तथ्य आ रहे है जिसमे आप जैसे बिल्डर्स स्थानीय बायर्स को उकसाकर इस तरह के आंदोलन करवा रहे है। हाल ही में ग्रेटर नॉएडा प्राधिकरण द्वारा आई० आई० टी० दिल्ली को इन भवनों के structural stability के बारे में शीघ्र ही स्टडी करने के लिए कार्य दिया गया है जो पूर्ण हो चूका है, अगले कुछ ही दिनों में यह स्टडी रिपोर्ट प्राप्त हो जाएगी परन्तु व्यापक स्तर पर विभिन्न माध्यमों से जनता के बीच में perception बना है, वह भवनों के काफी कमजोर होने के तथ्य की ओर इंगित कर रहे है इससे लोक जीवन में भय के वातावरण का संचार हो रहा है, ऐसी स्थिति में उपरोक्त facts and circumstancè के आधार पर मेरा यह निश्चित मत है की यदि आप छूटकर बाहर आएंगे तो अपने बचे हुए भवनों/फ्लैट्स को बेचने का पूरा प्रयास करेंगे। आप स्थानीय बायर्स को इन भवनों के नियमित करने के वर्तमान आंदोलन को उकसाने का प्रयास भी करेंगे, आप आई० आई० टी० दिल्ली द्वारा की जा रही तथ्यात्मक स्टडी को influence करने का प्रयास करेंगे। इन सभी स्थितियों में लोक व्यवस्था व्यवधानित होने की व्यापक सम्भावना है। उपरोक्त परिस्थितियों में balance of convenience भी आपके पक्ष में नहीं है तथा आपके सभी कृत्य एवं संभावित कृत्य जैसा की उपरोक्त वर्णित किया गया है, सभी प्रकार से Maintenance of Public Order के prejudicial है, तथा लोक हित के एवं लोक व्यवस्था के सर्वधा प्रतिकूल है।"

38. Accordingly, 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.

39. The nature and gravity of the actions of the petitioner though in strict sense may be concerning "law and order" situation but ultimately would be affecting the "public order".

40. It is tirite 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.

41. 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.

42. 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".

43. It may not be out of context to remind that the Court in exercise of extraordinary jurisdiction does not normally interfere with the subjective satisfaction recorded by the detaining authority except in exceptional circumstances inasmuch as the Court is not empowered to substitute its own opinion for that of the detaining authority. No exceptional circumstances have been established to permit interference with the subjective satisfaction recorded by the District Magistrate in passing the order of preventive detention of the petitioner.

44. Accordingly, we do not find any scope for exercising our discretionary power in the matter at hand so as to disturb the impugned order of preventive detention. However, as primarily the satisfaction has been recorded on apprehension that the activities of the petitioner would affect the "public order", we leave it open for the petitioner to apply for the revocation of the order of preventive detention or for his temporary release in accordance with the provisions of Section 14 and 15 of the Act which may be considered expeditiously subject to conditions as permitted in law.

45. No other point was raised and argued before us.

46. The writ petition, accordingly, is devoid of merit and is **dismissed**.

(2020)10ILR A337
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.10.2020

BEFORE
THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE AJIT KUMAR, J.

PIL No. 574 of 2020
with
PIL No. 1289 of 2019

In-Re Inhuman Condition at Quarantine Centres And for providing Better Treatment to Corona Positive ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
Sri Gaurav Kumar Gaur, Sri Aditya Singh Parihar, Sri Amitanshu Gour, Sri Jitendra Kumar, Sri Katyayini, Sri Rahul Sahai, Sri Rishu Mishra, Sri S.P.S. Chauhan, Sri Satyaveer Singh, Sri Shailendra Garg, Sunita Sharma, Sri Shwetashwa Agarwal, Sri Uttar Kumar Goswami, Sri Arvind Kumar Goswami

Counsel for the Respondent:
C.S.C., Sri Dhiraj Singh, Sri Hari Nath Tripathi, Purnendu Kumar Singh, Sri Satyavrat Sahai, Sri Sunil Dutt Kautilya

Civil Law - U.P. Urban Planning and Development Act, 1973 - U.P. Municipal

Corporation Act, 1959 - Encroachment on public land - both the Acts have to be read in harmony with each other - powers of the development authorities u/ss 26-A to Section 26-D of the 1973, Act are not in any way in derogation to the powers of the Municipal Corporations u/ss 295 and 296 of the 1959, Act and vice versa - both the public authorities are to act in coordination and come to the aid of each other - to remove unauthorized encroachers from public land and public places in the larger public interest (Para 13, 21)

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

1. Separate counter affidavits filed by Sri A.P. Paul, learned counsel appearing for the Prayagraj Development Authority and Sri Purnendu Kumar Singh, learned counsel appearing for the Union of India be kept on record.

2. As per our last order dated 01.10.2020, learned Additional Advocate General assisted by Ms. Akansha Sharma, Advocate produced before us, a list of eateries from whom undertaking to run their eateries as per the Covid-19 norms has been submitted by the State Authorities. However, these undertakings appear to be only of the district of Prayagraj. The list of undertakings from eateries from all over the State may be produced before us by the next date fixed.

3. So far as the enforcement of our mandamus dated 23.09.2020 with regard to wearing of masks is concerned, learned Additional Advocate General informed us that full efforts were being made to get the people of the State of U.P. to wear masks. However, it has been brought to our notice from the various counsel present in the Court during the hearing of this PIL that 100 per cent masking is yet to take place. For this purpose, we direct the Authorities at the helm of affairs to take further action in the following manner :-

(i) All Heads of the Department in the whole State of U.P. should send reminders to their employees that they and their family members have to compulsorily wear masks. This should be done on a daily basis.

(ii) The State Police should itself wear masks religiously and also see that everyone in their vicinity wears the masks. Here it may be mentioned that the security personnel deputed outside the houses of various dignitaries have not been wearing their masks. They should wear their masks and also request people passing by them that they should also wear masks.

(iii) All shops even other than eateries shall ensure that the customers/ individuals who enter their premises shall wear their masks at all times. Needless to say that non-wearing of masks would invite penalty and prosecution.

(iv) The Advocate Commissioners appointed by this Court may continue to take photographs as have been taken by them in the past and the State Authority may take action on those photographs.

4. In our earlier order, we had suggested that the Medical College at Prayagraj should have separate gates for the Swaroop Rani Nehru Hospital which deals with the Covid and non-covid patients. We had also pointed out that there was one gate in the hospital which opened in the road which joined the Nawab Yusuf Road and the Mahatma Gandhi Road and ran along the Medical College. This gate, if it is opened, a further source of ingress and egress would be made available and non-

covid patients would be able to go with confidence inside the hospital. A joint effort may be made by the Nagar Nigam, Prayagraj Development Authority, Moti Lal Nehru Medical College, Swaroop Rani Hospital and the State Authorities to see that an alternative gate is provided by the 19th of October, 2020. Here it may also be stated that the shops on the Nagar Nigam land which surround the SRN hospital be removed as they not only create hindrance to the ingress and egress of the ambulances etc but they also dirty the surroundings of the hospital.

5. So far as the standard of masks and sanitizers are concerned, the learned Additional Advocate General has informed that the masks which are being sold in the market and also being worn by people in general are as per the ICMR guidelines. However, with regard to the sanitizers, we find that further clarity is required. We are unable to understand as to whether along with the license to manufacture and sale of the sanitizer, any requirement is there to take licenses under the Drugs and Cosmetic Act, 1940 and the Drugs and Cosmetic Rules, 1945. This aspect may be clarified by the State by the next date.

6. The issue of unauthorized encroachment on public land i.e. road side public land and other vacant public land has acquired importance in the wake of the wide-spread Covid-19 pandemic as these road side land encroachers have developed markets and are inviting large congregation of men and women which is in total violation of the Covid-19 guidelines. Besides this, cleaning of road side land, management of parking of the vehicles in commercial areas of the city alongwith rehabilitation of the road side vendors/ street vendors in duly identified vending zones are a few other tasks which have to be accomplished by the various local administrative authorities in these days of the pandemic.

7. Coming to the issue of removal of unauthorized encroachers from public land, we find that in the past both the development authorities and the municipal bodies have been shifting their burden upon each other citing various provisions of U.P. Urban Planning and Development Act, 1973 (hereinafter referred to as 'Act, 1973') and the various Sections of the U.P. Municipal Corporation Act, 1959 (hereinafter referred to as 'Act, 1959').

8. We have heard Sri A.P. Paul, learned counsel appearing for the Prayagraj Development Authority, Sri S.D. Kautilya and Sri Vinay Sankalp, learned counsel appearing for Prayagraj Municipal Corporation and Sri Manish Goyal, learned Additional Advocate General assisted by Ms. Akansha Sharma and Sri A.K. Goyal, learned Standing Counsel for the State, at length.

9. Sri S.D. Kautilya, learned counsel for the Municipal Corporation has taken us through the various provisions of the Act, 1973 viz. Sections 3, 14, 26 and 26A etc. and various Government orders and the directives issued by the Government as well as Government authorities for the purposes of removal of unauthorized encroachments in the city. He has argued that after insertion of Section 26A in the Act, 1973 vide U.P. Amendment Act No.3, 1997 primarily the power now vests with the development authority to remove unauthorized structures and encroachments from public land, road and road side land as well.

10. Sri A.P. Paul, learned counsel for the development authority, on the contrary,

has argued that Sections 295 and 296 of the Act, 1959 have yet not been repealed and the Municipal corporation, therefore, cannot shirk from its duty of removal of unauthorized encroachments from the areas which have already been developed by the development authority and have been handed over to the Municipal Corporation for the purposes of collection of taxes and maintenance of drainage etc.

11. Sri Goyal, learned Additional Advocate General has argued that provisions of both the Acts have to be read in harmony with each other and the power vested under the Act, 1973 cannot be read in derogation of the powers vested with the Municipal Corporation under Sections 295 and 296 and a harmonious construction of the provisions will have to be made so that both the authorities shoulder their responsibilities in the larger public interest.

12. We have given our thoughtful consideration to the arguments advanced by the respective learned counsel for the parties and, *prima facie*, we find substance in the argument advanced by the learned Additional Advocate General that even after insertion of Section 26A of the Act, 1973, the Municipal corporations can equally be asked to perform their respective duties under Sections 295 and 296 of the Act, 1959. So the question which now arises for our consideration is as to whether the powers are overlapping with each other or can they be read in harmony with each other so as to make them supplement each other.

13. Admittedly both the public authorities are to act and they have both to come to the aid of each other to remove unauthorized encroachers from public land and public places in the larger public interest.

14. Insofar as the Act, 1973 is concerned, it has come into force much after the Act, 1959. The Act, 1973 has been enacted with the sole object of ensuring urban development activities in the various cities of Uttar Pradesh as may be notified by the Government by approving zonal development plan and master plan to be framed for such purposes. Section 2(F) of the Act, 1973 defines development area as an area declared and notified to be such under Section 3. Section 4 provides for the constitution of a development authority as a body corporate and it may include in its territorial authority, any part or whole of the area of a city as defined under the Act, 1959. Section 8 provides for a master plan and a zonal development plan to be enforced in the development area with the approval of the State Government. The master plan and the zonal development plan can, of course, be amended from time to time with the prior approval of the State Government vide Section 13 of the Act, 1973. Section 14 provides for the development of land in development area and further provides that if after an area is declared as "development area" under Section 3, no development activity shall be undertaken or would be continued to be carried out in such an area by any person or body including government department unless permission for such development is obtained in writing from the Vice-Chairman of Development Authority in accordance with the provisions of the Act. These sections further provide that development activities have to be in accordance with law with such plans as would be notified by the Development Authority with the approval of the State Government.

15. Section 15 provides that specific permission is to be obtained for such development activity. Section 25 provides with such provisions which authorise development authorities to carry out inspection of development activities to ensure that everything is being done as per the plan. Section 26 provides for penalties. Section 26A has now been inserted vide U.P. Amendment Act No.-3 of 1997. Section 26-A of the Act, 1971 is being reproduced hereunder in its entirety:-

*"**26-A. Encroachment or obstruction on public land**- (1) Whoever makes any encroachment on any land not being private property, whether such land belongs to or vests in the authority or not in a development area, except steps over drain in any public street, shall be punishable with simple imprisonment for a term which may extend to one year and with fine which may extend to twenty thousand rupees.*

(2) Any offence punishable under Sub-section (1) shall be cognizable.

(3) Whoever by placing or depositing building material or any other thing whatsoever, or otherwise makes any obstruction in any street or land not being private property, whether such street or land belongs to or vests in the Authority or not in a development area, except steps over drain in any public street, or placing of building material during such period as may be permitted on payment of stacking fees on a public street of public place, shall be punishable with simple imprisonment for a term which may extend to one month or with fine which may extend to two thousand rupees or with both.

(4) If there are grounds to believe that a person has made any encroachment or obstruction on a land in a development area which is not a private property the Authority or an officer authorised by it in this behalf may serve upon the person making encroachment or obstruction, a notice requiring him to show cause why he shall not be required to remove the encroachment or obstruction within such period not being less than fifteen days as may be specified in the notice, and after considering the cause, if any, shown by such person, may order removal of such encroachment or obstruction for reasons to be recorded in writing :

Provided that any encroachment made on public land by a person belonging to weaker section on or before the date of commencement of the Uttar Pradesh Urban Planning and Development (Amendment) Act, 1997 shall not be removed until alternative land or accommodation is offered to rehabilitate him in such manner and on such terms and conditions as may be prescribed.

Explanation- For the purposes of this section, the expression

(1) "a person belonging to weaker section' means a person -

(a) whose family on the date of commencement of the Uttar Pradesh Urban Planning and Development (Amendment) Act, 1997 does not hold any immovable property in any city as defined in the Uttar Pradesh Municipal Corporation Act, 1959 or any Municipal Area defined in the Uttar Pradesh Municipalities Act, 1916; and

(b) whose principal source of livelihood is manual labour, including the practice of any craft, either by himself or by the members of his family and includes a rickshaw-puller or scavenger, but does not include a person who has been assessed to income tax under the Income Tax Act, 1961 or trade tax under the Uttar Pradesh Trade Tax Act, 1948 or Sales Tax under the Central Sales Tax Act, 1956;

(2) 'family' in relation to a person belonging to weaker section, means the husband or wife, as the case may be, and unmarried minor children either or both of them.

(5) Notwithstanding anything contained in the forgoing provisions the Authority of the officer authorised by it in this behalf shall, in addition to the action taken as provided in this section, also have power to seize or attach any property found on the land referred to in this section or, as the case may be, attached to such land or permanently fastened to anything attached to such land.

(6) Where any property is seized or attached by an officer authorised by the Authority he shall immediately made a report of such seizure or attachment to the Authority.

(7) The Authority may make such orders as it thinks fit for the proper custody of the property seized or attached, pending the conclusion of confiscation proceedings, and if the property is subject to speedy and natural decay, or it is otherwise expedient so to do the Authority may order it to be sold or otherwise disposed of.

(8) Where any property is sold as aforesaid, the sale proceeds after deducting the expenses, if any, of such sale and other incidental expenses relating thereto, shall-

(a) where no order of confiscation is ultimately passed by the Authority, or

(b) where an order in appeal so requires, be paid to the owner thereof or the person from whom it is seized or attached.

(9) Where any property is seized or attached under Sub-section (5), the Authority may order confiscation of such property.

(10) No order for confiscation of any property shall be made under Sub-section (9) unless the owner of such property or the person from whom it is seized or attached is given-

(a) a notice in writing, informing him of the grounds on which it is proposed to confiscate the property;

(b) an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation; and

(c) a reasonable opportunity of being heard in the matter.

(11) Any order of confiscation under this section shall not prevent the infliction of any punishment to which the person affected thereby may be liable under the Act.

(12) Any person aggrieved by an order made under Sub-section (9) may within one month from the date of the communication to him of such order, appeal against it to the District Judge.

(13) On such appeal, the District Judge may, after giving, an opportunity to the appellant and the respondent of being heard, pass such order as he may think fit confirming, modifying or setting aside the order appealed against, and pending appeal, may stay the operation of such order on such terms, if any, as he thinks fit."(emphasis added)

16. From the provisions of Section 26(4) of the Act, 1973 it is explicit that power lies now with the development authority to ensure that no person makes any encroachment or creates any obstruction on a land in a development area unless it is a private property. What is very important to notice here is that as far as the provisions contained under Sections 25 and 26 are concerned, they were related to the development activities which were carried out against the plans and against the

sanctions made by the development authorities for the said purposes but since the area is notified as development area and no activity whatsoever can be carried out in violation of the master plan and zonal development plan, the Legislature in its wisdom rightly incorporated Section 26A to confer the authority with very wide powers to ensure that obstructions to development are not there and that no illegal activities are carried out in a development area. Taking the instance of Prayagraj, it is admitted to all the parties that Prayagraj Development Authority is carrying out development activity in the areas which have already stood notified by the State Government. The area has also been extended from time to time and as of now the entire city area is part and parcel of the development area notified under Section 3 and notification has not been withdrawn till date. So, therefore, whatever is contrary to the master plan and zonal development plan, as the case may be, can always be fixed by the development authority and appropriate action can be taken under Section 26A of the Act, 1973.

17. This is also clear from the various Government orders which have been issued from time to time by the State Government viz 3rd September, 1997; 26th September, 1997; 28th September, 1997 and 8th of December, 1997. All these Government orders which have been issued by the State Government are aimed at only with the removal of unauthorized encroachments from public land, be it a public road or a road side land or any other place defined as "public place".

18. Now coming to the provisions of Sections 295 and 296 of the Act, 1959, we find that the Municipal Corporation, prior to the coming into force of the Act, 1973, had full administrative power in respect of the municipal area notified under the Act, 1959. Section 295 restrains any person from erecting a wall, fence or any other structure of that kind whether fixed or movable, permanent or temporary upon any street, open channel drain, well or tank in any such street so as to form an obstruction, without prior permission of the Municipal Commissioner. The Municipal Corporation has been vested with the power to remove such unauthorized erections **without even notice**. Power also is there under Sections 297, 298 and 299 with regard to maintenance of street etc.

19. From a close scrutiny of the provisions as contained under Section 295 and 296, we find that these permanent or temporary unauthorized structures have been restrained from coming up in public streets and drains, well or tank. So also the Municipal Commissioner has been vested with the power to remove such obstructions.

20. Now reading these provisions of the Act, 1959 together with the provisions of Sections 14, 26A of the Act, 1973, we find that the powers are not overlapping. While development activities in the development areas have to be carried out like carving out main public road and public land and there is continuous process of inspection by the development authorities themselves in the development areas, the unauthorized encroachers are liable to be visited with action under Section 26A. But at the same time, the drainage, public street, maintenance of lanes and by-lanes in municipal areas, electricity poles and lighting etc. are such activities which are within the domain of the municipal corporation and so they have been vested with the powers to ensure

removal of such unauthorized encroachments also. In any development area if the municipal corporation has been working and the development activities have to be carried out as per the master plan and zonal development plan, then in our considered opinion both the development authorities as well as the municipal corporations have to act and aid each other to ensure that no public places, public roads or road side lands or public buildings are occupied by any person, be it by raising temporary or permanent structures or be it any violation of any development activity in an area notified under Section 3 of the Act, 1973 and in the municipal area notified under Section 3 of the Act, 1959.

21. Thus what is needed is the achievement of the objectives under both the Acts and thus there is a requirement of a harmonious construction of the two different sets of provisions under the two Acts of 1959 and 1973. We find the provisions to be supplemental to each other. Looking after the activities of removal of unauthorized encroachments and the powers of the development authorities under Section 26-A to Section 26-D are not in any way in derogation to the powers of the Municipal Corporations under Section 295 and 296 and vice versa. Both the authorities, therefore, are required to act in coordination with each. Primarily the duty of Development Authority is to ensure that no road or road side public land in the notified development area under the master plan and under the zonal development plan is encroached upon.

22. We accordingly direct the respondent Development Authority, Prayagraj to immediately proceed to remove all unauthorized encroachments from public road and road side land and other public places in Prayagraj with immediate effect.

23. Submissions have been advanced at the Bar that removal of unauthorized structures be initiated in a phased manner. Prayagraj Development Authority thus is directed to remove unauthorized encroachment, to begin with, from the Nawab Yusuf Road. The Municipal Corporation and Police administration shall render all necessary help in the anti-encroachment drive and report shall be submitted on the next date. After the Prayagraj Development Authority completes the anti-encroachment drive the Nagar Nigam shall see that the Nawab Yusuf Road is properly levelled, the road side kerbs are cleaned and properly painted and also all the street lights are properly lit.

24. On the issue of rehabilitation of the road side vendors and street vendors, in our opinion, earlier we had directed the Vending Committee to finalize the pending matter of approval of already identified vending zones.

25. Sri S.D. Kautilya, learned counsel for the municipal corporation has submitted that a large number of vending zones have already been approved and the process of allotment was underway and further the process for identifying new vending zone was underway. He has assured the Court that rigorous exercise to accommodate every street vendor and road side vendor was being carried out by the Municipal Corporation and by the next date fixed the task would be completed.

Order on Public Interest Litigation No.1289 of 2019

26. In this Public Interest Litigation, we find that on 15.10.2019 a detailed mandamus was issued by this Court but we find, and have also been informed by the Advocate Commissioners present in the Court, that parking as per the order dated 15.10.2019 has not been done. In this regard, the Nagar Nigam may positively see that the order dated 15.10.2019 is complied with by the next date fixed. The mandamus issued on 15.10.2019 is being represented here as under:-

"In view of whatever stated above, in addition to the directions already given, we deem it appropriate to further direct the respondents as follows:

(i) The parking zone identified opposite to Yatrik Hotel shall be made operational positively on or before 21st October, 2019.

(ii) Viability shall be examined by the respondents to provide parking on the third lane at S.P. Marg till having permanent parking zones as identified by the respondents.

(iii) The respondents shall consider the issue with regard to reduction of parking charges for parking the vehicles on Mahatma Gandhi Road and shall arrive at a definite decisions before next date of listing.

(iv) The respondents shall ensure complete maintenance of existing multilevel parking within a period of three days from today. The respondents shall take care of elevators, lighting system and shall make the entire area stray animals free.

(iv) The respondents shall put necessary highlighted marks to identify the parking space on the road concerned.

(v) The multi-storyed buildings and other buildings situated in the city of Prayagraj which are also having their own sanctioned parking space shall make those functional positively and shall not utilize that for any other purpose except parking. If any building owner or occupier utilizes such parking space for any other purpose than the parking then it shall be open for the respondents to take appropriate penal measures including initiation of proceedings under Contempt of Courts Act, 1971 before this Court."

27. In the city of Prayagraj, we also find that no attention is being paid to the fused street light bulbs which we have found in almost every locality. We expect from the Nagar Nigam to replace all the fused street light bulbs in the city of Prayagraj by the next date fixed.

28. Put up this matter on 14.10.2020 at 02:00 PM.

29. We appreciate the work being done by the Advocate Commissioners in these days of pandemic. We, therefore, direct that the Advocate Commissioners be paid a minimum of Rs.500/- per report which they have submitted. This would be in consonance with the Circular dated 26.04.2016 issued by National Legal Services Authority wherein every counsel has to be paid a minimum of Rs.500/- per application which is filed.

(2020)10ILR A345
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.02.2020

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 No. 7908 of 2020

Chand Khan ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:

Sri Babu Lal Ram

Counsel for the Opposite Parties:
A.G.A., Sri Arjun Singh Yadav

Criminal Law -Indian Penal Code (45 of 1860) - Sections 498A, 323, 324, 307 - Attempt to commit murder - Criminal Procedure Code (2 of 1974) , S.482 - Quashing of proceedings - Compromise between parties - Medico Legal Report, showed injuries in almost every part of body – injuries caused by blunt object and sharp edged weapon - *Held* - offence not fall under the category of matrimonial dispute - compounding of such kind of heinous offence will be against ends of justice & it will be detrimental to the interest of justice. (Para 7)

Dismissed (E-5)

List of Cases cited:-

St. of M.P. Vs Laxmi Narayan & ors. 2019 AIR 1296

(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, Chand Khan, with a prayer for setting aside proceedings of Sessions Trial No.27 of 2018, State vs. Chand Khan, arising out of Case Crime No.4 of 2016, under Sections 498A, 323, 324 and 307 of Indian Penal Code, Police Station-Bewar, District Mainpuri, pending before Additional District & Sessions Judge, Court, No.4, Mainpuri.

2. Learned counsel for applicant argued that parties have entered into compromise, resulting in divorce, in between them and proceeding, under Section 125 of Cr.P.C., decided on the basis of compromise. Joint affidavit has been filed in this case, mentioning compromise entered into between the parties. Hence, 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 with this contention that this case is of offence of attempt to commit murder, punishable, under Section 307 of Cr.P.C., which is not a compoundable offence and a compromise in such a heinous offence is not permissible, as has been held in the case of **State of Madhya Pradesh vs. Laxmi Narayan and others, reported in 2019 AIR 1296.**

4. Heard learned counsel for both sides and perused the record.

5. Medico Legal Report reveals injuries over the person of Smt. Nagma, which are as under:

1.Contusion 2.5. Cm X 1.5 Cm on the right parietal region of head, 4Cm above from right ear, Kept Under Observation.

2.Contusion 10Cm X 2 Cm on the lateral aspect of left upper arm, Kept Under Observation.

3. Strangulation mark 8 Cm X 1.5 Cm on the left side neck, Kept Under Observation. Advised X-ray.

4.Incised wound 3.5 Cm X 1 Cm X Muscles deep on the lateral aspect of left upper arm, 5 Cm below from left shoulder joint, margins are learcut fresh blood is present, Kept Under Observation. Advised Trans.

5.Contusion 7 Cm X 2 Cm on the back of lower part of chest.

6.Contusion 8 Cm X 2 Cm on the back of lower abdomen.

7.Contusion 5 Cm X 2 Cm on the back of both hip joint, Kept under Observation.

8.Incised wound 4 Cm X 1.5 Cm X Muscle deep on the front & Middle of right thigh margins are clearcut, fresh blood is present, Kept Under Observation, Advised X-ray, complaint of pain in occipital region of head, left temporal region of Head, bridge of nose.

6. Opinion: Injury Nos. 1, 2, 3, 4, 7 & 8 are Kept Under Observations & other are simple in nature. All injuries are caused by blunt & Hard object except Injury No.4 & 8, which are caused by sharp edged weapon & referred to Distt. Hospital Mainpuri for X-ray & further management.

7. Meaning thereby, perusal of Medico Legal Report, clearly shows that there are injuries of such wide dimensions, in almost every part of body, that too, caused by blunt object and sharp edged weapon, and, therefore, compounding of such kind of heinous offence will be against ends of justice and it will be detrimental to the interest of justice. Hence, in view of law, laid down by the Apex Court, in the case of **State of Madhya Pradesh vs. Laxmi Narayan and others (Supra)**, this Application, under Section 482 of Cr.P.C., does not fall, under the category of cases of matrimonial dispute, to be disposed of on the basis of compromise. In the result, relief prayed for, on the basis of compromise, in this Application, under Section 482 of Cr.P.C., is being declined.

8. In view of what has been discussed above, this Application, under Section 482 of Cr.P.C., merits dismissal and it stands **dismissed** according**ly.**

(2020)10ILR A347

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.04.2020

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Application U/S 482 No. 8286 of 2005

Udai Shanker Shukla & Ors. ...Applicants
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Applicants:
Sri P.N. Tripathi, Sri Anand Prakash Srivastava, Sri Mahendra Pratap Tiwari

Counsel for the Respondents:
A.G.A., Sri Chandan Sharma, Sri Satyendra Singh

Criminal Law - Criminal Procedure Code (2 of 1974) – Section 482 - Indian Penal Code (45 of 1860) – Sections 419, 420 - Quashing of charge sheet - at the stage of charge sheet factual query, assessment of defence evidence & its consideration is beyond purview of scrutiny u/s 482 Cr.P.C. - no findings can be recorded about veracity of allegations at that juncture in absence of evidence (Para 10, 11)

Allegation on basis of forged certificates applicant functioned as Assistant Teacher - *Held* - since questions of facts have to be examined, whether testimonials are genuine, whether applicants have defrauded public revenue or not & whether there is any mens rea, are all questions of facts requiring appreciation of evidence, no interference is permissible u/s 482 Cr.P.C. - charges are serious - No interference is permissible at this stage - Charge sheet not liable to be quashed. (Para 28)

Dismissed (E-5)

List of Cases cited:

1. Md. Allauddin Khan Vs The St. of Bihar & ors. Cri. Appeal No.675 of 2019 15.04.2019

2. St. of M.P. Vs Yogendra Singh Jadaun & anr. Criminal Appeal No.175 of 2020, 31.01.2020

3. St. of Hary. Vs Bhajan Lal & ors. 1992 6 Supp (1) SCC 335

4. Google India Pvt. Ltd. Vs Visakha Industries & ors. AIR 2020 SC 350

5. Jeffrey J. Diermeier & ors. Vs St. of W.B. & ors. (2010) 6 SCC 243

6. Som Mittal Vs St. of Kar. (2008) 3 SCC 753

7. Lakshman Vs St. of Kar. & ors. (2019) 9 SCC 677

8. Chilakamarthi Venkateswarlu & ors. Vs St. of A.P. & ors. AIR 2019 SC 3913

9. Zandu Pharmaceuticals Works Ltd. & ors. Mohd. Sharaful Haque & ors., (2005) 1 SCC 122

10. Rakhi Mishra Vs St. of Bihar & ors., (2017) 16 SCC 772

11. Sonu Gupta Vs Deepak Gupta & ors. 2015 (3) SC 424

12. Roshni Chopra & ors. Vs St. of U.P. & ors. 2019 (7) Scale 152

13. Dy. Chief Controller of Imports & Exports Vs Roshanlal Agarwal & ors. (2003) 4 SCC 139

14. U. P. Pollution Control Board Vs Mohan Meaking Ltd & ors. (2000) 3 SCC 745

15 Kanti Bhadra Shah Vs St. of W.B. (2001) SCC 722

16 Nupur Talwar Vs C.B.I. & ors. (2012) 11 SCC 465

17. Parbatbhai Aahir & ors. Vs St. of Guj & or.s (2017) 9 SCC 641

18. Arun Singh & ors. Vs St. of U.P. Criminal Appeal no.250 of 2020

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

1. Heard Sri Anand Prakash Srivastava,learned counsel for applicants, learned AGA for State-respondent-1 and Sri Chandan Sharma, learned counsel for respondent-3.

2. This application under Section 482 of Code of Criminal Procedure, 1973 (hereinafter referred to as "Cr.P.C.") has been filed by three applicants namely, Udai Shanker Shukla, Satish Shanker Shukla and Ram Shanker Shukla, all three brothers, with a prayer to quash charge sheet dated 28.03.2003 and entire criminal proceedings in Case Crime No.1297 of 2003 pending in Court of Chief Judicial Magistrate, Basti under Sections 419, 420, 467, 468, 469, 471 and 409 IPC, Police Station-Kotwali, District-Basti.

3. Facts in brief giving rise to this application are that one Ram Dhiraj Shukla, O.P.2 lodged First Information Report (hereinafter referred to as "FIR") against applicants, registered as Case Crime No.107 of 1985, under Section 379 IPC alleging that they plucked Kathal (Jackfruit) from Kathal tree standing on chak owned by Complainant/Informant, R. D. Shukla. Police after investigation submitted final report. Thereafter, to harass applicants, Complainant/Informant filed application under Section 156 (3) CrPC making accused-applicants and two others i.e. wife of applicant-2 and applicant-1 stating that applicant Satish Kumar without any valid qualification has functioned as Assistant Teacher with different names in various primary sections. Initially, he worked at Primary School, Ridhaura Development Block, Parshurampur and therefrom 20.08.1988 he was transferred to Primary School, Semra Development Block but did not return after 06.11.1989. After detection of fraud of Satish Shankar

Shukla, to protect his brother, Udai Shanker Shukla represented himself as Assistant Teacher and signed at Register (2) from 1986 to 24.09.1992 and usurped public funds. In this regard report in Police Station-Parshurampur was lodged by Principal of Primary School against Uday Shanker Shukla under Section 419 and 420 IPC. Therein Satish Shanker Shukla was also made an accused. Sri Uday Shanker Shukla is usurping different funds and getting regular salary on the basis of fraudulent appointment since 12.10.1992 and misappropriated about Rs.5 lacs. Uday Shanker Shukla has prepared his false and fraudulent BTC certificate and also certificate of dependent of Freedom Fighter though in his family there was no Freedom Fighter. His BTC degree is also forged. They have also managed removal of relevant documents from the Office.

4. On the said application, Chief Judicial Magistrate, Basti passed order on 24.04.2001 for lodging FIR against accused persons and conduct investigation. Accused persons filed Criminal Revision before this Court which was finally disposed of vide judgment dated 10.05.2001 directing investigation to continue but till police submits report under section 173 (2) CrPC, arrest shall not be made.

5. Pursuant to Magistrate's order dated 24.04.2001 police registered case as C-1 of 2001 under Sections 419, 420, 467, 468, 469, 471, 409 IPC against three accused applicants and applicants-1 and 2's wives namely, Shanti Shukla and Sushila Devi. Investigating Officer (hereinafter referred to as "I.O.") also submitted charge sheet dated 28.03.2003 under Sections 419, 420, 467, 468, 471, 409 IPC in the Court of Chief Judicial Magistrate, Basti.

6. It is pleaded that applicant-1 (Udai Shanker Shukla) passed High School in 1975, Intermediate in 1977 and BTC examination in 1985. He was appointed as Assistant Teacher in Primary School in 1987. Applicant-2 (Satish Shanker Shukla) passed High School examination in 1981, Intermediate in 1983. He was appointed as Assistant Teacher by order dated 13.02.1993. Applicant-3 (Ram Shanker Shukla) was never appointed as Assistant Teacher in Primary School and allegations made against him are false. Shanti Shukla is not wife of Satish Shanker Shukla, (applicant-2) but his wife is Umeshwari Devi. All the educational certificates have been found genuine by District Basic Education Officer, Basti (hereinafter referred to as "DBEO"), still Police has submitted charge sheet on 28.03.2003 under Sections 419, 420, 467, 468, 471, 409 IPC. A departmental enquiry was directed to be conducted by DBEO, Basti by order of Director of Education (Basic), U.P., Lucknow {hereinafter referred to as 'D.E.(Basic)'} whereupon enquiry was conducted and vide report dated 02.03.2000, DBEO, Basti found that complaint made against applicants is incorrect and their educational documents are c correct still Chief Judicial Magistrate, Basti has taken cognizance of charge sheet on 16.04.2003 ignoring said report, hence, proceedings are being challenged as the same are illegal.

7. It is contended that evidence collected by Investigating Officer cannot be relied on, in view of report dated 02.03.2000 submitted by DBEO, Basti, through D.E.(Basic).

8. On behalf of O.P.2 it is said that in a Public Interest Litigation (Writ) No.33071 of 2013, an order was passed on 06.06.2013 by this Court directing DBEO to take a decision on representation made by petitioner Ram Murti Misra and operative part of aforesaid judgment reads as under :

"Accordingly, the present writ petition is disposed of with liberty to the petitioner to make a representation ventilating all his grievances before respondent no.1, within two weeks from today, along with a certified copy of this order. On such a representation being made the respondent no.1 shall summon the original records and shall satisfy himself as to whether the appointment of respondents no.9 to 27 are strictly in accordance with law, they are possessed of the prescribed minimum qualifications and are working under valid orders, or not, after affording opportunity of hearing to respondents no.9 to 27."

9. Pursuant thereto DBEO enquired the matter and found that original record relating to appointment of applicant-3 Ram Shanker was not available in the Office and in this regard report namely, Case Crime No.768 of 2014 under Sections 419, 420, 467, 468, 471, 201 IPC, Police Station-Kotwali, Basti was registered by the then DBEO, Dr. Dharamveer Singh. He has found that Ram Shanker Shukla, applicant-3 played fraud with department and worked upto 20.08.1988, illegally received salary and thereafter left School. Similar enquiry was held against applicant-2 also and by order dated 12.05.2015, DBEO, Basti has declared his appointment illegal. A third report to similar effect has been submitted by DBEO and he has passed order dated 12.05.2015 declaring appointment of applicant-1, wholly illegal. Learned counsel for respondent i.e. O.P. No.2 has placed aforesaid documents before this Court for its perusal.

10. However, I am not taking cognizance of these documents for deciding this application for the reason that at the stage when Magistrate has taken cognizance on the basis of charge sheet submitted by police, he had occasion to consider only the material collected by I.O. during investigation. Scope of interference of this Court is also very limited at this stage. Contention of learned counsel for applicants that evidence is not reliable and their defence version must be considered, I am afraid, cannot be accepted for the reason that at this stage defence of applicants-accused cannot be considered.

11. Time and again it has been highlighted by Supreme Court that at the stage of charge sheet factual query and assessment of defence evidence is beyond purview of scrutiny under Section 482 Cr.P.C. The allegations being factual in nature can be decided only subject to evidence. In view of settled legal proposition, no findings can be recorded about veracity of allegations at this, juncture in absence of evidence. Supreme Court has highlighted that jurisdiction under Section 482 Cr.P.C. be sparingly/rarely invoked with complete circumspection and caution. In **Criminal Appeal No.675 of 2019 (Arising out of S.L.P. (Crl.) No.1151 of 2018) (Md. Allauddin Khan Vs. The State of Bihar & Ors.)** decided on 15th April, 2019, Supreme Court observed as to what should be examined by High Court in an application under Section 482 Cr.P.C. and in paras 15, 16 and 17 said as under :

"15. The High Court should have seen that when a specific grievance of the appellant in his complaint was that

respondent Nos. 2 and 3 have committed the offences punishable under Sections 323, 379 read with Section 34 IPC, ***then the question to be examined is as to whether there are allegations of commission of these two offences in the complaint or not.*** *In other words,* ***in order to see whether any prima facie case against the accused for taking its cognizable is made out or not, the Court is only required to see the allegations made in the complaint.*** *In the absence of any finding recorded by the High Court on this material question, the impugned order is legally unsustainable.*

16. The second error is that the High Court in para 6 held that there are contradictions in the statements of the witnesses on the point of occurrence.

17. In our view, the ***High Court had no jurisdiction to appreciate the evidence of the proceedings under Section 482*** *of the Code Of Criminal Procedure, 1973 (for short "Cr.P.C.")* ***because whether there are contradictions or/and inconsistencies in the statements of the witnesses is essentially an issue relating to appreciation of evidence and the same can be gone into by the Judicial Magistrate during trial when the entire evidence is adduced by the parties.*** *That stage is yet to come in this case."(emphasis added)*

12. Recently, above view has been reiterated in **Criminal Appeal No.175 of 2020 (State of Madhya Pradesh Vs. Yogendra Singh Jadaun and another)** by Supreme Court vide judgment dated 31.01.2020.

13. The principles which justify interference under Section 482 Cr.P.C. by Court have been laid down in various authorities in which Supreme Court's judgment in **State of Haryana vs. Bhajan Lal and others, 1992 Supp (1) SCC 335** was leading precedent and thereafter matter has also been examined by even Larger Benches.

14. In **State of Haryana vs. Bhajan Lal and others (supra)** issue of jurisdiction of this Court under Section 482 Cr.P.C. has been considered and what has been laid down therein in paragraph 102, has been repeatedly followed and reiterated consistently. In very recent judgment in **Google India Private Limited Vs. Visakha Industries and Ors. , AIR 2020 SC 350**, guidelines laid down in paragraph 102 in **Bhajal Lal's case (supra)** have been reproduced as under :

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power Under Article 226 or the inherent powers Under Section 482 of the Code which we have extracted and reproduced above, we give the ***following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice,*** *though it may* ***not be possible to lay down any precise, clearly defined and sufficiently*** *channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.*

(1) Where the ***allegations made in the first information report*** *or the complaint,* ***even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the Accused.***

(2) Where the ***allegations*** *in the first information report and other*

materials, if any, accompanying the FIR ***do not disclose a cognizable offence,*** *justifying an investigation by police officers Under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.*

(3) Where the ***uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence*** *and make out a case against the Accused.*

(4) Where, the ***allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence****, no investigation is permitted by a police officer without an order of a Magistrate as contemplated Under Section 155(2) of the Code.*

(5) Where the ***allegations made in the FIR or complaint are so absurd and inherently improbable*** *on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the Accused.*

(6) Where there is ***an express legal bar engrafted in any of the*** *provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.*

(7) Where a criminal proceeding is ***manifestly attended with mala fide*** *and/or where the proceeding* ***is maliciously instituted with an ulterior motive for wreaking vengeance*** *on the Accused and* ***with a view to spite him due to private and personal grudge."*** *(emphasis added)*

15. Court has also reproduced note of caution given in paragraph 103 in **Bhajan Lal's case (supra)** which reads as under :

"103. We also give a note of caution to the effect that the ***power of quashing a criminal proceeding should be exercised very sparingly and with circumspection*** *and that* ***too in the rarest of rare cases;*** *that the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice." (emphasis added)*

16. What would be the scope of expression "rarest of rare cases" referred to in para 103 in **State of Haryana vs. Bhajan Lal (supra)** has been considered in **Jeffrey J. Diermeier and Ors. Vs. State of West Bengal and Ors. , 2010 (6) SCC 243,** Court has said that words "rarest of rare cases" are used after the words 'sparingly and with circumspection' while describing scope of Section 482 CrPC. Those words merely emphasize and reiterate what is intended to be conveyed by the words 'sparingly and with circumspection'. They mean that the power under Section 482 to quash proceedings should not be used mechanically or routinely, but with care and caution, only when a clear case for quashing is made out and failure to interfere would lead to a miscarriage of justice. The expression "rarest of rare cases" is not used in the sense in which it is used with reference to punishment for offences under Section 302 IPC, but to emphasize that the power under Section 482 Cr.P.C. to quash FIR or criminal proceedings should be used sparingly and with circumspection.

17. Supreme Court in **Jeffrey J. Diermeier (supra)** infact referred to an earlier Three Judges' Bench judgment in

Som Mittal Vs. State of Karnataka, 2008 (3) SCC 753, to explain phrase "rarest of rare cases". In **Som Mittal (supra)**, Court also said that exercise of inherent power under Section 482 CrPC is not a rule but exception. Exception is applied only when it is brought to notice of Court that grave miscarriage of justice would be added if trial is allowed to proceed where accused would be harassed unnecessarily or if trial is allowed to linger when prima facie it appears to Court that trial would likely to be ended in acquittal. Whenever question of fact is raised which requires evidence, Courts always said that at pre trial stage i.e. at the stage of cognizance taken by Magistrate power under Section 482 CrPC would not be appropriate to be utilized, since, question of fact has to be decided in the light of evidence which are yet to be adduced by parties.

18. In **Lakshman vs. State of Karnataka and others, 2019 (9) SCC 677** Court said that it is not permissible for High Court in application under Section 482 CrPC to record any finding wherever there are factual disputes. Court also held that even in dispute of civil nature where there is allegation of breach of contract, if there is any element of breach of trust with mens rea, it gives rise to criminal prosecution as well and merely on the ground that there was civil dispute, criminality involved in the matter cannot be ignored. Further whether there is any mens rea on part of accused or not, is a matter required to be considered having regard to facts and circumstances and contents of complaint and evidence etc, therefore, it cannot be said pre judged in a petition under Section 482 CrPC.

19. In **Chilakamarthi Venkateswarlu and Ors. Vs. State of Andhra Pradesh and Ors., AIR 2019 SC 3913**, Court reiterated that inherent jurisdiction though wide and expansive has to be exercised sparingly, carefully and with caution and only when such exercise would justify by tests specifically laid down in Section itself. In paragraph 14 of judgment, Court said :

"14. For interference Under Section 482, three conditions are to be fulfilled. The ***injustice which comes to light should be of a grave, and not of a trivial character; it should be palpable and clear and not doubtful and there should exist no other provision of law by which the party aggrieved could have sought relief."***

(emphasis added)

20. Court also said that in exercise of jurisdiction under Section 482 CrPC it is not permissible for the Court to act as if it were Trial Court. Court has only to be prima facie satisfied about existence of sufficient ground for proceeding against accused. For that limited purpose, Court can evaluate material and documents on record but it cannot appreciate evidence to conclude whether materials produced are sufficient or not for convicting accused. High Court should not exercise jurisdiction under Section 482 CrPC embarking upon an enquiry into whether evidence is reliable or not or whether on reasonable apprehension of evidence, allegations are not sustainable, or decide function of Trial Judge. For the above proposition, Court relied on its earlier authority in **Zandu Pharmaceuticals Works Limited and others vs Mohd. Sharaful Haque and others, 2005 (1) SCC 122.**

21. Power under section 482 CrPC should not be exercised to stifle legitimate prosecution. At the same time, if basic

ingredients of offfences alleged are altogether absent, criminal proceedings can be quashed under Section 482 CrPC. Relying on **M.A.A. Annamalai Vs. State of Karnataka and Ors. , 2010 (8) SCC 524, Sharda Prasad Sinha Vs. State of Bihar, AIR 1977 SC 1754** and **Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Ors., 1976 AIR 1976 SC 1947, Court in Chilakamarthi Venkateswarlu and Ors. (supra)** said that where allegations set out in complaint or charge sheet do not constitute any offence, it is open to High Court exercising its inherent jurisdiction under Section 482 CrPC to quash order passed by Magistrate taking cognizance of offence. Inherent power under Section 482 CrPC is intended to prevent abuse of process of Court and to clear ends of justice. Such power cannot be exercised to do something which is expressly barred under CrPC. Magistrate also has to take cognizance applying judicial mind only to see whether prima facie case is made out for summoning accused persons or not. At this stage, Magistrate is neither required to consider FIR version nor he is required to evaluate value of materials or evidence of complainant find out at this stage whether evidence would lead to conviction or not.

22. It has also been so observed in **Rakhi Mishra Vs. State of Bihar and Ors., 2017 (16) SCC 772** and **Sonu Gupta Vs. Deepak Gupta and Ors. , 2015 (3) SC 424** and followed recently in **Roshni Chopra and others vs. State of U.P. and others, 2019 (7) Scale 152.** Here Court also referred to judgment in **Dy. Chief Controller of Imports & Exports v. Roshanlal Agarwal and Ors., (2003) 4 SCC 13**9, wherein paragraph 9, Court said that in determining the question whether any process has to be issued or not, Magistrate has to be satisfied whether there is sufficient ground for proceeding or not and whether there is sufficient ground for conviction; whether the evidence is adequate for supporting conviction, can be determined only at the trial and not at the stage of inquiry.

23. However, it is also true that at the stage of issuing process to the accused, Magistrate is not required to record detailed reasons. In **U. P. Pollution Control Board vs. Mohan Meaking Limited and others, 2000 (3) SCC 745**, after referring to a decision in **Kanti Bhadra Shah Vs State of West Bengal 2001 SCC 722**, Court said :

"Legislature has stressed the need to record reasons in certain situations such as dismissal of complaint without issuing process. There is ***no such requirement imposed on a Magistrate for passed detailed order while issuing summons. Process issued to accused cannot be quashed merely on the ground that Magistrate had not passed a speaking order."*** *(emphasis added)*

24. Same proposition was reiterated in **Nupur Talwar Vs Central Bureau of Investigation and others, 2012 (11) SCC 465.**

25. In a Three Judges' Bench in **Parbatbhai Aahir and Ors. Vs State of Gujarat and Ors, 2017 (9) SCC 641**, Court has observed that Section 482 CrPC is prefaced with an overriding provision. It saves inherent power of High Court, as a superior court, to make such orders as are necessary (i) to prevent an abuse of the process of any court; or (ii) otherwise to secure the ends of justice. In Paragraph 15 of the judgment Court summarized as under :

"(i) 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;***

(ii) 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.***

(iii) 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;***

(iv) 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;

(v) 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;*

(vi) 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;*

(vii) 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;***

(viii) ***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;***

(ix) 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*

(x) There is ***yet an exception*** *to the* ***principle set out in propositions (viii) and (ix) 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." (emphasis added)

26. Above observations have been reiterated in **Arun Singh and other Vs State of U.P.** passed in **Criminal Appeal no.250 of 2020 (arising out of Special Leave Petition (Crl.) No. 5224 of 2017),** decided by Supreme Court on 10.02.2020.

27. Reliance placed by learned counsel for applicant in **Pepsi Foods Ltd (supra)** on the scope of Section 482 CrPC is also in conformity with law as discussed above. I do not find anything otherwise stated therein or something which is different than what has been discussed above, which may help petitioner in a different manner. No doubt Court said that summoning of accused in criminal case is a serious matter and Criminal law cannot be set into motion as a matter of course, but to suggest that at the cognizance stage, defence evidence can be looked into and assessed on merit or it can be done by this Court when an application under Section 482 CrPC is brought to this Court against order of cognizance/summoning is neither legal nor permissible. This argument is, therefore, rejected.

28. In view of above, since questions of facts have to be examined, whether testimonials relating to qualification of applicants are genuine, whether they have got appointment fraudulently or correctly and whether they have defrauded public revenue or not and there is any mens rea, which are all questions of facts requiring appreciation of evidence, no interference is permissible at this stage. In my view, evidence is not to be examined at this stage. Since charges are serious, it also cannot be said that there is any gross abuse of process of law so as to justify interference under Section 482 CrPC. I, therefore, find no merit in this application to quash entire proceedings.

29. Application is dismissed accordingly.

30. Interim order, if any, stands vacated.

(2020)10ILR A356
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.08.2020

BEFORE
THE HON'BLE SUNEET KUMAR, J.

Application U/S 482 No. 9551 of 2020

Ashok Kumar Pathak ...Applicant
Versus
C.B.I./ACB, Ghaziabad ...Opposite Party

Counsel for the Applicants:
Ronak Chaturvedi

Counsel for the Opposite Party:
Sri Gyan Prakash (A.S.G.I.), Sri Sanjay Kumar Yadav, Sri Raman Saxena

A. Criminal Law - Code of Criminal Procedure,1973 - Section 482,311 & Prevention of Corruption Act,1988 - Sections 7, 13(2) r/w 13(1)(d)-quashing of-application filed u/s 311 CrPc for recalling PW-1 rejected-the sanction is referable to Section 19, however, inadvertently sanctioned under Clause (a), instead of Clause (c) of Section 19(1) of the Act-it is not being disputed by the applicant that PW-1 is not the competent authority to accord sanction for prosecution and applicant is not a government servant-it is settled proposition of law that mere mentioning the wrong provision or non-mentioning of a provision in the order would not vitiate the order or proceedings initiated pursuant thereof.(Para 6 to 21)

B. The power conferred u/s 311 Cr.PC 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. Thus, there is no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the denial of fair trial.(Para 10)

The application is dismissed. (E-6)

List of Cases Cited:-

1. Natasha Singh Vs CBI (2013) 5 SCC 741

2. Talab Haji Hussain Vs Madhukar Purshottam Mondkar & anr.,AIR (1958) SC 376

3. Zahira Habibulla H. Shekh Vs St. Of Guj.,AIR (2004) SC 3114

4. Zahira Habibullah Sheikh (5) Vs St. Of Guj, AIR (2006) SC 1367

5. Kalyani Baskar Vs M.S. Sampoornam, (2007) 2 SCC 258

6. Vijay Kumar Vs St. Of U.P.,(2011) 8 SCC 136

7. Sudevanand Vs State, (2012) 3 SCC 387

8. Manju Devi Vs St. of Raj. & anr.(2019) 6 SCC 203

9. Peerless General Finance Ltd. & Investment Co. Ltd. Vs RBI (1992) 2 SCC 343: AIR (1992) SC 1033

10. Ram Sunder Ram Vs U.O.I. & ors.,(2007) 9 SCALE 197

11. N. Mani Vs Sangeetha Theaters & ors., (2004) 12 SCC 278

12. HC of Guj. Vs Guj. Kishan Mazdoor Panchayat, (2003) 4 SCC 712

13. P.K. Palanisamy Vs N. Arumugham,(2009) 9 SCC 173

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

1. Heard Sri Ronak Chaturvedi, learned counsel for the applicant and Sri Gyan Prakash, learned Assistant Solicitor General of India assisted by Sri S.K. Yadav and Sri Raman Saxena.

2. The instant application assails the order dated 6 September 2019 passed by the Special Judge, (Anti Corruption), CBI, Court No. 3, Ghaziabad, in Special Case No. 02 of 2017 (State through CBI Versus Ashok Kumar Pathak) arising from Case Crime No. RC-1202017A0006, under Sections 7, 13(2) r/w 13(1)(d) of the Prevention of Corruption Act, Police Station ACB CBI, Ghaziabad, rejecting the application of the accused/applicant filed under Section 311 of Code of Criminal Procedure, 1973 (for short "Cr.P.C.') for recalling P.W.-1, Lieutenant General Suresh Sharma for cross examination.

3. The facts giving rise the present application is that Pawan Kumar Tiwari made a complaint before the Anti Corruption Branch C.B.I. Ghaziabad, alleging that applicant demanded illegal gratification for release of his payments for the works performed by him for Military Engineering Services. Pursuant to the complaint, F.I.R. came to be lodged on 10 April 2017. After investigation C.B.I. submitted charge sheet against the applicant, the Special Judge, Anti

Corruption CBI Ghaziabad vide order dated 27.07.2027 took cognizance.

4. Applicant moved an application to recall P.W.-1 for the reason that during cross examination, inadvertently, it could not be clarified from P.W.-1 as to how sanction for prosecution under Section 19(1)(a) of Prevention of Corruption Act, 1988 (for short 'Prevention of Corruption Act') was accorded, whereas, accused applicant is not a government servant. The court below rejected the application, inter alia, on the ground that P.W.-1 was cross examined by the defence, and with the aid of the application filed under Section 311 Cr.P.C., the applicant wants to fill up the lacuna and delay the proceedings. It is noted in the impugned order that during cross examination P.W.-1 categorically deposed that he was the competent authority to accord sanction for prosecution of the applicant.

5. Para 22 of the impugned order is extracted:-

"22. In the matter in hand, sanctioning authority categorically stated in his statement before this Court as PW1 which is reproduced herein below:-

*"अशोक कुमार पाठक **AE AGE E/M** जी0ई0 (ईस्ट) आगरा थे और मैं इजीनियर इन चीफ होने के नाते उन्हे पदच्युत करने के लिए सक्षम अधिकारी था।"*

The chief examination of PW-1 shows that he has stated himself competent to accord sanction and defence had sufficient opportunity to cross examine the witness on that point. So far as the question regarding application of mind is concerned, the cross examination of PW-1 dated 23.04.2018, shows that PW-1 was controverted on application of mind in granting prosecution sanction. It appears that all the questions which are proposed to be asked, were very much in the knowledge of learned counsel for defence and were asked. Defence had got sufficient opportunity for cross examination and no new fact took place during trail making re examination of PW-1 necessary. The object of the provisions as a whole is to do justice not only from the point of view of accused and the prosecution but also from the point of view of an orderly society. This power is to be exercised only for strong and valid reasons and it should be exercised with caution and circumspection. Recall is not a matter of course and the discretion given to the court has to be exercised judicially to prevent the failure of justice. Therefore, the reasons for exercising this power should be strong and genuine. The delay in filing the application is also one of the important factors which has to be taken into consideration. It is noticed that statement of PW-1 was recorded on 23.04.2018 and the application for recall of witness has been given on 14.05.2019 almost after one year without showing reasonable cause."

6. Learned counsel for the applicant submits that the counsel for the accused/applicant before the trial court could not cross examine P.W.-1 with regard to his competency to accord sanction for prosecuting the applicant. It is further urged that the sanction order reflects that the sanction has been granted under Section 19(1)(a) of Prevention of Corruption Act under which only Central Government is competent, therefore, the applications to recall P.W.-1 for clarification as to how P.W.-1 could sanction prosecution. It is contended that there is total non application of mind while according sanction which goes to the root of the matter and would vitiate the trial.

7. Learned Senior Counsel appearing on behalf of the CBI opposes the application and submits that the sanction order has been placed on record, it clearly records that sanction was granted by Lt. General Suresh Sharma (P.W.-1) who is competent under the Prevention of Corruption Act. Further, during cross examination P.W.-1 clearly stated that he had sanctioned the prosecution. The purpose of the application under Section 311 Cr.P.C. is to delay the proceedings. In any case, the objection that is being raised by the learned counsel for the applicant can be raised before the trial court on the strength of the documentary evidence i.e. sanction order dated 30 June 2017. It is categorically noted in the sanction order that Sri Ashok Kumar Pathak AGE E/M (accused-applicant) in the office of Garrison Engineer (East) Agra, U.P., had demanded illegal gratification for the release of pending payment, accordingly, Lt. General Suresh Sharma E-in-C accorded sanction under Section 19(1)(a) of the Prevention of Corruption Act for the persecution of the accused applicant for the offence under Section 7 and 13(2) read with Section 13(1)(b) of Prevention of Corruption Act and for any other offences. The relevant portion of the sanction order is extracted:

"NOW THEREFORE, 1 Lt. Gen. Suresh Sharma, E-in-C, hereby accord sanction under section 19 (1)(a) of Prevention of Corruption Act, 1988, for the prosecution of the said Shri Ashok Kumar Pathak, the then AGE E/M, O/o Garrison Engineer (East) Agra, for the offences under Section 7 & 13(2) r/w 13(1)(d) of Prevention of Corruption Act, 1988, in respect of the aforesaid acts and for any other offences made out from the aforesaid facts for taking cognizance of the said offences by a court of competent jurisdiction."

8. Rival submissions fall for consideration.

9. The scope and object of Section 311 Cr.P.C. is to enable the court to determine the truth and to render a just decision after discovering all relevant facts and obtaining the proof of such facts, to arrive at a just decision of a case. Such power must be exercised, provided, that the evidence i.e. likely to be tendered by a witness, is germane to the issue involved. The power can be invoked by the court only in order to meet the ends of justice for strong and valid reasons, and the same is an exercise with great caution and circumspection. Section 311 Cr.P.C. has been expressed in the widest possible terms by using the words such as, "any court", "at any stage", or "or any enquiry, trial or other proceedings". "any person" and "any such person". The court must examine whether such additional evidence is necessary to facilitate a just and proper decision of the case.

10. Supreme Court in **Natasha Singh Versus Central Bureau of Investigation**1, observed as follows in para 15 and 16:

"15.....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....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.... There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case."

16. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner.....Thus, under no circumstances can a person's right to fair trial be jeopardized. Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the denial of a fair trial. ***(Vide: Talab Haji Hussain v. Madhukar Purshottam Mondkar and another2; Zahira Habibulla H. Shekh v. State of Gutajar3; Zahira Habibullah Sheikh (5) v. State of Gujarat4; Kalyani Baskar v. M.S. Sampoornam5; Vijay Kumar v. State of U.P.6; and Sudevanand v. State.****7"*

11. In **Natasha Singh**, the appellant had furnished an application stating that he wished to examine the witness of panchnama, who the prosecution had neither listed nor examined in court. The second person sought to be examined was Company Secretary of the appellant as he was the best person to provide greater details of the company of which the appellant is the Director. The third witness, a hand-writing expert, was required to be examined regarding the correctness of the signatures. The Court held that the witnesses desired to be examined were necessary for just decision of the case. The Court cannot prejudge the relevance of the witness.

12. In **Manju Devi Versus State of Rajasthan and another**8, an application was moved to examine the doctor who conducted the first post mortem of the dead body of the deceased in Nigeria. The reason assigned for summoning and examining the doctor was that the Medical Board constituted in India found that no definite opinion could be given regarding the time and cause of death. The doctor at Nigeria was not cited as a witness the prosecution. The Apex Court was of the opinion that the application under Section 311 Cr.P.C. was wrongly rejected on the ground that the post mortem report was available on record and that would suffice. The Court opined that the examination of the Nigerian doctor is germane to the questions involved in the matter for a just decision of the case.

13. In the given facts of the case in hand, it is not in dispute that the document according sanction is available on record. The author of the sanction order is P.W.-1 the competent authority. The authority was examined. In his cross examination, he has clearly stated that he had sanctioned the prosecution of the applicant.

14. Learned counsel for the applicant, however, submits that the sanction has been granted under Section 19(1)(a), whereas, applicant is not a government servant. It is, therefore, urged that there is total non application of mind while according sanction. It is sought to be contended that since the sanction has been granted under a wrong provision, therefore, PW-1 needs to be re-examined to clarify as to how sanction could have been granted under Section 19(1)(a) applicable to employees of the Central Government. On specific query, learned counsel submits that sanction could

have been accorded under Section 19(1)(c) of the Prevention of Corruption Act.

15. Section 19(1)(c) provides that in case of a person who is not employed in connection with the affairs of the Union or of the State the sanction for prosecution can be granted by the authority competent to remove him from office. Clause (c) of Sub-Section (1) of Section 19 reads thus:

"(1) No court shall take cognizance of an offence punishable under section 7, 10, 11, 13 and 15 alleged to have been committed by a public servant except with the previous sanction:-

(a).....

(b).....

(c) In the case of any other person, of the authority competent to remove him from his office."

16. On being confronted with the provision, learned counsel for the applicant does not dispute that P.W.-1 is competent to accord sanction under Clause (c) of Section 19(1), however, submits that the witness is sought to be recalled to clarify whether there was application of mind while sanctioning the prosecution under Section 19(1)(a) instead of 19(1)(c).

17. The sanction order clearly records that Lt. Gen. Suresh Sharma (P.W.-1) is competent and has sanctioned the prosecution of the applicant. Further, in cross examination he has categorically stated that he has sanctioned the prosecution. Merely mentioning the wrong provision of Prevention of Corruption Act in the sanction order would not vitiate the sanction and the trial pursuant thereof.

18. It is not in dispute that sanction has been granted by the competent authority and is referable to Section 19 of the Prevention of Corruption Act, though, inadvertently mentioning Sub-Section (1)(a), instead under Sub-Section (1) (c) of Section 19. It is settled proposition of law that mere mentioning the wrong provision or non mentioning of a provision in the order would not vitiate the order or proceedings initiated pursuant thereof. The relevant consideration is that the authority passing the order under the Act is competent and the exercise of the power is traceable to the relevant provision.

19. In **Peerless General Finance Ltd. And Investment Co. Ltd. v. Reserve Bank of India**9, the Supreme Court observed as under:

"It is settled law that so long as the power is traceable to the statute mere omission to recite the provision does not denude the power of the legislature or rule making authority to make the regulations, nor considered without authority of law...."

20. In **Ram Sunder Ram v. Union of India and others**10, it was held:

".....It appears that the competent authority has wrongly quoted Section 20 in the order of discharge whereas, in fact, the order of discharge has to be read having been passed under Section 22 of the Army Act. It is well settled that if an authority has a power under the law merely because while exercising that power the source of power is not specifically referred to or a reference is made to a wrong provision of law, that by itself does not vitiate the exercise of power so long as the power does exist and can be traced to a source available in law." ***(Refer- N. Mani v. Sangeetha Theatres and others11, High Court Of Gujarat vs Gujarat Kishan***

Mazdoor Panchayat12 and P.K. Palanisamy vs N.Arumugham13)

21. The court below was justified in rejecting the application for the reason that the witness sought to be recalled was not essential to arrive at a just decision of the case. The issue of "non application of mind' by the sanctioning authority is not germane to the issue involved. It is not being disputed by the applicant that PW-1 is not the competent authority to accord sanction for prosecution and applicant is not a government servant. The sanction is referable to Section 19, however, inadvertently sanctioned under Clause (a), instead of Clause (c) of Section 19(1) of Prevention of Corruption Act. No further clarification is required to be thrown upon the sanction order by PW-1 in the backdrop of his deposition that he is competent and had accorded the sanction to prosecute the applicant.

22. Learned counsel for the applicant failed to point out any illegality, infirmity or jurisdictional error in the impugned order.

23. The application being devoid of merit is accordingly dismissed.

(2020)10ILR A362
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.08.2020

BEFORE
THE HON'BLE MRS. SUNITA AGARWAL, J.

Application U/S 482 No. 9964 of 2020

Munshi Lal & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Rakesh Kumar

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

A. Criminal Law - Code of Criminal Procedure,1973-Section 482 - Indian Penal Code,1862-Section 447 & Prevention of Damage to Public Property Act,1984-Section 2/3-quashing of – chargesheet-prosecution failed to prove that the entry or unlawful occupation with an intent to intimidate, insult or annoy the person in possession-the conviction u/s 447 IPC cannot be sustained nor the damage can be imposed u/s 2/3 of the P.D.P.P. Act, 184-criminal proceeding initiated against the applicant is abuse of process of law.(Para 3 to 19)

B. Criminal Law - Prevention of Damage to Public Property Act,1984 - Is confined to the destruction or damage of public property during the course of riots,bundh, hartal or public commotion. The said provision cannot be invoked for lodging the criminal complaint or FIR on the allegations of damage or loss caused to the Gram Sabha land by illegal encroachment against a person permanently residing in the village or a tenure holder of any land in question as the procedure provided in Revenue Code,2006 for undertaking the proceedings regarding land in dispute is complete in itself and does not leave any scope for any further computation of damage for wrongful occupation, damage caused or misappropriation of Gram Sabha land.(Para 7 to 18)

The application is allowed. (E-6)

List of Cases Cited:-

1. In Re. Destruction of Public & Pvt. Properties, In Re. Vs St. Of A.P. & ors., (2009) 5 SCC 212

2. Kodungallur Film Society & anr. Vs U.O.I. & ors., (2018) 10 SCC 713

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

1. Heard Sri Rakesh Kumar learned Advocate for the applicants and learned A.G.A for the State respondents.

2. By means of the present application, the applicants seek for quashing of the charge sheet no. 1 of 2018 dated 20.1.2018 submitted in Case Crime No. 850 of 2017 as also the order dated 14.10.2019 in Criminal Case No. 2418 of 2019 (State vs. Kastoori Singh and others), whereby the Judicial Magistrate, Puwaya, Shahjahanpur has directed for appearance of the accused-applicants before him. The first information report dated 19.8.2017 namely Case Crime No. 850 of 2017 was lodged by the Lekhpal of Village Hardayal Kucha, Puwaya, Tehsil Puwaya, District Shahjahanpur alleging commission of offence under Section 447 I.P.C. and Section 2/3 of the Prevention of Damage to Public Property Act, 1984 (hereinafter referred as to "the P.D.P.P. Act, 1984"). The allegations in the F.I.R. are that the persons named therein including the applicants herein namely Munshi Lal and Kastoori Singh, both sons of Ganga Ram, resident of Village Diuhana, Police Station Banda, District Shahjahanpur had encroached plot no. 179 area 0.890 hectares, which is recorded as Banjar in the revenue records. The applicants had, thus, caused damage and loss to the public property which is the land vested in the Gram Sabha.

3. Seeking for quashing of the charge sheet, the main submission of learned counsel for the applicants is that the lodging of the first information report taking aid of provisions of the P.D.P.P. Act, 1984 is nothing but an abuse of process of the law, inasmuch as, the said provisions cannot be invoked to lodge a criminal case on the allegations of damage or loss caused to the Gram Sabha land. The Magistrate has acted illegally and without application of judicial mind in taking cognizance on the charge sheet submitted under Section 2/3 of the P.D.P.P. Act, 1984.

4. As far as the allegations of commission of offence of criminal trespass under Section 447 I.P.C. is concerned, it is contended that no such offence can be made out from the allegations in the first information report as even the date of entry of the applicants over the Gram Sabha land has not been indicated. Even otherwise, the names of the applicants over the plot in question namely Plot No. 179 area 0.3800 hectares has been recorded in the revenue records pursuant to an order dated 31.12.2013 under "Pa-Ka 11 Kha" being their ancestral property.

5. In any case, the question as to whether the land in dispute belongs to the applicants or they had illegally encroached upon the land vested in Gram Sabha, allegedly recorded as Banjar, can only be adjudicated by the revenue Court. The proper proceeding for eviction of the unauthorized occupant can be undertaken under Section 67 of the Revenue Code, 2006. The short cut procedure adopted by the Lekhpal of the village concerned is nothing but with a view to harass the applicants.

6. Having heard the learned counsel for the applicants and perused the record. At the out set, we may note that complete mechanism has been provided under Section 67 of the Revenue Code, 2006 empowering the Gram Sabha or any other authority to take possession of any land

under the provisions of the Revenue Code, where such property is entrusted or deemed to be entrusted to a Gram Sabha or other local authority and is damaged or misappropriated by anyone. The Sub-Divisional Officer of the concerned Sub-Division is empowered to take action on the information received from the Bhumi Prabandhak Samiti or other authority or the Lekhpal concerned about such illegal occupation or damage or misappropriation of the Gram Sabha Land. In case, any person is found in occupation of any such land in contravention of the provisions of the Revenue Code, the Sub-Divisional Officer has to issue notice to the person concerned to show cause as to :- (i) why compensation for damage, misappropriation or wrongful occupation specified in the notice be not recovered from him? (ii) why he should not be evicted from such land?

7. The person to whom such a notice is issued under sub-section (2) of Section 67 of the Code, can submit his reply disclosing his right or title or the nature of occupation over the land in question. In that case, the Sub-Divisional Officer has to pass an order giving reasons for not accepting the explanation, if so, offered by the person concerned. The eviction from the land can only be ordered after disposal of the explanation offered by the person concerned keeping in line with the principles of natural justice by passing a reasoned and speaking order which shall disclose the application of mind by the Officer. The amount of compensation for damage or misappropriation of the property or for wrongful occupation, as the case may be, may be recovered from such person as arrears of land revenue. Under sub-section (4) of Section 67, the Officer is empowered to discharge the notice if he forms an opinion that the person showing cause is not guilty of causing the damage or misappropriation or wrongful occupation of the property in question. Any person aggrieved by the order of the Sub-Divisional Officer under sub-section (3) or sub-section (4) of Section 67 may prefer an appeal to the Collector within thirty days from the date of such order. The procedure for undertaking the proceedings under Section 67 of the Revenue Code, thus, is complete in itself and does not leave any scope for any further computation of damage for wrongful occupation, damage caused or misappropriation of Gram Sabha land.

8. Section 210 of the Revenue Code, 2006 confers supervisory power on the Board or the Commissioner to call for the record of any proceeding decided by the subordinate revenue court in which no appeal lies for the purpose of satisfying itself or himself as to the legality or propriety of any order passed in such suit or proceeding.

Chapter XV of the Revenue Code, 2006 talks of penalties for encroachment and provides that any person who encroaches upon or causes any obstruction to the use of any public land (including chak road), path or common land of the village, shall be liable to a fine minimum Rs. 500/- and not exceeding Rs. 2,000/- and in case of his repetitive act, the Sub-Divisional Officer or the Tehsildar may require him to execute a personal bond for a sum not exceeding of Rs. 5,000/-.

9. A careful reading of the provisions of the Revenue Code, 2006, thus, makes it clear that the proceeding for causing damage to the public property can be undertaken against any person who is in

wrongful occupation of the same or causes damage or misappropriation to the said property. The nature of eviction proceeding under Section 67 of the Revenue Code, 2006 is, however, summary in nature. The rights of the parties claimed, if gives rise to a dispute requiring adjudication on the questions of fact, a suit for declaration has to be instituted against such person. The Gram Sabha may institute a suit under Section 145 of the U.P. Revenue Code, 2006 for declaration of its right or to seek any further relief. In case of institution of such a suit, a temporary injunction may be granted by the Court concerned to prevent wastage, damage or alienation of the suit property. The Revenue Code, 2006 is a Special enactment providing for the law relating to the 'land' defined under Section 4(14) of the Code.

10. As far as criminal proceeding for illegal encroachment, damage or trespass over the land belonging to Gram Sabha is concerned, the same can be undertaken but it would be subject to the adjudication of rights of the parties over the land in dispute as the said determination can be done only by the revenue Court.

11. As far as the P.D.P.P. Act, 1984 is concerned, the same has been enacted with the specific purpose. The statement of objects and reasons of the said Act shows that it was enacted with a view to curb acts of vandalism and damage to public property including destruction and damage caused during riots and public commotion. A need was felt to strengthen the law to enable the authorities to deal with cases of damage to public property. The "public property" as defined under Section 2(b) of the P.D.P.P. Act, 1984 means any property, whether immovable or movable (including any machinery) which is owned by or in possession of or under the control of the Central or State Government or any local authority or any Corporation or any institution established by the Central, Provincial or State Act or its undertaking. Section 3 of the P.D.P.P. Act, 1984 provides that anyone who commits mischief by doing any act in respect of any 'public property' including the nature referred in sub-section (2) in the said section shall be punished with imprisonment and a fine depending upon the nature of the property as per sub-section (1) and sub-section (2) of Section 3 of the P.D.P.P. Act, 1984. Section 4 provides punishment for an act of 'Mischief' causing damage to pubic property by fire or explosive substance. The P.D.P.P. Act, 1984 is, thus, a Special Act enacted to punish for the offence committed under Sections 3 and 4 of the said Act by doing any act of vandalism including the destruction or damage during any riots or public demonstration in the name of agitations, bandhs, hartals and the like. The "Mischief" has been defined under Section 2(a) of the P.D.P.P. Act, 1984 having the same meaning as in Section 425 of the Indian Penal Code (45 of 1860). Section 6 is the saving clause which says that the Act' 1984 covers the offence committed under it and the provisions of it are in addition to any other law which provides for any proceeding (whether by way of investigation or otherwise) which may be instituted or taken against the offender, apart from this Act. Special provisions with regard to disposal of a prayer for bail made by a person accused of commission of offence under the Act' 1984 has been provided under Section 5 of the P.D.P.P. Act, 1984.

The provisions oblige a person found guilty of commission of offence to

pay the damage or loss caused to the public property. This Act, thus, covers the specific area of damage or loss or destruction of public property and recovery of such damages from the person(s) who is/are found guilty of such damage during the course of any public demonstration in the name of agitations, bandhs, hartals and the like.

12. In Re. **Destruction of Public and Private Properties, In Re vs. State of Andhra Pradesh and others**1. Taking a serious note of various instances where there was a large scale destruction of public and private properties in the name of agitations, bandhs, hartals and the like, suo motu proceedings had been initiated by the Apex Court and two committees were appointed to give suggestions on strengthening of the legal provisions of P.D.P.P. Act to effectively deal with such instances. The recommendations of two committees were considered and it was observed that the suggestions were extremely important and they constitute sufficient guidelines which need to be adopted. It was left open to the appropriate authorities to take effective steps for their implementation.

In a recent decision in **Kodungallur Film Society and another vs. Union of India and others**2, relief was sought to issue a mandamus to the appropriate authorities to strictly follow and implement the guidelines formulated by the Apex Court "Destruction of Public & Private Properties In re:", with regard to measures to be taken to prevent destruction of public and private properties in mass protests and demonstrations and also regarding the modalities of fixing liability and recovering compensation for damages caused to public and private properties during such demonstration and protests.

It was acknowledged in **Kodungallur Film Society**2 that the recommendations of the Committee noted in the said judgment travesed the length and breadth of the issue at hand and, if implemented in their entirety, would go a long way in removing the bane of violence caused against persons and property.

As far as implementation of the said recommendations, the Union had advised the States to follow the same in its letter and spirit. Issuing directions to implement recommendations made by the Apex Court in both the above decisions. Direction was issued in **Kodungallur Film Society**2 to both the Central and the State Government to do the same at the earliest.

13. In compliance thereof, the State of U.P. notified the "Uttar Pradesh Recovery of Damages to Public and Private Property Rules, 2020", framed with a view to provide for recovery of damages to public and private property during hartal, bundh, riots, public commotion, protests etc. in respect of the property and imposition of fine. The said 'Rules' provide for constitution of the claims tribunal to investigate the damages caused and to award compensation related thereto.

The area which is covered by the P.D.P.P. Act, 1984 is, thus, confined to the destruction or damage to the 'public property' within the meaning of Section 2(b) of the Act during the course of riots or public demonstrations (commotion). The said provisions, in the considered opinion of the Court, cannot be invoked for lodging the criminal complaint or the first information report on the allegations of

damage or loss caused to the Gram Sabha land by illegal encroachment against a person permanently residing in the village or a tenure holder of any land in the village in question.

14. The first information report dated 19.8.2017 reporting an offence committed under Section 2/3 of the P.D.P.P. Act, 1984 is nothing but an abuse of the process of law. The concerned Magistrate has committed a patent error of law in taking cognizance of the alleged offence by passing a cryptic order without application of his independent mind. The charge sheet and the cognizance order summoning the applicants herein for alleged commission of offence under Section 2/3 of the P.D.P.P. Act, 1984 are, thus, liable to be quashed.

15. As far as the allegation of criminal offence under Section 447 IPC to constitute criminal trespass, the prosecution has to prove and the Court has to return a finding on the evidence that the trespass was committed with one of the intents enumerated in Section 441 of the Indian Penal Code. The prosecution has, thus, not only to allege but also to prove that the entry or unlawful occupation must be with an intent; (i) to commit an offence; or (ii) to intimidate, insult or annoy any person in possession of the property''. Every 'trespass' by itself is not criminal. In absence of any such finding, the conviction under Section 447 IPC cannot be sustained. The offence under Section 447 I.P.C. though is cognizable but is also a compoundable offence triable by any Magistrate, trial of which has to be conducted summarily. A charge under this section should specifically state intent which is alleged. The accused may lay a bonafide claim and right in the land in question. Although he may have no right to the land but he cannot be convicted of criminal trespass unless it is proved by the prosecution that he did so with an intention to intimidate, insult or annoy the person in possession or to commit an offence. The complainant need not be necessarily a person in actual physical possession of the land in question on the date of entry of the trespasser, i.e. the accused person. He may be a person to whom the land in question belonged or deemed to have been vested. The person who actually owns the land or property is the competent person to lodge the complaint.

16. In the instant case, the allegations in the F.I.R. are general and vague against many persons with respect to different nature of lands. So far as the applicants herein both sons of Ganga Ram are concerned, it is averred in the FIR that they had encroached and damaged the public property belonging to Gram Sabha. The charge sheet does not disclose appreciation of any particular material on record against the applicants. The order of taking cognizance passed by the Magistrate is a non-speaking order. In this case, the criminal action proposed against the applicants, thus, is a result of non-application of judicial mind.

17. Noteworthy is that the allegations against the applicants herein are of encroachment on 'Banjar' land and not on a 'public utility land', which can be regularized if a proceeding for eviction is instituted against the applicants under the Revenue Code, 2006 as they may take a defence of being landless labourers of the village concerned, i.e. of being eligible persons for allotment of land or requlariza tion of their occupation/possession.

18. In any case, determination on the disputed questions of facts, in an

appropriate proceeding before the Revenue Court is necessary. Neither the damage can be imposed for alleged 'Mischief' by taking criminal action under Section 2/3 of the P.D.P.P. Act, 1984 nor any offence of 'criminal trespass' under Section 447 of the Indian Penal Code can be said to have been prima facie made out against the applicants herein. The criminal proceedings initiated against the applicants pursuant to the F.I.R. namely Case Crime No. 0850 of 2017, Police Station Banda, District Shahjahanpur cannot but be said to be an abuse of the process of law or the Court. The cognizance order dated 14.10.2019 in Criminal Case No. 2418 of 2019 (State vs. Kastoori Singh and others) has been passed in complete ignorance of law. The continuation of criminal proceedings, in the considered opinion of the Court, being an abuse of process of the Court, ends of the justice requires that the said proceedings be quashed.

19. Invoking inherent powers under Section 482 Cr.P.C. of the High Court, the entire criminal proceedings of Case Crime No. 850 of 2017, Police Station Banda, District Shahjahanpur is hereby quashed.

The application stands **allowed**.

(2020)10ILR A368
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.09.2020

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 No. 11176 of 2020

Ankit Prasad & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicants:
Sri Alok Kumar Singh

Counsel for the Respondents:
A.G.A., Sri Jawahir Yadav

A. Criminal Law - Code of Criminal Procedure,1973-Section 482 - Indian Penal Code,1862-Sections 323, 452, 504, 506-quashing of-summoning order-statements of complainant and witnesses corroborated the contention with regard to criminal trespass-At the time of summoning, the Magistrate is not to make analytical analysis of evidence-only a prima facie case for proceeding further is there or not is to be seen-one witness was not examined, is of no relevance –the complainant and injured have been examined-magistrate is not required to examine each and every witness at the juncture of summoning. (Para 5)

B. The court in exercise of its inherent jurisdiction u/s 482 CrPC, is not expected to meticulously analyse the facts and evidence as it is within the domain of trial court. (Para 6)

The application is dismissed. (E-6)

List of Cases Cited:-

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.,Rept. By Inspector 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. Amrawati & Anr. Vs St. Of U.P.,(2004) 57 ALR 290

8. Lal Kamlendra Pratap Singh Vs St. Of U.P.,(2009) 3 ADJ 322 SC

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. Heard learned counsel for the applicants and learned A.G.A. representing the State. Perused the records.

2. This application under Section 482 Cr.P.C. has been filed by applicants Ankit Prasad and Shashi Bala against State of U.P. and Amita Jagdamba Prasad with prayer to quash summoning order dated 29.4.2019 passed by Additional Civil Judge (S.D.)-5/ Judicial Magistrate, Ghaziabad, in Complaint Case No. 768 of 2019, Amita Jagdamba Prasad Vs. Ankit Prasad and another, under Sections 323, 452, 504, 506 I.P.C., P.S. Shahibabad, district Ghaziabad, pending in court of Additional Civil Judge (S.D.)-5/ Judicial Magistrate, Ghaziabad.

3. Learned counsel for the applicants argued that the applicants are family members of complainant-O.P. No. 2. In the statement recorded u/s 200 Cr.P.C. it has been specifically said to be an occurrence of 9.4.2018 as well as of 11.4.2018. The alleged assault said to be given to injured Sumeru Chakraborty is not in consonance with report. The offence u/s 452 I.P.C. is not made out because it has been admitted by complainant that the disputed house belongs to both sides. Civil Suit with regard to above disputed Flat is pending and this proceeding is with a view to create pressure and is an abuse of process of law. Hence this application with above prayer.

4. Learned A.G.A. as well as learned counsel for complainant have vehemently opposed the above argument with this contention that the complainant, who is an unmarried daughter of her father Jgdamba Prasad, is residing in the Flat owned by Jagdamba Prasad. Accused Ankit Prasad by making false statement by way of an affidavit in the office of electricity department mentioned himself to be the sole successor of Late Jagdamba Prasad. It was a misstatement under fraudulent intention. The accused-applicants are trying to evict the complainant for which they made assault on 11.4.2018 when Sumeru Chakraborty tried to intervene, he too was badly beaten. There is medical report of Sumeru Chakraborty. The complainant in her statement recorded u/s 200 Cr.P.C. and the statements of witnesses recorded u/s 202 Cr.P.C. the contention of complaint has been corroborated. Hence this application be dismissed.

5. Having heard learned counsel for both parties and gone through material placed on record, it is apparent that a complaint was filed by complainant Amita Jagdamba Prasad against Ankit Prasad and Shashi Bala in the Court of C.J.M., Ghaziabad, for offences punishable u/s 420, 406, 467, 468, 471, 387, 323, 504, 506 I.P.C., P.S. Sahibabad, District Ghaziabad, by way of an application u/s 156(3) Cr.P.C. It was treated to be a complaint, wherein statements of complainant Amita Jagdamba Prasad was recorded u/s 200 Cr.P.C. and of her witnesses were also got recorded u/s 202 Cr.P.C. The contention made in complaint with regard to criminal trespass on the alleged date of occurrence and thereafter making assault has been corroborated by complainant as well as her witnesses and on the basis of this enquiry made by Magistrate, impugned summoning order dated 29.4.2019 has been passed, wherein the applicants have been summoned for the offences punishable u/s 323, 452, 504, 506 I.P.C. At the time of summoning u/s 204 Cr.P.C. the Magistrate

is not to make analytical analysis of evidence. Rather only a prima facie case for proceeding further is there or not is to be seen. It is very well there because the contention of complaint was corroborated in the statements recorded u/s 200 and 202 Cr.P.C. made under enquiry by the Magistrate. It is said that on 11.4.2018 Patwari Shahzad had come at the spot for investigation when those accused persons along with 3-4 others did criminal trespass, made assault and abused the complainant. For this occurrence, the complaint was made and the complainant and her witnesses were examined. They have corroborated the contention of complaint. The very argument that this Patwari Shahzad was not examined, is of no relevance because the complainant and injured have been examined and they have corroborated the contention of complaint. At the juncture of summoning, the Magistrate is not required to examine each and every witness mentioned in the complaint.

6. This court in exercise of its inherent jurisdiction u/s 482 Cr.P.C. is not expected to meticulously analyse the facts and evidence as it is within the domain of trial court.

7. 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".

8. 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".*

9. Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above.

10. Accordingly, there remains nothing for any indulgence in this proceeding. The prayer for quashing summoning order as well as proceeding of the aforesaid complaint case is refused and the application u/s 482 Cr.P.C. is hereby dismissed.

11. However, in the interest of justice, it is provided that if the applicants appear and surrender before the court below within thirty days from today and apply for bail, then the bail application of the applicants be considered and decided in view of the settled law laid by this Court in the case of ***Amrawati and another Vs. State of U.P. reported in 2004 (57) ALR 290*** as well as judgment passed by Hon'ble Apex Court reported in ***2009 (3) ADJ 322 (SC) Lal Kamlendra Pratap Singh Vs. State of U.P.***

12. For a period of thirty days from today or till the disposal of the application for grant of bail whichever is earlier, no coercive action shall be taken against the applicants.

13. However, in case, the applicants do not appear before the Court below within the aforesaid period, coercive action shall be taken against them.

(2020)10ILR A371
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.09.2020

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 No. 12058 of 2020

Narayan Giri ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Sher Bahadur Yadav

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

A. Criminal law - Code of Criminal Procedure,1973 - Section 482 - Indian Penal Code,1862-Sections 323, 504, 506, 419, 420, 406-quashing of-entire proceeding- Husband of the complainant was duped by committing fraud by the accused persons- contention of the complaint stood corroborated by the witnesses examined and complainant statement disclosing connivance of all the accused.(Para 6)

B. 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. ,To secure ends of justice, inherent jurisdiction has to be exercised carefully by the tests specifically laid down in the section itself.(Para 8)

B. Husband of the complainant was duped by committing fraud by the accused persons, thereby Tractor was sold by way of hypothecation with State Bank of India, was held to be with material defects and it was taken by the agency concerned and neither it was restored nor was repaired by replacement of engine as was directed by the District Consumer Redressal Forum and this contention of the complaint stood corroborated by the witnesses examined and complainant statement disclosing connivance of all the accused.(Para 6)

The application is dismissed. (E-6)

List of Cases Cited:-

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.,Rept. By Inspector 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, Narayan Giri, with a prayer for setting aside entire proceeding of Criminal Complaint Case No. 1918 of 2017, Chameli Devi vs. Narayan and others, under Sections 323, 504, 506, 419, 420 and 406 of Indian Penal Code, Police Station-Tarnva, District Azamgarh, including summoning order, dated 30.1.2018, passed by the court of Judicial Magistrate, court no.16, Azamgarh.

2. Learned counsel for applicants argued that the applicant is not having any concern with alleged occurrence, as mentioned in the complaint. He is merely an agent and in a previous proceeding, which stood dismissed against Opposite party nos. 3, 4 and 5, and application is Opposite party no.4 in said proceeding. Order, so passed, has been filed at page nos. 29 and 30 of this proceeding and after this order having been passed, this complaint has been filed by the complainant. The warranty was of one year and alleged complaint was made by the complainant's husband after lapse of above period. Nowhere any other complaint was there. Hence, this summoning order as well as entire proceeding of complaint case is under abuse of process of law and, therefore, this Application 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 materials placed on record, it is apparent that a case was filed before the District Consumer Reddressal Forum against the agency of

Sonalika Tractor, its Proprietor, Agent, through whom, said Tractor was purchased, the Manager of the Branch of State Bank of India, Branch Azamgarh, where tractor was hypothecated and sub-agency-Alam Automobile, Naraoli, Azamgarh, with the same contention as is there in present complaint. It was complaint number 60 of 2011, filed on 12.7.2011 and decided on 26.11.2016, wherein, claim of the applicant, Jawahar Lal Chauhan, was decreed against Dev Automobile, i.e., Authorised Dealer of Sonalika Tractor, Tractor Sales Services, Parts, Bhitarimore Main Road, Syedpur, Ghazipurpur, through its Manager, Sudhansu Singh.

5. There had been a direction with regard to the Tractor concerned. As District Consumer Reddressal Forum is not a criminal court, it cannot take cognizance for criminal offence, but, it is for making reddressal of damage caused to consumer, under Consumer Dispute Reddressal Act, and contention of the present complainant was decreed. Hence, by any order regarding non-award of decree against other defendant, in above consumer dispute, the offence is not affected.

6. Present complaint is with regard to same sequence of occurrence, wherein husband of the complainant was duped by committing fraud by the accused persons, thereby, Tractor was sold by way of hypothecation with State Bank of India, was held to be with material defects and it was taken by the agency concerned and neither it was restored nor was repaired by replacement of engine as was directed by the District Consumer Reddressal Forum and this contention of the complaint stood corroborated by the witnesses, examined, under Section 202 of Cr.P.C. Complainant, in her statement, recorded, under Section 200 of Cr.P.C., has categorically said connivance of all the accused persons, including present applicant in above fraudulent activities and criminal breach of trust. On the basis of all these evidences, collected by the Magistrate, in its enquiry, impugned order for summoning of Narayan Giri, Sudhanshu Singh and Jugunu Singh, for offences, under Section 323, 504, 506, 419, 420 and 406 of I.P.C. is there.

7. There appears to be no illegality or irregularity apparent on the face of record, warranting interference, in exercise of power under its inherent jurisdiction by this 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)10ILR A374
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.08.2020

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 No. 12648 of 2020

Balvir Singh @ Shintu Singh ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Kamal Kishor Mishra

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

A. Criminal Law - Code of Criminal Procedure,1973 - Section 482 & U.P. Gangster and Anti Social Activities (Prevention) Act,1986-Section 3(1)-quashing of- entire proceeding-trial court rejected discharge application-accused had criminal antecedent-acquittal in any criminal case does not delete criminal antecedent-merit is to be appreciated on the basis of evidence within the domain of trial court- Factual correctness or incorrectness or appreciation of same cannot be made, under Section 482, in exercise of inherent power-Meticulous analysis of facts and evidence at the time of framing of charges may lead prejudice against fair trial.(Para 5 to 7)

B. 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. 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.(Para 6,7)

The application is dismissed. (E-6)

List of Cases Cited:-

1. Palwinder Singh Vs Balwinder Singh & ors,(2008) 14 SCC 504

2. St. Of A.P. Vs Gaurishetty Mahesh, JT (2010) 6 SC 588: (2010) 6 SCALE 767: (2010) Cr. LJ 3844

3. Hamida Vs Rashid, (2008) 1 SCC 474

4. Monica Kumar Vs St. Of U.P.,(2008) 8 SCC 781

5. Popular Muthiah Vs St.,Rept. By Inspector of Police,(2006) 7 SCC 296

6. Dhanlakshmi Vs R. Prasana Kumar,(1990) Cr. LJ 320 (DB): AIR (1990) SC 494

7. St. Of Bih. Vs Murad Ali Khan,(1989) Cr. LJ 1005: AIR (1989) SC 1

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. Heard learned counsel for the applicant and learned A.G.A. for the State.

2. The applicant, by means of this application under Section 482 Cr.P.C., has invoked the inherent jurisdiction of this Court with prayer to quash the entire proceeding against the applicant in Session Trial No. 132 of 2009 (State Versus Pintu Singh and another), arising out of Case Crime No. 263 of 2009, under Section 3(1) U.P. Gangster and Anti Social Activities (Prevention) Act, 1986, Police Station Cant. District Gorakhpur, pending in the court of learned Additional Session Judge / Special Judge, Gangster Act, Gorakhpur as well as impugned order dated 05.03.2020.

3. Learned counsel for the applicant argued that accused applicant has been falsely implicated in this case crime number, whereas in criminal antecedent given against him at serial nos. 1 and 3, he has been acquitted by the trial court. Case no. 2 is a counter blast of the first information report got lodged by applicant. Case no. 4 is the case, in which applicant is informant. On this gang chart, he has been charge sheeted for offence punishable under Gangster Act. This was raised before trial court with request for discharge in this session case, but trial court rejected the same vide impugned order dated 05.03.2020. It was an abuse of process of law. Hence, this application with above prayer.

4. Learned A.G.A. has vehemently opposed.

5. Having heard learned counsel for both sides and gone through material placed on record, it is apparent that application 26Kha was moved by accused Balvir Singh @ Shintu, under Sections 227 read with 235 of IPC for discharge in Case Crime No. 263 of 2009, under Section 3(1) U.P. Gangster Act. This was with contention that applicant had never been a member of any gang nor he is concerned of any gang. He is one amongst two of his brothers. His elder brother is Brijesh Singh alias Pintu. No relation amongst them is there. Both of them are having separate living. Gang chart prepared by police station is dated 30.11.2009 and the same was got approved by the then District Magistrate. This ensure that proceeding was a mechanical process. No application of mind was there. On the basis of above

report and its approval, Case Crime No. 263 of 2009 was got registered at police station on 30.01.2009 at 23.30 P.M. Four cases were shown against applicant and he was shown to be involved with Pintu Singh, in above alleged gang, having his involvement in three cases, whereas applicant was of no criminal antecedent. Pintu Singh, who is real brother of applicant, was with inimical terms since 1999. Hence, no question of any gang ever arisen. His property was illegally attached under Gangster Act, but the same was got released by High Court after setting aside order of District Magistrate, Gorakhpur as well as Special Judge, Gorakhpur. No offence under Gangster Act is made out against applicant. Hence, this application for discharge was moved. After hearing, learned Special Judge has rejected the same. At the time of framing of charge meticulous analysis of fact and evidence is not to be made, rather substance of alleged charge is to be seen, as has been propounded by Hon'ble Apex Court in so many cases and reported in case of **Palwinder Singh Vs. Balwinder Singh and others; (2008) 14 Supreme Court Cases 504**. Meticulous analysis of facts and evidence at the time of framing of charges may lead prejudice against fair trial. Pre-trial acquittal after appreciation of evidence and fact is also not pleaded. Hence, trial court after appreciating facts and circumstances of present case has rejected discharge application and thereby directed for presence of accused for framing of charge. Acquittal in any criminal case does not delete criminal antecedent and what is the merit is to be appreciated on the basis of evidence. This is within domain of trial court. The High Court in exercise of inherent jurisdiction, under Section 482 Cr.P.C is not to analyze factual matrix, because it may again prejudice fair trial.

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. Accordingly, this application merits its dismissal. **Dismissed** as such.

(2020)10ILR A377
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.09.2020

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 No. 12664 of 2020

Chhitar Singh & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicants:
Sri Bala Nath Mishra, Sri Ram Vishal Mishra

Counsel for the Respondents:
A.G.A.

A. Criminal Law - Code of Criminal Procedure,1973-Section 482 & Indian Penal Code,1862- Section 406 & U.P. Regulation of Cold Storage Act,1976-Section 25-quashing of-complaint-usurping price money of potato, hired in the cold storage is a criminal breach of trust u/s 406 IPC not in the category of compensation u/s 24 of the Cold Storage Act,1976-procedure u/s 25 of the Act is not relevant with the fact of the present case.(Para 12 to 15)

B. The initial condition precedent for constituting an offence of criminal breach of trust is dishonest misappropriation or conversion to its own uses, and in the present case, the accusation is of dishonest conversion and sale of potatoes for its own use, thereby usurping price money for such is punishable u/s 406 IPC whereas section 24 of the Act,1976 provides provision for payment of compensation caused to hirer, by way of loss, destruction, damage, deterioration or non-delivery of the goods stored in his cold storage. It is limited only to the negligence, misconduct or default on the part of such licensee.(Para 6 to 9)

The application is dismissed. (E-6)

List of Cases Cited:-

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.,Rept. By Inspector 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. Amrawati & anr. Vs St. Of U.P.,(2004) 57 ALR 290

8. Lal Kamlendra Pratap Singh Vs St. Of U.P.,(2009) 3 ADJ 322 (SC)

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. The applicants namely, Chhitar Singh, Tejveer Singh and Neeraj Singh, by means of this application under Section 482 Cr.P.C., have invoked the inherent jurisdiction of the Court with prayer for quashing impugned order dated 1.5.2019, 10.10.2017, 18.11.2019 and 5.2.2020, passed by learned Judicial Magistrate, Iglas, District Aligarh, with entire proceeding of Complaint Case No. 615 of 2017, Karamveer Singh Vs. Chittar Singh and others, pending in the court of learned Judicial Magistrate, Iglas, Aligarh, under Section 406 IPC, P.S. Iglas, District Aligarh.

2. Heard learned counsel for the applicants and learned A.G.A. for the State.

3. Learned counsel for the applicants argued that this Court in a proceeding under Section 482 of Cr.P.C. No. 46991 of 2019, Chittar Singh and others Vs. State of U.P. and another, vide order 7.1.2020, has directed learned trial Court for getting a report from District Horticulture Officer, Aligarh, with regard to reference to be made under Section 25 of U.P. Regulation of Cold Storage Act, 1976 (hereinafter referred to as 'Act') and if reference, as per provision of above Act was there and report is being submitted, then after case may be proceeded in accordance with above legal provision. A report from District Horticulture Officer of Aligarh was obtained, wherein, finding of liability of Rs. 62,392/-, was reported by District Horticulture Officer of Aligarh. It has been mentioned in its report that a complaint was made by Karamveer Singh in Kisan Diwas, held on 19.10.2016, which is entered in serial No. 478, regarding deposit of potato on two dates by two receipts in cold storage of M/s RSD Ice and Cold Storage Pvt. Ltd. G-28, Gyan Sarover Colony, Ramghat Road Aligarh, U.P., and it was usurped by owner of above cold storage. Payment of same was not made. District Horticulture Officer issued notice to owner of cold storage as well as complainant, whereupon, some compromise on 28.11.2016, was entered in between, but there is no reference as to whether that compromise was obeyed or not. But the compromise entered in between makes the accounting as above, resulting liability of Rs. 62392/-, and trial Court after this report, proceeded by way of issuing coercive process against applicants. But it was neither a reference made to District Horticulture Officer not a disposal of reference as per provision of above Act. Section 25 of said Act makes a provision that amount fixed by District Horticulture Officer, will be recoverable as land revenue and recovery certificate is to be issued to Revenue Officer i.e. District

Collector and the same shall be acted upon in the way of recovery of public money as land revenue. No coercive criminal proceeding is to be instituted under above provision. Hence, the very contention, since the beginning, by applicants, was neither adjudged by District Horticulture Officer nor by Magistrate concerned nor by revisional court and all those impugned orders are under abuse of process of law. Hence, for ensuring end of justice, this application has been filed with above prayer.

4. Learned AGA has vehemently opposed the above prayer.

5. From the very perusal of complaint, it is apparent that the same was filed by Karamveer Singh against Chhitar Singh and Tejveer Singh, with accusation of offence of criminal breach of trust. It was specifically accused that potato in two lots were deposited in above cold storage, but the same was sold for personal benefit by accused persons and the money was usurped. For this offence, there was summoning for offence punishable under Section 406 of IPC. This summoning order was challenged before revisional Court of Session Judge, Aligarh, in Criminal Revision No. 19/2018, wherein, after hearing both sides, revision was dismissed. Thereby, impugned summoning order dated 10.10.2017 was confirmed. A proceeding under Section 482 of Cr.P.C. was filed with above contention of Section 25 of Act as above and this Court perusing the admission of act of deposit of potato in above cold storage and legal provision of Section 25 of U.P. Regulation of Cold Storage Act, 1976, passed order dated 7.1.2020, with a direction to trial Court for getting the version of District Horticulture Officer, Aligarh, over above legal proposition and till above exercise an order of protection was given in favour of applicants. Trial Court did exercise and obtained report from District Horticulture Officer, Aligarh, wherein, above outstanding amount of Rs. 62,392/-, in favour of complainant against accused persons have been adjudged.

6. The legal proposition of Section 25 of Act, "Dispute regarding compensation to be referred to the Licensing Officer - (1) Every dispute regarding compensation payable by the licensee under Section 24 shall be referred to the Licensing Officer, and subject to the result of appeal, if any, under Section 36, the order of the Licensing Officer shall be final."

7. That is, Section 24 of the Act provides procedure with regard to payment of compensation referred to Licensing Officer and compensation which is payable under Section 24 of the Act Act.

8. Section 24 of the Act:- "Compensation for loss, destruction, etc. - Except as otherwise provided in this Act, the licensee shall be liable to pay to the hirer compensation for every loss, destruction, damage, deterioration or non-delivery of the goods stored in his cold storage caused by the negligence, misconduct or default on the part of such licensee."

9. That is, Section 24 of the Act provides provision for payment of compensation caused to hirer, by way of loss, destruction, damage, deterioration or non-delivery of the goods stored in his cold storage and such loss destruction, damage, deterioration or non-delivery of the goods, is owing to negligence, misconduct or default on the part of such licensee i.e. it is

limited only to the negligence, misconduct or default on the part of licensee and if by such negligence, misconduct or default on the part of such licensee, same damage, loss, destruction or deterioration or non delivery of goods stored in above cold storage is being caused to hirer, then the compensation is to be adjudged under section 25 of the Act, and is with regard to above liability, which falls under Section 24 of the Act.

10. Whereas, for offence punishable under Section 406 of IPC, the criminal mensrea, which makes a criminal breach of trust is punishable under Section 406.

11. Section 405 of I.P.C. provides definition of criminal breach of trust as:- "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?. "

12. Meaning thereby, for constituting of criminal breach of trust the enstrustment with property or dominion over property is a condition. Other condition is with dishonest misappropriation or conversion to its own use or dishonest uses or dispossess 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 with regard to discharging of such trust. Hence, the initial condition precedent for constituting an offence of criminal breach of trust is, dishonest misappropriation or conversion to its own uses and in the present complaint case, the accusation is of dishonest conversion and sale of potatos for its own use, thereby, usurping price money for such and this criminal breach of trust is punishable under Section 406 of IPC. Hence, this complaint, in the present case was for the offence of criminal breach of trust punishable under section 406 of IPC by way of criminal breach of trust, thereby, usurping price money of potato, hired in above cold storage by accused persons and this criminal breach of trust is not given in category of compensation under Section 24 of Act. Hence, the entire argument relating to procedure under Section 25 of Act is not applicable with the fact of present case. Hence, this proceeding merits its dismissal.

13. Moreso, this Court in exercise of inherent power under Section 482 of Cr.P.C., is not expected to make analytical analysis of evidence and fact of the case, as the same is the question before trial court. 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.***

14. However, it is made clear that above findings of this Court will not cause any prejudice in fair trial of this complaint case.

15. **Dismissed**, accordingly.

16. However, in the interest of justice, it is provided that if the applicants appear and surrender before the court below within thirty (30) days from today and apply for

bail, then the bail application of the applicants be considered and decided in view of the settled law laid by this Court in the case of **Amrawati and another Vs. State of U.P. reported in 2004 (57) ALR 290** as well as judgment passed by Hon'ble Apex Court reported in **2009 (3) ADJ 322 (SC) Lal Kamlendra Pratap Singh Vs. State of U.P.**

17. For a period of thirty (30) days from today or till the disposal of the application for grant of bail, whichever is earlier, no coercive action shall be taken against the applicants.

18. However, in case, the applicants do not appear before the Court below, within the aforesaid period, coercive action shall be taken against them.

19. With the aforesaid directions, this application stands disposed of, accordingly.

(2020)10ILR A381
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.06.2020

BEFORE
THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MAHESH CHANDRA TRIPATHI, J.

Special Appeal No. 245 of 2020
&
Special Appeal Defective No. 209 of 2020
&
Special Appeal Defective No. 210 of 2020

Mohammad Shoeb Khan & Anr.
...Appellants
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellants:
Sri Rahul Mishra

Counsel for the Respondents:
C.S.C., Sri Ashok Khare, Sri Gautam Baghel

A. Service Law - Intermediate Education Act, 1921 - Section 16FF - Indian Constitution - Article 30 - Appointment .

The appellants was selected and appointed in the institution as Assistant Teacher in LT Grade. Their appointment was approved by the District Inspector of Schools. Joint Director of Education found gross irregularities in the entire selection process. The enquiry initiated at the behest of the court reveals that their signatures have been forged on the papers relating to selection which were forwarded by the management. Such selection procedure in a minority institution and rights of the respondents to review or scrutinize an appointment made is governed by the provisions made in Section 16FF. Serious discrepancies were found in the selection process. The members who were shown as constituting the Selection Committee have not only denied having participated in any such exercise, they have gone to the extent of asserting that their signatures as stated to appear on the record of selection have been forged. (Para 13, 14)

The Constitution while recognizing and preserving the right of minorities to establish and administer educational institutions under Article 30 of the Indian Constitution envisage it to be a carte blanche to maladminister or to ignore basic concepts of fairness which must infuse any recruitment exercise. (Para 16)

Special Appeal Rejected. (E-10)

List of Cases cited:-

1. Ajay Singh & anr. Vs St. of U.P. & ors. Civil Misc. Writ Petition No. 32932 of 2004

2. Sanjay Kumar Sigh Vs District Inspector of Schools, Jaunpur & ors. Civil Misc. Writ Petition No. 9738 of 2009

3. TMA Pai Foundation Vs St. of Karnataka (2002) 8 SCC 481

4. Sk. Md. Rafique Vs Managing Committee Contai Rahamania High Madrasah & ors. (2020) SCC Online SC 4

(Delivered by Hon'ble Ramesh Sinha, J. & Hon'ble Mahesh Chandra Tripathi, J.)

1. The Court convened through video conferencing.

2. Heard Shri Rahul Mishra, learned counsel for the petitioners-appellants and Shri Ramanand Pandey, learned Standing Counsel for State respondents. Shri Ashok Khare, learned Senior Counsel assisted by Shri Gautam Baghel appears for Committee of Management, Mirza Anwar Beg Inter College, Userahta, Shahganj, Jaunpur through its Manager.

3. With the consent of parties, all the special appeals are being decided by this common judgment.

4. The Court has occasion to peruse the exemption applications filed in Special Appeal Defective Nos.209 of 2020 and 210 of 2020 and find substance in both the applications. Both the exemption applications stand allowed.

5. Present intra Court special appeal under Chapter VIII Rule 5 of the High Court Rules have been preferred against the common judgment and order dated 11.2.2020 passed by learned Single Judge in Writ-A Nos.9034 of 2013; 31865 of 2013 and 31868 of 2013 by which all the writ petitions were dismissed with following observations:-

".....The imperatives of a fair and just process of recruitment in order to select the most deserving and qualified candidate is a facet which has an indelible bond to standards of education in an educational institution. The rights that are claimed by a minority institution, consequently must be read as being subject to the caveat noticed above, namely, the obligation to act in accordance with the mandate of Articles 14 and 16. A process of recruitment which does not answer even the rudimentary requirements of a fair and just process can neither commend sanction in law nor can it be preserved by the protective umbrella of Article 30 of the Constitution. Regard must also be had to the fact that the Institution was in receipt of State aid. Once that institution stands conferred that benefit, the respondents could legitimately claim the right to regulate the selection process within the narrow confine culled out above. The provisions of Section 16FF cannot be construed as conferring an immunity to the minority institution to claim a right to select and appoint by adopting a process which is neither fair nor transparent. The right to select a teacher must be read as being hedged and subject to the rigours of other parts of the Constitution.

The power of the State to regulate and overseee within this narrow confine has an ineradicable link to maintenance of standards of education. The power if so exercised can neither be viewed as an infringment nor can it be said to impinge upon the rights guaranteed by Article 30. The State cannot be expected to remain a mute spectator while a minority institution proceeds to adopt a selection process which does not answer the requirement of Articles 14 and 16. Article 30 is neither an impregnable barrier nor can it be construed as a restraint upon the power of the State to regulate the affairs of a minority institution to the extent that the said power is exercised and invoked in aid of maintenance of standards. A minority

institution cannot be permitted in law to act with impunity and then rise up to claim an unbridled constitutional right to administer. That right must be balanced against the constitutional obligation placed upon all constituents to act in accordance with law and the Constitution.

The Court also bears in mind that in the present case, it is the Management which has proceeded to annul the appointment of the petitioners. It does not assert or contend that its rights to administer and manage have been interfered with. Bearing in mind the serious irregularities from which the selection process stood tainted, the Court is of the considered view that the petitioners are not entitled to any relief and the petitions must fail.

The writ petitions are consequently dismissed."

6. It appears from the record in question that the Writ-A No.9034 of 2013 had been preferred assailing the validity of the order dated 17th November, 2011 passed by the Joint Director of Education and consequential order dated 14th December, 2012 passed by the District Inspector of Schools (DIOS). The order of the Joint Director dated 17th November, 2011 had been passed in pursuance of the directions issued by the Court in Writ-A No.20463 of 2011. The order dated 17th November, 2011 directed the District Inspector of Schools to undertake a detailed enquiry in respect of the alleged irregularities in connection of the selection of two Assistant Teachers in the respondent-minority institution in question. The two Assistant Teachers are the petitioners-appellants in the present special appeals.

7. The petitioners-applicants claim to have been selected and appointed in the institution as Assistant Teachers in LT Grade on 10th April, 2003. Consequently, the District Inspector of Schools by its order dated 22nd February, 2005 accorded approval to the appointment of the petitioners-appellants. Consequently a complaint was made in 2020 to the DIOS by certain members claiming affiliation to a new Committee of Management, which had come to hold office. One of the complainants approached the Court by filing Writ Petition No.20463 of 2011, which was disposed of with direction to the Joint Director of Education to enquire into the compliant and take appropriate decision. Pursuant to the said direction, the order impugned dated 17th November, 2011 had been passed by which an enquiry was initiated, whereby the Committee of Management terminated the services of the petitioners-appellants. It is evident from the order dated 17th November, 2011 that there were gross illegalities and irregularities committed in the entire selection process in question. The enquiry, which was undertaken by the educational authorities established that most of the members of the Selection Committee had subsequently stated that their signatures had been forged on the papers relating to selection, which were forwarded by the Management. The respondents have also found serious discrepancies and lack of particulars in the advertisements, which were issued. It was also noted that in none of the advertisements the subject or disciplines in respect of which appointments were sought to be made found mention. The Joint Director in its order had also noted that Mohd. Saleem Khan (petitioner-appellant herein) was appointed on the post of Asstt. Teacher LT Grade and was having qualifications of B.Sc., B.Ed., whereas the advertised qualification was B.A., B.Ed. So far as Mohd. Shoeb Khan (petitioner-appellant herein) is concerned, he held the

qualifications of B.A. and Drawing Grade Examination but did not held the B.Ed. degree at all. A categorical finding of fact has been recorded qua the essential qualifications against the petitioners-appellants as well as the fallacies in the advertisement. In this backdrop, the respondent authorities commanded the Management to terminate the services of the two Assistant Teachers i.e. the petitioners-appellants.

8. Learned Single Judge, in this backdrop, while dismissing the writ petitions has heavily relied upon the enquiry so made in response to the writ Court direction and also considered the relevant provisions of the Act of 19211 and specially the provisions of Section 16FF of the Act of 1921 as well as Appendix-C contained in Chapter-II of the Regulations framed under the Act of 1921.

9. Shri Rahul Mishra, learned counsel for the petitioners-appellants has vehemently contended that the Joint Director of Education had no jurisdiction or authority to pass directions to the District Inspector of Schools to undertake any enquiry. He has also heavily relied upon the provisions of Section 16FF of the Act of 1921 and contended that the power to interfere with the choice made by the Management stands vested only in the Regional Deputy Director of Education or the Inspector as the case may be. It is also submitted that the Joint Director had no power to recommend or command the Management to terminate the services of the petitioners-appellants. But strangely the authority i.e. Joint Director of Education, which had no jurisdiction in the matter held that the appointment is illegal and commanded the DIOS to take necessary action, which resulted into stopping of salary and finally the Committee of Management terminated the services of the petitioners appellants. Learned counsel for the petitioners-appellants has also urged that the findings recorded by the learned Single Judge based upon the enquiry made by the authority qua the educational qualifications is also unsustainable as the petitioners-appellants had requisite qualifications. Infact it was no one's case that the petitioners-appellants' appointments were made on non-sanctioned post. The appellant no.1 Mohd. Shoeb Khan was duly qualified for Arts teacher and appellant no.2 Mohd. Saleem Khan was duly qualified for Science teacher. The respondents have transgressed their authority in outreaching the scope of enquiry under Section 16FF of the Act of 1921, which lays provisions vis-a-vis service conditions in minority institutions. As such it is contended that the order passed by learned Single Judge is unsustainable and liable to be set aside. Moreover the petitioners-appellants in response to the advertisement applied and they have rendered more than 7 years of their service and in most arbitrary manner their services have been dispensed with. As such it is contended that this Court should come for rescue and reprieve of the petitioners-appellants otherwise they would suffer irreparable loss and injury.

10. Shri Ramanand Pandey, learned Standing Counsel has vehemently opposed the special appeals and submitted that due to gross illegalities, which were noticed in the course of enquiry and from which the selection proceedings undisputedly sufferred, the respondent authorities were fully justified in interfering with the entire process and command the respondent management to terminate those illegal appointments. More so the same was done

on the dictate/ direction made by the Court and as such at no point of time the respondent authorities had transgressed or violated any provisions of the Act of 1921. They were fully justified in interfering with the entire process and commanded the respondent-management to terminate those illegal appointments. He has also vehemently contended that full fledged mechanism is provided in the Act of 1921 and the minority institutions may be empowered to select appointment and eligible persons in the light of the provisions made under Section 16FF, the State cannot be said to be totally deprived or denuded of authority especially when the burden of salaries of such teachers would ultimately fall on public exchequer. On the basis of record admittedly there were discrepancy in the advertisement, which has been highlighted in the enquiry and more so the petitioners-appellants did not have minimum eligibility to get appointment. Therefore, the entire selection was dehorse the provisions and the petitioners-appellants failed to justify that the selection was made strictly in accordance with law. There is no infirmity or illegality in the orders impugned passed by the educational authorities, which are rightly approved and upheld by learned Single Judge.

11. Shri Ashok Khare, learned Senior Counsel assisted by Shri Gautam Baghel, learned counsel for Committee of Management has also vehemently opposed the present special appeals and submitted that the enquiry was made by the educational authorities on the basis of record available in which it was found that there was discrepancy in the appointment. Once the complaint was made and in the enquiry it had been found that there were discrepancies in the selection process and the appointments were made dehorse the Rules, then definitely the management had to give due weightage to the outcome of the enquiry. More so the appointments of the petitioners-appellants were dispensed with in the year 2013 and therefore at this belated stage no interference is required. Learned Single Judge has rightly considered the provisions enshrined in the Act of 1921 and there is no infirmity or illegality in order impugned.

12. Heard rival submissions and perused the record.

13. It is evident from the record that the Joint Director of Education in his order dated 17th November, 2011 has found that there were gross irregularities committed by the management in the entire selection process. Moreso the said enquiry was made on the directions issued by the Court. The enquiry also revealed that most of the members of the Selection Committee had subsequently stated that their signatures had been forged on the papers relating to selection, which were forwarded by the management. Serious discrepancy and lack of particulars in the advertisement were also found.

14. It may be noted that the selection and appointment of teachers in a minority institution and the right of the respondents to review or scrutinise an appointment made is governed by the provisions made in Section 16FF. The provision firstly lays down the composition of the Selection Committee. In case selection is for the Head of the institution, it must comprise of an expert selected out of a panel prepared by the Director. In case of appointment of a Teacher, the Selection Committee must also include the head of the Institution as a member. Section 16FF (2) then provides

that the Selection Committee shall follow such procedure "as may be prescribed". Regulation 17 falling in Chapter II which admittedly governs selections undertaken by a minority institution, attracts the procedure prescribed by Regulation 10 clauses (e) and (f) to such selections. In this backdrop, learned Single Judge has considered the judgment passed in **Ajay Singh & Anr. v. State of U.P. & Ors.**2 where the position has been taken that the provisions made in Appendix-C contained in Chapter II of the Regulations framed under the 1921 Act would ipso facto apply to minority institutions also and in view thereof it was incumbent upon the Selection Committee to award quality point marks upon the evaluation of individual candidates. The legal position as enunciated in Ajay Singh (Supra) is as under:-

"In view of the aforesaid provisions, Appendix 'C' attached to Chapter-II becomes applicable in respect of selections made on the post of Lecturers in minority institutions automatically. Appendix 'C' regulates the manner in which quality point marks and interview marks ought to be provided as well as bifurcation of the same. Proceedings of selection are necessary to be submitted in Appendix 'C', referred to above. It is only on such proceedings submitted in Appendix 'C', that the educational authorities can act upon and take decision for grant of approval to selected candidate. Appendix 'C' reads as follows:"

From the affidavit filed by the Regional Joint Director of Education, noticed herein above, it is apparent that the proceedings of selection, as required, have not been intimated as required in Appendix 'C' nor there is any other record available to educational authorities on the basis whereof Appendix 'C' could be prepared for taking decision that the selection on the post in question is in accordance with law. Even otherwise none of the respondents being able to demonstrate as to what was the maximum marks fixed for interview, the entire documents submitted for selection are rendered mere paper transaction. This Court is also not able to ascertain what was the maximum marks fixed for interview.

In view of the aforesaid, the entire papers pertaining to the selection of Sri Desh Deepak Srivastava do not inspire confidence and therefore the selection of Sri Desh Deepak Srivastava cannot be said to have taken place in accordance with the provisions applicable."

15. Learned Single Judge has also considered the judgment rendered in **Sanjay Kumar Singh v. District Inspector of Schools, Jaunpur & Ors.**3 and has held that it was incumbent upon the Selection Committee to draw a chart evidencing a comparative analysis of the respective merit of candidates and the award of quality point marks. Undisputedly in the present case no such exercise was undertaken. The members who were shown as constituting the Selection Committee have not only denied having participated in any such exercise, they have gone to the extent of asserting that their signatures as stated to appear on the record of selection have been forged. This aspect amounts to a flagrant violation of the procedure prescribed by statute.

16. We are also of the opinion that Article 30 standing in Part III of the Constitution like all other rights is not absolute. The Constitution while recognising and preserving the right of minorities to establish and administer

educational institutions does not envisage it to be a carte blanche to maladminister or to ignore basic concepts of fairness which must infuse any recruitment exercise. The Constitution Bench of Hon'ble the Apex Court in **TMA Pai Foundation Vs. State of Karnataka**4 has observed as under:-

"135. We agree with the contention of the learned Solicitor-General that the Constitution in Part III does not contain or give any absolute right. All rights conferred in Part III of the Constitution are subject to at least other provisions of the said Part. It is difficult to comprehend that the framers of the Constitution would have given such an absolute right to the religious or linguistic minorities, which would enable them to establish and administer educational institutions in a manner so as to be in conflict with the other Parts of the Constitution. We find it difficult to accept that in the establishment and administration of educational institutions by the religious and linguistic minorities, no law of the land, even the Constitution, is to apply to them.

136.Decisions of this Court have held that the right to administer does not include the right to maladminister. It has also been held that the right to administer is not absolute, but must be subject to reasonable regulations for the benefit of the institutions as the vehicle of education, consistent with national interest. General laws of the land applicable to all persons have been held to be applicable to the minority institutions also -- for example, laws relating to taxation, sanitation, social welfare, economic regulation, public order and morality.

137.It follows from the aforesaid decisions that even though the words of Article 30(1) are unqualified, this Court has held that at least certain other laws of the land pertaining to health, morality and standards of education apply. The right under Article 30(1) has, therefore, not been held to be absolute or above other provisions of the law, and we reiterate the same. By the same analogy, there is no reason why regulations or conditions concerning, generally, the welfare of students and teachers should not be made applicable in order to provide a proper academic atmosphere, as such provisions do not in any way interfere with the right of administration or management under Article 30(1)."

17. Similar view has also been taken by Hon'ble Apex Court in a recent decision in **Sk. Md. Rafique Vs. Managing Committee Contai Rahamania High Madrasah and others**5 as under:-

"106.The decision inTMA Pai Foundation8, rendered by Eleven Judges of this Court, thus put the matter beyond any doubt and clarified that the right under Article 30(1) is not absolute or above the law and that conditions concerning the welfare of the students and teachers must apply in order to provide proper academic atmosphere, so long as the conditions did not interfere with the right of the administration or management. What was accepted as correct approach was the test laid down by Khanna, J. in Ahmedabad St. Xavier's College5 case that a balance be kept between two objectives - one to ensure the standard of excellence of the institution and the other preserving the right of the minorities to establish and administer their educational institutions. The essence of Article 30(1) was also stated - "to ensure equal treatment between the majority and the minority institutions" and that rules and regulations would apply equally to the

majority institutions as well as to the minority institutions."

18. More so learned Single Judge has rightly highlighted in the operative portion of the judgment that in the present case, it is the Management which has proceeded to annul the appointment of the petitioners. It does not assert or contend that its rights to administer and manage have been interfered with. Bearing in mind the serious irregularities from which the selection process stood tainted, learned Single Judge has rightly dismissed the writ petitions.

19. Considering the fact and circumstances, the Court does not find any infirmity or illegality in the judgment passed by learned Single Judge. Present special appeals sans merit and are accordingly **dismissed**.

(2020)10ILR A388
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.09.2020

BEFORE
THE HON'BLE SHASHI KANT GUPTA, J.
THE HON'BLE SANJAY KUMAR PACHORI, J.

WRIT - A No. 5576 of 2020

Shikhar Agrawal ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Siddharth Khare

Counsel for the Respondents:
C.S.C., Sri Ashish Mishra, Sri M.N. Singh, Sri Rahul Srivastava

A. Service Law - U.P. Judicial Service Rules, 2001; U.P. Judicial Service (Second Amendment) Rules, 2012 - Rule 20(3) - Process of selection/Preparation of wait-list The Commission after undertaking the process of examination/interview is obliged to prepare a list of finally selected candidates alongwith a wait-list in order of their proficiency as disclosed by aggregate of marks finally awarded to each candidate in the written examination and the interview. The wait-list is to be utilized only in case, the candidates in the select list do not join the posts and shall not be utilized for any subsequent vacancies.

Petitioner states that the respondent No. 1 had issued an advertisement dated 11.9.2018 inviting applications from eligible candidates for U.P. Judicial Service Civil Judge (Junior Division) Examination, 2018. The final result of Examination was declared on 20.07.2019 in which cutoff marks for General Category was 560 wherein the petitioner had obtained 559 marks. The petitioner further states that candidates selected under General Category, have joined or have been selected elsewhere. (Para 4, 5)

The petitioner sought information under RTI Act regarding his placement in waiting list but no such information has been supplied. The appeal filed on 11.11.2019 is still pending. The respondents have also not cancelled the candidature of the candidates, who failed to join the post as advertised. (Para 6)

Respondents have failed to show that any waiting list as envisaged under Rule 20 sub-rule (3) has been prepared, to fill up the vacancies rendered vacant on account of non-joining of the selected candidates within a specified period. (Para 7, 8)

Writ petition disposed of with the directions to the commission to forward the list of wait listed candidates against each category and to fill up posts that have not been utilized in any subsequent recruitment, strictly in accordance with the Uttar Pradesh Judicial Services Rules, 2001, within the specified time. (Para 10). (E-4)

Precedent followed:

1. Nadeem Anwar Vs State of U.P & anr., (2016) 2 UPLBEC 1391 (Para 7)

2. Ritu Chaudhary & 2 ors. Vs St. of U.P., Writ A No. 1641 of 2020, decided on 31.01.2020 (Para 7)

(Delivered by Hon'ble Sanjay Kumar Pachori, J.)

1. This writ petition is being disposed of finally at the stage of admission with the consent of learned counsel for the parties.

2. This writ petition has been filed, *inter-alia*, for the following reliefs:-

i. issue a writ, order, or direction in the nature of mandamus commanding the respondent authorities to fill the post of Civil Judge (Junior Division) under General Category pursuance to Advertisement dated 29.7.2016 from 10 % waiting list envisaged under Rule 20(3) of U.P. Judicial service (Second Amendment) Rules, 2012.

3. Heard Sri Sidharth Khare, learned counsel for the petitioner, Sri Rahul Srivastava, learned counsel for the respondent no.3 and Sri Deepak Mishra, learned A.G.A.

4. The instant writ petition has been filed by the petitioner stating therein that the respondent no.1 had issued an advertisement (Annexure No.1) dated 11.09.2018 inviting application from eligible candidates for U.P. Judicial Service Civil Judge (Junior Division) Examination, 2018 (hereinafter referred to as "Examination, 2018"). The total number of vacancies advertised were 610 across all categories. The recruitment to the post of Civil Judge (Junior Division) is governed by Uttar Pradesh Judicial Services Rules, 2001 (Annexure No.2) (hereinafter referred to as "Rules").The final result of Examination was declared on 20.07.2019 in which cutoff marks for General Category was 560 wherein the petitioner had obtained 559 marks (Annexure Nos. 5 and 6 respectively). The following candidates of aforesaid "Examination, 2018" have already been selected under General Category on the post of Civil Judge (Junior Division) pursuant to the advertisement dated 11.09.2018:-

Serial No.	**Name of the Candidates**	**Roll number of the candidates (In U.P.)**
1.	Abhinav Singh	049571
2.	Shivangi Vyas	032535
3.	Arvind Dev	003769
4.	Shruti Jain	017455
5.	Harshvardhan Dhakar	000586
6.	Surbhi Singhania	008854
7.	Kumar Shivam	009084
8.	Preeti	000420
9.	Ruchi Kaushik	040957
10.	Ajeet Kumar Mishra	013651

5. The learned counsel for the petitioner further states that the candidate mentioned at Serial Nos. 1, 2, 3 and 8 of the aforesaid list have already joined in Delhi Judicial Services, the candidates mentioned at serial nos. 4 and 5 have joined in M.P. Judicial Services, the candidates

mentioned at serial nos. 6 and 7 have also joined Bihar Judicial Service and the candidates mentioned at Serial Nos. 9 and 10 of the aforesaid list have also been selected elsewhere.

6. By means of an application dated 17.09.2019 under Right to Information Act, the petitioner sought information regarding his placement in waiting list but no such information has been supplied to the petitioner. The petitioner filed an appeal on 11.11.2019 but the said appeal has not been decided till date. The respondents have also not cancelled the candidature of the candidates, who failed to join the post as advertised above.

7. Learned counsel for the petitioner has relied upon the judgment rendered another Co-ordinate Bench of this Court in **Nadeem Anwar Vs. State of U.P. and another (2016) 2 UPLBEC 1391** and argued that the respondent no. 2 has not prepared any waiting list as envisaged under Rule 20 sub-rule (3) of the second Amendment of U.P. Judicial Service Rules, 2012 and to fill up the vacancies rendered vacant on account of non-joining of the selected candidates within a specified period. Learned counsel for the petitioner has also relied upon the judgment passed in **Writ A No. 1641 of 2020, Ritu Chaudhary and two others Vs. State of U.P.** decided on 31.1.2020.

8. Learned counsel for the respondents despite advancing elaborate arguments, have failed to show that any waiting list as contemplated under Section 20 sub-section (3) of the amended rules has been prepared

9. In order to appreciate the submissions made by the learned counsel for the parties , it would be useful to extract Rules 20 and 21 of the Rules herein below :

"20. List of candidate approved by the Commission.- *(1) After the result of written examination is prepared, the Commission shall call for interview such number of candidates, who in the opinion of the Commission have secured minimum marks as may be fixed by the Commission in this respect.*

(2) Notwithstanding anything to the contrary contained in any rules or orders, the Commission shall invite a sitting Judge of the Court to be nominated by the Chief Justice to participate in the interview of the candidates called under sub-rule (1) and the opinion given by him with regard to the suitability of the candidates shall not be disregarded by the Commission unless there are strong and cogent reasons for not accepting the opinion which reasons must be recorded in writing by the Commission.

(3) The Commission then shall prepare a final list of selected candidates in order of their proficiency as disclosed by aggregate of marks finally awarded to each candidate in the written examination and the interview.

Note-- The wait list shall be prepared category-wise, i.e. for Scheduled Castes, Scheduled Tribes and other categories. The wait-list shall be utilized only in case, the candidates in the select list do not join the posts and shall not utilized for any subsequent vacancies.

Provided that if two or more candidates obtain equal marks in the aggregate, the name of the candidate being elder in age, shall be placed higher:

Provided further that if two or more candidates of equal age obtain equal marks in the aggregate, the name of the candidate, who has obtained higher marks

in the written examination, shall be placed higher.

21. Appointment to the service.- *(1) Subject to the provisions of sub-rule (2), the Governor shall, on receipt of the list of candidates submitted by the Commission under sub-rule (3) of Rule 20, make appointment on the post of Civil Judge (Junior Division) in the order in which their names are given in the list provided the Governors is satisfied that the Candidate is otherwise qualified and entitled for such appointment under these rules. (2) The select list prepared under sub-rule (3) of Rule 20 shall lapse after all the vacancies advertised or varied after due notification, are filled up."*

10. There is nothing on record which may indicate that in terms of Rule 20(3) of the "Rules",the vacancies which remain underutilized due to non-joining of the candidates, as mentioned in the list, have been released by a subsequent recruitment.

11. In view of the above, we dispose of the writ petition with the following directions to respondent no. 2 (U.P. Public Service Commission):-

i) That the Commission shall forward the list of wait listed candidates against each category, keeping vertical and horizontal reservation in mind within 30 days from the date of filing of certified copy of this order before it.

ii) Further, if such posts have not been utilized in any subsequent recruitment, the commission shall fill up the said posts strictly in accordance with the Uttar Pradesh Judicial Services Rules, 2001, which could not be filled up, in order to merits of the wait listed candidates, within a further period of 60 day and submit compliance report to the Registrar General of this Court within 75 days from today.

12. With the aforesaid direction, the writ petition, is, finally disposed of.

(2020)10ILR A391
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.08.2020

BEFORE
THE HON'BLE PRAKASH PADIA, J.

WRIT - A No. 6238 of 2020

Praveen Kumar ...Petitioner
Versus
Registrar General, Hon'ble High Court, Allahabad & Anr. ...Respondents

Counsel for the Petitioner:
Sri Moti Lal Chauhan

Counsel for the Respondents:
Sri Ashish Mishra, Sri Chandan Sharma

A. Service Law – Opportunity for interview and verification of documents – An advertisement inviting applications for examination or recruitment is merely an invitation to offer and not an offer itself. If the postal rule is made applicable in matters of inviting applications to appear for an examination or for an interview, and applications are to be sent by post, even if one application does not reach in time on account of postal delay to scrap the examination or hold special examination in such cases would produce manifest inconvenience and absurdity.

Even if principle of contract regarding offer and acceptance is applicable, then in that case as soon as an offerer dispatches its offer, his duty is over. It is only required to be seen whether such offer was made within the prescribed period or not.

In the present case, a question arose before this Court that whose fault is this by which the

petitioner was prevented from attending interview on the relevant date and time. Whether it is a fault of the respondents or of the postal department? According to the respondents, call letter was dispatched 15 days before from the date of interview by "Speed Post", an urgent delivery scheme of Indian Postal Department. It further appears from perusal of the postal document that though the postman tried to serve the letter in question upon the petitioner for the first time on 23.6.2020 itself but since petitioner was not available and his door was locked, the same could only be served upon the petitioner on 30.6.2020. Therefore, Court held that there is absolutely no fault either on part of the respondents in the present writ petition or on part of the postal department. (Para 8, 9)

Writ petition dismissed. (E-4)

Precedent followed:

1. Gunjan Bhardwaj Vs Indian Oil Corporation Ltd. & anr. 2011 (5) AWC 4719 decided on 23.05.2011 (Para 6, 9)

2. Neena Chaturvedi Vs Public Service Commission, U.P. 2010 (9) ADJ 152 (Para 8)

(Delivered by Hon'ble Prakash Padia, J.)

1. Heard learned counsel for the petitioner and Sri Chandan Sharma, learned counsel appearing for the respondent no.1.

2. The petitioner has preferred the present writ petition with the prayer to issue a mandamus directing the respondent no.1/Registrar General, High Court, Allahabad to provide one opportunity again to the petitioner for interview and verification of documents for the post of Farrash (Group-IV) in pursuance of advertisement dated 05.2.2018.

3. The facts in brief as contained in the writ petition are that an advertisement was issued by the respondent no.1 for inviting applications for appointment of Sweeper, Cook, Mali, Farrash (Group-IV) on 05.2.2018.

4. The petitioner applied being the eligible and qualified candidate for the post of farrash. An admit card was issued to the petitioner by which the petitioner was permitted to appear in the written test, which was held on 25.8.2019. The petitioner duly participated in the aforesaid written examination. The result of the same was published on 19.2.2020 in which petitioner was declared qualified. Subsequently on 16.6.2020 a call letter was issued to the petitioner by the respondent no.2 by which the petitioner was directed to appear for interview and document verification on 30.6.2020 at 8.00 A.M. The same was served upon the petitioner on 30.6.2020 at about 3.15 P.M. The track consignment available on the official website of the postal department is appended as annexure 4 to the writ petition. It appears from perusal of the same that though the postman concerned along-with envelop went to the registered postal address of the petitioner on 6 times, i.e., on 23.6.2020, 24.6.2020, 25.6.2020, 26.6.2020, 27.6.2020 and 29.6.2020 but all the times the remark was made by the postman "item onhold door locked". Ultimately the aforesaid envelop was served on the petitioner on 30.6.2020 at 15.49.11. In this view of the matter, since for inter-view, call letter was not received by the petitioner within time, he was not able to appear before the interview board. Thereafter, a representation was submitted by the petitioner before the respondent no.1 on 7.7.2020 with a request to permit the petitioner to participate in the interview and for document verification. Since no action was taken on the same, petitioner has preferred the present writ petition.

5. Sri Chandan Sharma, learned counsel appearing on behalf of respondent no.1 placed before this Court the copy of the advertisement published by the respondent no.1. In para 11 of the advertisement date, time and venue of examination was mentioned. It is further stated in para 12 of the advertisement that the respondent no.2 was authorized to hold the aforesaid examination. Pursuant to the same, examination in question was held and results of the written examination was declared. Subsequently, a call letter was issued to the petitioner by the respondent no.2 by speed post on 16.6.2020 by which the petitioner was directed to appear for the document verification and interview and the date fixed for interview was 30.6.2020. It further appears from perusal of the postal document that though the postman tried to serve the aforesaid letter upon the petitioner for the first time on 23.6.2020 but since the petitioner was not available and his residence was locked, the aforesaid letter was not served upon the petitioner. It further appears that the concerned postman tried to serve the aforesaid letter upon the petitioner at least on six occasions but on all the times, he found that the door was locked. In this situation letter was served upon the petitioner for the first time on 30.6.2020 and in view of the same, he was not able to attend the interview.

6. It is further argued by Sri Chandan Sharma, learned counsel appearing for the respondent no.1 that there is absolutely no fault either on part of the respondents. He also relied upon a Division Bench judgement of this Court passed in ***Gunjan Bharadwaj Vs. Indian Oil Corporation Limited and another*** reported in ***2011 (5) AWC 4719*** decided on 23.5.2011.

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

8. From perusal of the facts as narrated above, the Court is of the opinion that there is no fault on part of the respondents. In this background of the matter, a question arose before this Court that whose fault is this by which the petitioner was prevented from attending interview on the relevant date and time. Whether it is a fault of the respondents or of the postal department. According to the respondents, call letter was dispatched 15 days before from the date of interview by "Speed Post", an urgent delivery scheme of Indian Postal Department. It further appears from perusal of the postal document that though the postman tried to serve the letter in question upon the petitioner for the first time on 23.6.2020 itself but since petitioner was not available and his door was locked, the same could only be served upon the petitioner on 30.6.2020. In this view of the matter, Court is of the opinion that there is absolutely no fault either on part of the respondents in the present writ petition or on part of the postal department. The Full Bench of this Court in the case of ***Neena Chaturvedi Vs. Public Service Commission, Uttar Pradesh*** reported in ***2010 (9) ADJ 152*** has held that an advertisement inviting applications for examination or recruitment is merely an invitation to offer and not an offer itself. However, in coming to conclusion the Full Bench has held as follows:

"(43). If the postal rule is made applicable in matters of inviting applications to appear for an examination or for an interview, and applications are to be sent by post, even if one application does not reach in time on account of postal delay to scrap the examination or hold special examination in such cases would

produce manifest inconvenience and absurdity."

9. In the case of Gunjan Bharadwaj (supra) it was held by a Division Bench of this Court that the authorities could not be held liable for non reaching of postal articles of the petitioner. The relevant paragraph of the aforesaid judgement is reproduced hereinbelow:-

"Against this background, the Corporation can not be held liable for non-reaching of postal articles to the petitioner. Even if we accept that the principle of contract regarding offer and acceptance is applicable between the petitioner and the Corporation, then in that case as soon as an offerer dispatches its offer, his duty is over. We are only required to see whether such offer was made within the prescribed period or not. Factually, we find that it was dispatched within the prescribed period. We also find that in the brochure it has been categorically said that the Corporation is not responsible for any postal delay. The petitioner seeing such clause with open eyes wanted to make offer, pursuant to which the call letter was issued to her by the Corporation well within time. Thereafter, no responsibility lies on the part of the Corporation for such delay."

10. In this view of the matter, I am of the view that no relief, either mandatory or compensatory in nature, can be granted to the petitioner.

11. The writ petition has no force. Accordingly, it is dismissed, however, without imposing any cost.

(2020)10ILR A394
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.09.2020

BEFORE
THE HON'BLE VIVEK AGARWAL, J.

WRIT - A No. 6649 of 2020

Alok Kumar Singh & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Anurag Tripathi, Sri Gaurav Kumar

Counsel for the Respondents:
C.S.C., Sri M.N. Singh

A. Service Law - UPPSC (Procedure and Conduct of Business) Rules, 2011 - Rule 51- UP State Public Service Commission (Regulation and Procedure) Act, 1985 - Respondent - Recruitment/Selection Process – Scaling Methodology -

Aspect of scaling has nothing to do with the right of the petitioners to obtain copies of his answer script - There is no violation of law under Right to Information Act - Petitioners allegation is that not providing information amounts to violation of law. Mandate of law is, examinee in a public examination has a right to inspect his evaluated answer book or taking certified copies thereof. Such a book is document and record in terms of Sections 2(f) and 2(i) and therefore, "information" under Right to Information Act. (Para 20)

In the present case, dispute is not w.r.t. irregularities in valuation of the answer book but is w.r.t. scaling methodology adopted by UPPSC. There is no allegation of irrational, illogical or arbitrary valuation but whole **writ petition is based on ground of methodology of the scaling and on the premise that its adoption has been disapproved by the Supreme Court in Case of *Sanjay Singh*** (infra). (Para 22, 23)

B. Present facts are distinguishable from the Case of *Sanjay Singh* (infra) - The law laid-down in case of *Sanjay Singh* (infra) is on the issue of inconsistency between Rules for appointment of Judicial Officers and the Rules of the Public Service Commission. The ratio is that in absence of anything to the contrary, Rules of 2001 will have supremacy over the Rules of Public Service Commission. (Para 35)

The back drop in which law in case of *Sanjay Singh* (infra) has been laid down is that if Rules do not permit scaling then it cannot be adopted to. Secondly where all the candidates taking up judicial service examination are appearing in common papers then 'Subject variability' being not present, scaling has no application and the SC has held that moderation is a better methodology. (Para 33)

(i) Rule 51, UPPSC Rules, 2011, has provision for adoption of any method, device or formula which is considered proper for the purpose of eliminating variation in the marks awarded to candidates at any examination or interview – Therefore, petitioner's submission, that neither the Act of 1985 nor Rules, 2011 prescribe for any scaling method and in absence of any Rules or the Act, scaling could not been adopted, is not made out. Also, there is no dispute or challenge to validity of Rule 51 of PSC Rules. (Para 11, 34, 36, 49)

(ii) 'Subject Variability' is present - In the present case it is admitted that all the candidates did not appear in the same papers and they had opted for different subjects (Optionals), therefore, Combined State/Upper Subordinate Services (PCS) Examination is different from examination conducted for selection of Civil Judge. (Para 35)

C. Principle of Estoppel - When a candidate appears in an examination without objection and is subsequently found to be not successful a challenge to the process is precluded – Petitioners participated in the selection process and there is specific mention in the scheme as was advertised by the Commission in regard to scaling system, therefore, after being unsuccessful petitioners have no right to challenge the scaling system and they are estopped from challenging the same. (Para 37-41, 49)

D. In absence of any evidence to substantiate the allegations pertaining to resort to scaling of marks, to deprive more meritorious candidates of their legitimate right to be selected, such contention cannot be accepted. (Para 42)

E. In absence of impleadment of selected candidates as parties, petitioners are not eligible to seek desired relief of quashing of the results. (Para 44, 49)

F. The party who invokes the extraordinary jurisdiction of the SC u/Article 32 or of a HC u/Article 226 of the Constitution, is supposed to be truthful, frank and open. He must disclose all material facts without any reservation even if they are against him – It was observed that petitioner nos. 1, 2, 5, 7 and 8 are guilty of suppressing of correct facts. They made an incorrect declaration that no earlier writ petition has been filed by them before the Hon'ble High Court or Lucknow Bench of this Court or any other court of law pertaining to the same cause of action involved in the present writ petition. Whereas, it was observed that they were petitioners in Writ Petition No. 5302 of 2020 claiming the same relief as has been sought in the present writ petition. (Para 15-18, 50-53)

Writ petition dismissed. (E-4)

Precedent followed:

1. Dhananjay Malik Vs St. of Uttranchal, (2018) 4 SCC 171 (Para 38)

2. U.O.I. Vs M. Chandra Shekharan, (1998) 3 SCC 694 (Para 39)

3. Gurmeet Pal Singh Vs St. of Punj. & anr., (2018) 7 SCC 260 (Para 40)

4. Prashant Ramesh Chakkarwar Vs UPSC, (2013) 12 SCC 489 (Para 42)

5. All India State Bank Officers Federation Vs U.O.I., 1990 Supp. SCC 336 (Para 51)

6. Hindustan Transport Corporation Vs St. of U.P., AIR 1984 SC 953 (Para 52)

Precedent distinguished:

1. Sanjay Singh & anr. Vs U.P. Public Service Commission, Allahabad & ors., (2007) 3 SCC 720 (Para 1)

2. UPPSC Vs Subhash Chandra Dixit, (2003) 12 SCC 701 (Para 10)

3. Central Board of Secondary Education & anr. Vs Aditya Bandopadhyay & others, (2011) 8 SCC 497 (Para 11, 20)

Precedent cited:

1. Bhanwar Lal Vs St. of Raj. & anr. (S.B.), Civil Misc. Writ Petition No. 1211 of 2014, decided on 03.03.2014 (Para 9)

2. Manoj Kumar Yadav Vs PPPSC, Civil Appeal No. 2326 of 2011, decided on 16.02.2018 (Para 13)

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

1. Petitioners who admittedly undertook examination in terms of advertisement issued by the UP Public Service Commission on 6.7.2018 for Combined State / Upper Subordinate (PCS) Examination, 2018 and Assistant Conservator of Forest (ACF)/ Range Forest Officer (RFO) Services Examination, 2018, are challenging the selection process on the ground that since scaling method has been adopted, therefore, in the light of the judgment of the Supreme Court in case of **Sanjay Singh and another Vs. U.P. Public Service Commission, Allahabad and others** as reported in **(2007) 3 SCC 720**, selection process has been vitiated. It is prayed that a writ, order or direction in the nature of certiorari quashing the impugned result of PCS-2018 main examination declared on 23.6.2020 by UPPSC, be granted. It is also prayed that UPPSC be directed by issuing a writ, order or direction in the nature of mandamus to declare the result of main exam afresh and calling for records relating to scaling/moderation method applied in PCS-18 main exam. Petitioners have also prayed for the following other reliefs:

(i) Issue a writ, order or direction in the nature of mandamus commanding the respondent no. 2 to provide the descriptions (names, roll no, marks obtained, category etc.) of the selected candidates in the selection list when the final result is declared.

(ii) Issue a writ, order or direction in the nature of mandamus commanding respondent no. 2 to issue the marks sheets (raw marks & scaled marks both) of the petitioners who appeared in main / interview exam after declaring the result as soon as possible within a specified time-frame.

(iii) Issue a writ, order or direction in the nature of mandamus commanding the respondent no. 2 to answer any application submitted under Right to Information Act, in a manner taking into consideration practicality (to fix a reasonable date in order to allow the candidate to inspect his answer scripts of written examination), so that it may not appear that UPPSC takes RTI queries as a burden and a tool to harass candidates.

(iv) Issue any other suitable writ, order or direction in addition to & in supplement to refer the above, as this Hon'ble Court may deems fit and proper in view of the facts and circumstances of the case.

(v) Award the cost of the writ petition to the petitioners.

2. Learned counsel for the petitioners, submits that UP Public Service Commission, Prayagraj (Respondent no. 2) is a constitutional autonomous body and its main duty is to conduct examination for appointment to various services of the State.

3. It is submitted that the general business and functions of UPPSC are

regulated by the provisions of UPPSC (Procedure and Conduct of Business) Rules, 2011 (hereinafter referred to as Rules, 2011) and UP State Public Service Commission (Regulation and Procedure) Act, 1985 (hereinafter referred to as Act, 1985).

4. It is submitted that vacancies were advertised on 6.7.2018 for approximately 984 posts under various categories with the rider of reservation.

5. The examination is to be conducted by the UPPSC in three stages consisting of :- (i) Preliminary Examination (objective type and multiple choice), (ii) Main examination (conventional type) i.e. written examination and (iii) viva voice i.e. personality test / interview.

6. Petitioners case is that they had qualified for the main examination and were issued admit cards after qualifying in preliminary examination. In the main examination, a total of 16738 candidates have been declared qualified to appear in the interview. It is submitted that admittedly petitioners did not pass written (main examination) except for petitioner No. 4, Alok Kumar Singh, who has become eligible to appear in the interview and has been called for interview on 31.7.2020.

7. Petitioners contention is that they were fully hopeful of success in the main examination, but are shocked not to find their names in the list of successful candidates when result for main examination was declared on 23.6.2020.

8. Petitioners contention is that scaling method has been adopted as a result of which candidates whose marks were scaled have been subjected to several anomalies and since marks of petitioner no. 1 were scaled to 934.06 against obtained raw marks of 951 in the Public Service Examination 2011, he could not succeed in the examination.

9. Petitioners have placed reliance on the judgment of Sanjay Singh (supra) and of Rajasthan High Court in case of **Bhanwar Lal Vs. State of Rajasthan & another (S.B. Civil Writ Petition No. 1211 of 2014** (decided on 3.3.2014). By placing reliance on these judgments, it is submitted that so called, scaling formula, that has been used by UPPSC for result processing is unjust, unfair and irrational. It is submitted that, in fact, when scaling system is applied over the raw-marks in optional subject, then it results to, increase or decrease. When the raw-marks are converted into scaled marks, it causes undue disadvantage to candidates who appear in the main examination.

10. Counsel for the petitioner also submits that in case of Sanjay Singh (Supra) Hon'ble Supreme Court has held that application of scaling formula as has been approved in case of **UPPSC Vs. Subhash Chandra Dixit, (2003) 12 SCC 701**, requires reconsideration and it is further observed that scaling system adopted by the Commission leads to irrational results and does not offer a solution for examiner variability arising from strict / liberal valuation.

11. Learned counsel for the petitioners, based on aforesaid material submits that the Commission by not providing raw-marks, under Right to Information Act has violated the ratio of the judgment pronounced by the Hon'ble Supreme Court in case of **Central Board of Secondary Education &another Vs.**

Aditya Bandopadhyay & others as reported in **(2011) 8 SCC 497**, decided on August, 09, 2011. It is submitted that neither the Act of 1985 nor Rules, 2011 prescribe for any scaling method and therefore adoption of scaling procedure to remove examiner variability is against the ratio of judgment of Sanjay Singh case (Supra).

12. It is also submitted that if any Act, Rule or judgment, having force of law, provides something to be done in a particular manner, then it should be done in that manner alone, otherwise not at all.

13. Counsel for the petitioner also submits that the judgment of the Supreme Court rendered in case of **Manoj Kumar Yadav Vs. PPPSC in Civil Appeal No. 2326 of 2011** decided on 16.2.2018 reiterated that UPPSC must form the merit list made on the basis of the marks allotted to candidates as per judgment pronounced in Sanjay Singh's case (Supra).

14. Sri M.N. Singh, learned counsel for the UP Public Service Commission submits that final result has been already declared on 11.9.2020 after conducting the interviews in which admittedly one of the candidates out of the petitioners appeared.

15. It is submitted that petitioners in para-1 of the writ petition has mentioned that the present writ petition is the first writ petition being filed by the petitioners pertaining to the cause of action involved in the writ petition. No earlier writ petition has been filed by the petitioner in this regard before the Hon'ble High Court or the Lucknow Bench of this Court or any other court of law for the same cause of action.

16. He submits that earlier as many as 26 persons had filed Civil Misc. Writ Petition No. 5302 of 2020; Anuj Dwivedi and 25 others Vs. UP Public Service Commission and 2 others praying for issuance of writ, order or direction in the nature of certiorari quashing the result of main written examination of Provincial Civil Services (PCS) Examination-2018 as declared by UP Public Service Commission (UPPSC) and determining the cut off for declaring the list of the candidates eligible to appear in the interview for selection and further prayed to issue any other suitable, writ, order or direction, which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

17. It is submitted that this relief is similar to the prayer clause-1 in the present writ petition. It is pointed that petitioner no. 7 Anuj Dwivedi, S/o Amar Nath Dwivedi, R/o village Manaiya, Manaiya Kachar, District Prayagraj was petitioner no. 1 in Civil Misc. Writ Petition No. 5302 of 2020. Similarly, petitioner no. 8 - Nirmal Kumar Jaiswal, S/o Ram Prasad Jaiswal, R/o Bank Road, Bank Road Chauraha, Prayagraj was petitioner no. 2 in that writ petition. Petitioner no. 1 Alok Kumar Singh, S/o Ajay Pratap Singh is petitioner no. 3 in the said writ petition whereas petitioner no. 2 Shashank Shekhar Singh, S/o Harinarayan Singh is petitioner no. 4 in the said writ petition. Petitioner no. 5 Upendra Kumar Singh, S/o Narendra Pratap Singh, R/o Ward No. 03, Dindayal Nagar, Robertsganj, district Sonebhadra was petitioner no. 9 in the said writ petition and therefore, it is apparent that these petitioners namely petitioner nos. 1, 2, 5, 7 and 8 are guilty of suppressing of correct facts from this Court and therefore this writ petition filed on the basis of incorrect

declaration deserves to be dismissed in regard to these petitioners.

18. It is also submitted that Civil Misc. Writ Petition No. 5302 of 2020 has been dismissed by a coordinate Bench of this Court vide order dated 10.7.2020.

19. As far as another ground which has been urged by learned counsel for the petitioners that petitioners had sought information under the Right to Information Act, in regard to raw/scaled marks, but the respondent authorities have not replied till date, is concerned, there is an elaborate mechanism under the Right to Information Act, 2005 which provides for first appeal and second appeal, and therefore if petitioners are aggrieved by non-compliance of mandate of the Right to Information Act, 2005 then they have statutory remedy under the Act of 2005 itself.

20. Petitioners allegation is that not providing information amounts to violation of law laid down by the Hon'ble Supreme Court in case of Central Board of Secondary Education & another Vs. Aditya Bandopadhyay & others (Supra). Mandate of law is, examinee in a public examination has a right to inspect his evaluated answer book or taking certified copies thereof. Such a book is document and record in terms of Sections (2) (f) and 2 (i) and therefore, "information" under Right to Information Act.

21. Thus the ratio of the law laid-down in case of CBSE Vs. Aditya Bandopadhyaya (Supra) that an examinee is having right to inspect his evaluated answer book and if there are glaring irregularities in the evaluation then that can be made a ground for challenge before the High Court. This right is subject to be read with harmony with exemption and exclusion provision provided under the Right to Information Act.

22. In the present case dispute is not in regard to irregularities in valuation of the answer book but dispute is in regard to scaling methodology adopted by UPPSC (Respondent no. 2) and therefore scaling being a statistical tool and the object of the scaling is to counter variation in standards adopted by different examiners.

23. Thus it is apparent that aspect of scaling has nothing to do with the right of the petitioners to obtain copies of his answer script and as such there is no allegation of irrational, illogical or arbitrary valuation but whole writ petition is based on ground of methodology of the scaling and on the premise that its adoption has been disapproved by the Supreme Court in Case of Sanjay Singh (supra) and therefore UPPSC should be directed to prepare the merit list on the basis of raw-marks.

24. In view of such prayer in the writ petition, this ground of not providing copies under the Right to Information Act looses its steam and therefore the judgment rendered by the Hon'ble Supreme Court in case of CBSE Vs. Aditya Bandopadhyay (Supra) has no relevance to the facts and circumstances of the present case.

25. Third ground which has been taken by the petitioner which is the main limb of the writ petition that respondent no. 2 is not entitled to adopt methodology of scaling in PCS (Provincial Civil Services), 2018 main examination as it promotes mediocrity at the cost of meritorious candidates and this practice has been discarded by Hon'ble Supreme Court in case of Sanjay Singh (Supra).

26. Facts of the case of Sanjay Singh (Supra) are that on the request of Allahabad High Court, UPPSC issued an advertisement on 28.11.2003 to fill up 347 post of Civil Judge (JD) for which 51524 candidates appeared in preliminary examination on 21.3.2004 and the preliminary examination was of objective type consisting of 2 papers - General Knowledge and Law. On 30.6.2004 results were declared and 6046 candidates were declared to be qualified to appear in the main examination which was of "descriptive" (conventional type). Main examination consist of 5 papers, each carrying 200 marks, namely, General Knowledge, Language, Law-1, Law-2 and Law-3. In fact, 5748 candidates took the examination and thereafter 1290 candidates were interviewed and the UPPSC declared the final result on 1.5.2005 based on the aggregate of scaled marks.

27. The unsuccessful candidates challenged the selection process contending that the statistical scaling method adopted by the Commission is illegal and is contrary to the Uttar Pradesh Judicial Services Rules, 2001 (for short Judicial Services Rules) . They contended that conversion of their raw-marks into scaled marks, is illegal as it was done by applying arbitrary, irrational and inappropriate scaling formula. Therefore argument before the court was that scaling has resulted in meritorious students being ignored and less meritorious students being awarded higher marks and selected thereby violating the fundamental rights of the candidates.

28. The Supreme Court framed as many as 4 issues namely :-

(i) Whether the writ petitions are not maintainable?

(ii) Whether "scaling" of marks is contrary to or prohibited by the relevant Rules?

(iii) Whether the "scaling system" adopted by the Commission is arbitrary and irrational, and whether the decision in case of S.C. Dixit approving the "scaling system" requires reconsideration?

(iv) If the statistical scaling system is found to be illegal or irrational or unsound, whether the selections already made, which are the subject-matter of these petitions, should be interfered with?

29. As far as question no. 2 is concerned, in para-18, the Supreme Court drew comparison between Rule 20 (3) of UP Judicial Services Rules along with Note (i) of Appendix-II and Rule 51 of PSC Procedure Rules and noted that since field of appointment of Civil Judge is occupied by Rule 20(3) and note (i) of Appendix-II of the Judicial Service Rules, they will prevail over the general provisions in Rule, 51 of the PSC procedure Rules and in this back drop it is held that the scaling system adopted by the UPPSC contravenes Rules 20(1) so also Rule 20(3) and Note (i) of Appendix II which specifically refers "to the marks finally awarded to each candidates in the written examination" and held that this implies that marks awarded by the examiner can not be altered by scaling.

30. While answering question no. 3 regard to validity of the decision of the Supreme Court in case of UPPSC Vs. Subhash Chandra Dixit and others (Supra), also a case of appointment of Civil Judge (JD) which approved the scaling system, the Supreme Court did not approve the ratio of the judgment of the SC Dixit (Supra) which upheld scaling on two conclusions namely (i) that the scaling

formula was adopted by the Commission after an expert study and in such matter, the Court will not interfere unless it is proved to be arbitrary and unreasonable, and (ii) scaling system adopted by the Commission eliminated the inconsistency arising on account of examiner variability, differences due to evaluation by strict examiners and liberal examiners on the ground that the Supreme Court in case of Sanjay Singh (Supra) found after an examination of the manner in which scaling system has been introduced and the effect thereby on the present examination, that the system is not suitable. In this back drop the Supreme Court held that "neither of the two assumptions made in SC Dixit case can validly continue to apply to the type of the examination with which we are concerned. We are, therefore of the view that the approval of the scaling system in SC Dixit is no longer valid".

31. These findings are based on appreciation of the material before the Supreme Court in regard to which following relevant paragraphs of judgment in case of Sanjay Singh (Supra) needs to be reproduced so the throw light on the material on the basis of which conclusion has been drawn in regard to question no. 3.

"25. A. Edwin Harper Jr. & V Vidya Sagar Misra in their publication "Research on Examinations in India" have tried to explain and define scaling. We may usefully borrow the same. A degree 'Fahrenheit' is different from a degree 'Centigrade'. Though both express temperature in degrees, the 'degree' is different for the two scales. What is 40 Degrees in Centigrade scale is 104 Degrees in Fahrenheit scale. Similarly, when marks are assigned to answer-scripts in different papers, say by Examiner 'A' in Geometry and Examiner 'B' in History, the meaning or value of the 'mark' is different. Scaling is the process which brings the mark awarded by Examiner 'A' in regard to Geometry scale and the mark awarded by Examiner 'B' in regard to History scale, to a common scale. Scaling is the exercise of putting the marks which are the results of different scales adopted in different subjects by different examiners into a common scale so as to permit comparison of inter se merit. By this exercise, the raw marks awarded by the examiner in different subjects is converted to a 'score' on a common scale by applying a statistical formula. The 'raw marks' when converted to a common scale are known as the 'scaled marks'. Scaling process, whereby raw marks in different subjects are adjusted to a common scale, is a recognized method of ensuring uniformity inter se among the candidates who have taken examinations in different subjects, as, for example, the Civil Services Examination.

26. The Union Public Service Commission ('UPSC' for short) conducts the largest number of examinations providing choice of subjects. When assessing inter se merit, it takes recourse to scaling only in civil service preliminary examination where candidates have the choice to opt for any one paper out of 23 optional papers and where the question papers are of objective type and the answer scripts are evaluated by computerized/ scanners. In regard to compulsory papers which are of descriptive (conventional) type, valuation is done manually and scaling is not resorted to. Like UPSC, most examining authorities appear to take the view that moderation is the appropriate method to bring about uniformity in valuation where several examiners manually evaluate answer-scripts of descriptive/ conventional type question

papers in regard to same subject; and that scaling should be resorted only where a common merit list has to be prepared in regard to candidates who have taken examination of different subjects, in pursuance of an option given to them.

27. But some Examining Authorities, like the Commission are of the view that scaling can be used, not only where there is a need to find a common base across different subjects (that is bringing the performance in different subjects to a common scale), but also as an alternative to moderation, to reduce examiner variability (that is where different examiners evaluate answer scripts relating to the same subject).

30. We may at this stage refer to the condition to be fulfilled, for scaling to be effective. For this purpose, we are referring to passages from the Authors/Experts relied on by the Commission itself.

30.1) A. Edwin Harper & Vidya Sagar Misra (in 'Research on Examinations in India) make it clear that scaling will be useful and effective only if the distribution of marks in the batch of answer scripts sent to each examiner is approximately the same as the distribution of marks in the batch of answer scripts sent to every other examiner.

30.2) A similar view is expressed by J.P. Guilford & Benjamin Fruchter (in their treatise 'Fundamental Statistics in Psychology and Education' page 476-477). They say that two conditions are to be satisfied to apply scaling :

(i) The population of students from which the distributions of scores arose must be assumed to have equal means and dispersions in all the abilities measured by the different tests; and (ii) the form of distribution, in terms of skewness and kurtosis, must be very similar from one ability to another. He proceeds to refer to the disadvantages of scaling thus :

"Unfortunately, we have no ideal scales common to all these tests, with measurements which would tell us about these population parameters. Certain selective features might have brought about a higher mean, a narrower dispersion, and a negatively skewed distribution on the actual continuum of ability measured by one test, and a lower mean, a wider dispersion, and a symmetrical distribution on the continuum of another ability represented by another test. Since we can never know definitely about these features for any given population, in common scaling we often have to proceed on the assumption that actual means, standard deviations, and form of distribution are uniform for all abilities measured. In spite of these limitations, it is almost certain that derived scales provide more nearly comparable scales than do raw scores."

30.3) V. Natarajan & K. Gunasekaran in their treatise 'Scaling Techniques what, why and how', have warned :

"If one studies the literature in this field, he can find that there are a number of methods available ranging from simple to complex. Each has its own merits and demerits and can be adopted only under certain conditions or making certain assumptions."

The Authors describe the Linear Standard Score method (which is used by the Commission) thus :

"Unlike Z-score (Standard score) which has a mean of 'zero' and standard deviation 'one', the linear standard score has some pre-determined mean and standard deviations.

The choice of the mean and standard deviations is purely arbitrary. Each has its own advantages and disadvantages and useful for specific

purpose only. It may be emphasized here that both the standard scores and linear standard scores retain the shape of the original distribution of raw marks. Therefore, if the original distribution is 'normally' distributed, then any type of Linear Standard Scores will also be 'normally' distributed. Taking the Normal Curve as the model, various points in other scales are plotted. It should be, however, noted that the kind of relationship shown in Figure -2 between normal curve vis-`-vis the other scores are valid only if the raw score distribution can be assumed to approximately normally distributed. (emphasis supplied).

30.4) The Kothari Report, 1976 ('Policy & Selection Methods' published by UPSC) while referring to scaling in regard to papers in different subjects, by using appropriate statistical techniques as a recognized procedure for improving the reliability of examination as a tool for selection, however cautions that the method should be under continuous review and evaluation, that continuing improvement in the light of experience and new developments, taking into account advancement of knowledge, is essential.

45. We may now summarize the position regarding scaling thus:

(i) Only certain situations warrant adoption of scaling techniques.

(ii) There are number of methods of statistical scaling, some simple and some complex. Each method or system has its merits and demerits and can be adopted only under certain conditions or making certain assumptions.

(iii) Scaling will be useful and effective only if the distribution of marks in the batch of answer scripts sent to each examiner is approximately the same as the distribution of marks in the batch of answer scripts sent to every other examiner.

(iv) In the Linear Standard Method, there is no guarantee that the range of scores at various levels will yield candidates of comparative ability.

(v) Any scaling method should be under continuous review and evaluation and improvement, if it is to be a reliable tool in the selection process.

(vi) Scaling may, to a limited extent, be successful in eliminating the general variation which exists from examiner to examiner, but not a solution to solve examiner variability arising from the 'hawk-dove' effect (strict/liberal valuation)."

32. Thus ratio of the law is that marks are assigned to answer script in different papers in different subjects by different examiners. Scaling process uses its variability by bringing the marks in different subjects to common scale by applying a statistical formula which is :

Formula

Z=Overall Combined Mean + X-MOverall combined SD SD

Z = is the scaled Score
X = is the Raw marks (actual Marks)
SD = is the standard deviation.
M = is the mean of Raw Marks of the Subject/ Examiner (as the case may be)

33. Thus the back drop in which law in case of Sanjay Singh (Supra) has been laid down is that if Rules do not permit scaling then it cannot be adopted to. Secondly where all the candidates taking up judicial service examination are appearing in common papers then as per publication by *A. Edwin Harper & Vidya Sagar Misra (in 'Research on Examinations*

in India) Subject variability being not present scaling has no application and the Supreme Court has held that moderation is a better methodology.

34. In the present case it is evident from discussion made in para-18 of the judgment of Sanjay Since Case (Supra) that PCS examination in which petitioners had appeared is covered by PSC Procedures Rules and there is provision in Rule 51 for adoption of any method, device, or formula which they consider proper for the purpose so to eliminate variation in the marks awarded to candidates at any examination or interview.

35. In the present case it is admitted that all the candidates did not appear in the same papers and they had opted for different subjects (Optionals), therefore, Combined State/ Upper Subordinate Services (PCS) Examination is different from examination conducted for selection of Civil Judge. Secondly unlike Civil Judge selection where provisions of Judicial Service Rules are applicable and there is a specific provision in Rule 20 (3) as to method of and the basis of preparation of final list of selected candidates, this being totally different from Rule 51 of PSC Procedure Rule, ratio of law laid down in case of Sanjay Singh (Supra) overruling the judgment of SC Dixit (Supra) being in specific context of Civil Judge (JD) selection, which is governed by the Judicial Service Rules, will not be helpful to the petitioners in stricto sensu. Thus necessarily the law laid-down in case of Sanjay Singh (Supra) is on the issue of inconsistency between Rules for appointment of Judicial Officers and the Rules of the Public Service Commission. The ratio is that in absence of anything to the contrary, Rules of 2001 will have supremacy over the Rules of Public Service Commission.

36. This discussion leads to another aspect, that petitioners, submission in absence of any Rules or the Act, scaling could not have been adopted, is not made out. It is apparent that such contention deserves to be rejected and is hereby rejected in view of availability of Rule 51 as has been extracted in case of Sanjay Singh (Supra).

37. A careful perusal of the advertisement issued by the Commission on 6.7.2018, Annexure-1 to the writ petition reveals that under the head "important instructions for candidates:" "(15) scaling system will remain applicable in the optional subjects of the main (written) examination", makes it abundantly clear that petitioners were aware of the fact, even before filling of forms for preliminary examination, that scaling system will be applicable in the optional subjects of the Main Written examination. Therefore, after they have participated in the examination, demanding change of the Rule and saying that adoption of scaling is arbitrary amounts to demanding the change of Rules after the game has began and the petitioners have participated by appearing both in the preliminary examination (successful) and in the main examination unsuccessfully (except for one successful candidate).

38. Thus now petitioners are estopped from challenging the selection criteria as has been held in case of **Dhananjay Malik Vs. State of Uttranchal, (2008) 4 SCC 171** wherein it has been held that "if petitioners had any valid objection to the terms and conditions of the advertisement then they should have challenged the

selection process without participating in the same.

39. Similarly in case of **Union of India Vs. M. Chandra Shekharan, (1998) 3 SCC 694**, it has been held that "Principle of estoppel will apply to candidates who appeared in the DDC after being made aware of the procedure for promotion before they sat for the written test and appeared in the interview and such candidates on not being selected, are not permitted to turn around and contend that the marks prescribed for interview and confidential reports were disproportionately high or that the authorities seeking fixed minimum marks to be secured either at the interview or in the evaluation of the confidential report.

40. Similarly in case of **Gurmeet Pal Singh Vs. State of Punjab and another, (2018) 7 SCC 260**, it is held by the Supreme Court that the advertisement was not challanged by any of the appellants, it is a well-settled principle of law that when a candidate appears in an examination without objection and is subsequently found to be not successful a challenge to the process is precluded. In a recent judgment in Ashok Kumar Vs. State of Bihar, this principle has been re-emphasised by referring to the earlier judgments on this point starting from Chandra Prakash Tiwari Vs. Shakuntala Shukla. Thus, undoubtedly the appelants not having challenged the advertisement at the relevant point of time, cannot be permitted to contend that having not made a mark in the cut-off for the select list, something must be done to somehow accommodate them.

41. Admittedly, petitioners participated in the selection process and there is specific mention in the scheme as was advertised by the Commission in regard to scaling system, therefore, after being unsuccessful petitioners have no right to challenge the scaling system and they are estopped from challenging the same.

42. In case of **Prashant Ramesh Chakkarwar Vs. UPSC** as reported in **(2013) 12 SCC 489**, the Supreme Court has held that "in absence of any evidence to substantiate the allegations pertaining to resort to scaling of marks, to deprive more meritorious candidates of their legitimate right to be selected, such contention rejected". It has been held that mere fact that some candidates who cleared preliminary examination could not pass main examination, cannot lead to an inference that method of moderation adopted by the Commission was faulty.

43. In case of Prashant Ramesh Chakkarwar (Supra), the Supreme Cout has approved the judgment of Delhi High Court and has held that in case of Sanjeev Singh Case (Supra), the court was called upon to decide the legality of the method of scaling adopted. Dehors the above conclusion, we are convinced that the impugned order does not suffer from any legal infirmity. In Sanjay Singh's case, the Court was called upon to decide the legality of the method of scaling adopted by the U.P. Public Service Commission for recruitment to the posts of Civil Judge (Junior Division). After examining various facets of the method adopted by the U.P. Public Service Commission and taking cognizance of the earlier judgment in U.P. Public Service Commission v. Subhash Chandra Dixit (supra), the three Judge Bench observed: (sanjay singh case , SCC pp.738-42,paras 20,23,&26)

"We cannot accept the contention of the Petitioner that the words "marks

awarded" or "marks obtained in the written papers" refer only to the actual marks awarded by the examiner, "Valuation" is a process which does not end on marks being awarded by an examiner. Award of marks by the examiner is only one stage of the process of valuation. Moderation when employed by the examining authority, becomes part of the process of valuation and the marks awarded on moderation become the final marks of the candidate. In fact Rule 20(3) specifically refers to the "marks finally awarded to each candidate in the written examination", thereby implying that the marks awarded by the examiner can be altered by moderation."

Thus it is apparent that Sanjeev Singh case (Supra) is to be read in the context of the Rules of 2001` and it cannot be read in isolation.

44. Another facet though not argued is that whether the petitioners are entitled to claim the desired relief without impleading the selected candidates as parties. If entire selection is to be quashed then opportunity of hearing is to be given to those who have been selected and appointed in different cadres, leads to conclusion, that, petitioners were obliged to implead those selected candidates as party whose results were declared on 11.9.2018 and admittedly this writ petition was taken up for hearing on 23.9.2020. In absence of such impleadment, petitioners are not eligible to seek desired relief of quashing of the results.

45. Similarly the Supreme Court dealt with the issue of plea of the petitioners in regard to disclosing certain information like showing evaluated answer books to candidates and the problems which arises in the process. These problems are enumerated in the judgment are as under:

B) PROBLEMS IN SHOWING EVALUATED ANSWER-BOOKS TO CANDIDATES

(i) Final awards subsume earlier stages of evaluation. Disclosing answer-books would reveal intermediate stages too, including the so-called 'raw marks' which would have negative implications for the integrity of the examination system, as detailed in Section (C) below.

(ii) The evaluation process involves several stages. Awards assigned initially by an examiner can be struck out and revised due to (a) Totalling mistakes, portions unevaluated, extra attempts (beyond prescribed number) being later corrected as a result of clerical scrutiny (b) The Examiner changing his own awards during the course of evaluation either because he/she marked it differently initially due to an inadvertent error or because he/she corrected himself/ herself to be more in conformity with the accepted standards, after discussion with Head Examiner/ colleague Examiners (c) Initial awards of the Additional Examiner being revised by the Head Examiner during the latter's check of the former's work (d) The Additional Examiner's work, having been found erratic by the Head Examiner, been re-checked entirely by another Examiner, with or without the Head Examiner again re-checking this work.

(iii) The corrections made in the answer-book would likely arouse doubt and perhaps even suspicion in the candidate's mind. Where such corrections lead to a lowering of earlier awards, this would not only breed representations/grievances, but would likely lead to litigation. In the only evaluated answer book that has so far been shown to a candidate (Shri Gaurav Gupta in WP 3683/2012) on the orders of the High Court, Delhi and that too, with the marks assigned masked; the candidate has

nevertheless filed a fresh WP alleging improper evaluation.

(iv) As relative merit and not absolute merit is the criterion here (unlike academic examinations), a feeling of the initial marks/revision made being considered harsh when looking at the particular answer-script in isolation could arise without appreciating that similar standards have been applied to all others in the field. Non-appreciation of this would lead to erosion of faith and credibility in the system and challenges to the integrity of the system, including through litigation.

(v) With the disclosure of evaluated answer-books, the danger of coaching-institutes collecting copies of these from candidates (after perhaps encouraging/inducing them to apply for copies of their answer-books under the RTI Act) is real, with all its attendant implications.

(vi) With disclosure of answer-books to candidates, it is likely that at least some of the relevant Examiners also get access to these. Their possible resentment at their initial awards (that they would probably recognize from the fictitious code numbers and/ or their markings, especially for low-candidature subjects) having been superseded (either due to inter-examiner or inter-subject moderation) would lead to bad blood between Additional Examiners and the Head Examiner on the one hand, and between Examiners and the Commission, on the other hand. The free and frank manner in which Head Examiners, for instance, review the work of their colleague Additional Examiners, would likely be impacted. Quality of assessment standards would suffer.

(vii) Some of the optional Papers have very low candidature (sometimes only one), especially the literature papers. Even if all Examiners' initials are masked (which too is difficult logistically, as each answer-book has several pages, and examiners often record their initials and comments on several pages-with revisions/ corrections, where done, adding to the size of the problem), the way marks are awarded could itself be a give-away in revealing the examiner's identity. If the masking falters at any stage, then the examiner's identity is pitilessly exposed. The 'catchment area' of candidates and Examiners in some of these low-candidature Papers is known to be limited. Any such possibility of the Examiner's identity getting revealed in such a high-stakes examination would have serious implications-both for the integrity and fairness of the Examination system and for the security and safety of the Examiner. The matter is compounded by the fact that we have publicly stated in different contexts earlier that the Paper-setter is also generally the Head Examiner.

(viii) UPSC is now able to get some of the best teachers and scholars in the country to be associated in its evaluation work. An important reason for this is no doubt the assurance of their anonymity, for which the Commission goes to great lengths. Once disclosure of answer-books starts and the inevitable challenges (including litigation) from disappointed candidates starts, it is only a matter of time before these Examiners who would be called upon to explain their assessment/award, decline to accept further assignments from the Commission. A resultant corollary would be that Examiners who then accept this assignment would be sorely tempted to play safe in their marking, neither awarding outstanding marks nor very low marks-even where these are deserved. Mediocrity would reign supreme and not only the prestige, but the very integrity of the system would be compromised markedly.

46. These problems have been accepted as challenge before the Commission authorities, which prevents them from showing the answer books.

47. At this stage and in this back drop Sri M.N. Singh, learned counsel for the Commission submits that orders passed in Writ A No. 5302 of 2020 is when tested on aforesaid yardsticks then even that mandate cannot be enforced in absence of any specific Rule being brought on record in the light of the law laid down in case of Prashant Ramesh Chakkarwar (Supra).

48. This argument does not call for any pronouncement in asmuch as it is always open to the Commission to seek review of the order passed in Writ A No. 5302 of 2020.

49. Thus on due appreciation of the facts and law on the subject, I am of the opinion that the petitioners are not entitled to the relief claimed by them as firstly they are estopped from claiming such relief for the reasons mentioned above. Secondly, facts of Sanjay Singh's case (Supra) being different are not applicable to the facts and circumstances of the present case especially when there is no dispute or challenge to validity of Rule 51 of PSC Rules. Thirdly petitioners are not entitled to claim quashing of the results already declared in absence of impleadment of successful candidates. Therefore the writ petition deserves to be dismissed and is dismissed.

50. However, before directing consignment of the petition to the record room, it will be appropriate to again refer to the undertaking / declaration made by the petitioners in para-1 of the writ petition. Viz that, the present writ petition is the first writ petition being filed by the petitioner pertaining to the cause of action involved in the writ petition. No earlier writ petition has been filed by the petitioners in this regard before this Hon'ble Court or the Lucknow Bench of this Hon'ble Court or any other court of law for the same cause of action. Since petitioner nos, 1, 2, 5, 7 and 8 namely

(i) Alok Kumar Singh, S/o Ajay Pratap Singh.

(ii) Shashank Shekhar Singh, S/o Harinarayan Singh.

(iii) Upendra Kumar Singh, S/o Narendra Pratap Singh.

(iv) Anuj Dwivedi, S/o Amar Nath Dwivedi and

(v) Nirmal Kumar Jaiswal, S/o Ram Prasad Jaiswal

were petitioners in Writ Petition No. 5302 of 2020 claiming the same relief as has been sought in the present writ petition and as has been submitted by the learned counsel for respondent no. 2, that writ petition is not maintainable on the ground of suppression and making incorrect submission before the High Court by furnishing a false declaration having been proved from the record. The jurisdiction of the High Court under Article 226 of the Constitution is extraordinary, equitable and discretionary. Prerogative writs mentioned therein may be issued for doing substantial justice. It is, therefore, of utmost necessity that the petitioner approaching the writ court must come with clean hands, put forward all the facts before the court without concealing or suppressing anything and seek an appropriate relief. If there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the court, his petition may be dismissed at the threshold without considering the merits of the claim..

The underlying object has been succinctly stated by Scrutton, L.J., in R. v. Kensington Income Tax Commissioners (1917) 1 KB 486: 86 LJ KB 257: 116 LT 136, in the following words:

" [I]t as been for many years the rule of the Court, and one which it is of the greatest importance to maintain, that when an applicant

comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts - facts, not law. He must not misstate the law if he can help it - the Court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the Court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the Court will set aside any action which it has taken on the faith of the imperfect statement."

51. In India in case of ***All India State Bank Officers Federation vs. Union of India, 1990 Supp. SCC 336***, it has been held that the party who invokes the extraordinary jurisdiction of the Supreme Court under Article 32 or of a High Court under Article 226 of the Constitution, is suppose to be truthful, frank and open. He must disclose all material facts without any reservation even if they are against him. He cannot pick and choose the facts he likes to disclose and to suppress (keep back) or not to disclose (conceal) other facts. The very basis of the writ jurisdiction rests in disclosure of true and complete (correct facts). It is also held that if material facts are suppressed or distorted, the very functioning of the writ courts and exercise would become impossible.

52. In case of ***Hindustan Transport Corporation vs. State of Uttar Pradesh*** as reported in ***AIR 1984 SC 953***, it has been held that non-disclosure and suppression will not only invite rejection of the petition, but over and above, dismissing the petition, the Court may direct the petitioner to pay heavy costs also.

53. In view of the aforesaid discussion, present writ petition needs to be dismissed with cost of Rs. 10,000/- against each of the above named five petitioners whose roll numbers and registration numbers are mentioned in para-10 of the writ petition which are as under:-

Petitioners Name	Roll No.	Registration No.
1. Alok Kumar Singh	516103	10600934061
2. Shashank Shekhar Singh	512868	10601817318
3.Upendra Kumar Singh	298786	10601824071
4 Anuj Dwivedi	303262	10603846527
5. Nirmal Kumar Jaiswal	428234	10603062851

54. The above named petitioners are directed to deposit the cost within 30 days before the High Court Legal Services Authority, failing which Registrar General shall direct the Collector of the concerned district where the concerned petitioners are residing to recover the cost as arrears of land revenue from the petitioners.

In view of the above, the writ petition is dismissed.

(2020)10ILR A409
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.09.2020

BEFORE
THE HON'BLE VIVEK AGARWAL, J.

WRIT - A No. 6792 of 2020

Rama Shanker Prasad ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Shantanu Khare, Sri Ashok Khare, Sri Siddharth Khare

Counsel for the Respondents:
C.S.C., Sri Sandeep Kumar Agrahari, Sri Vinod Kumar Upadhyay, Sri Radha Kant Ojha, Sri Harish Chandra Dubey

A. Service Law –U.P. Secondary Education Services Selection Board Rules, 1998 - Rule 10, 14 - Uttar Pradesh Secondary Education (Services Selection Boards) Act, 1982 - Section 2 - Process of selection/Promotion - Violation of principles of natural justice and not providing complete opportunity of hearing is not germane in cases where there is clear infraction of the statutory provisions. (Para 22)

Where a benefit is obtained by committing fraud, the Authorities are not obliged to comply with the principles of natural justice before cancelling the advantage obtained by such fraud. (Para 23, 24)

In the present case, it is apparent that the benefit of promotion was obtained by committing fraud in collusion with the Management Committee and in violation of the statutory rules and regulations. The act of the Management Committee in favouring the petitioner is fraught with illegalities and irregularities, therefore, cancellation of such promotion order cannot be faulted on the ground of violations of principles of natural justice saying that petitioner was not given full opportunity of hearing before passing of the impugned order. (Para 25)

B. Definition of 'year of recruitment' read with the provisions contained in Rule 14(1) - S. 2(1) of the Act of 1982, defines 'year of recruitment', as a period of 12 months commencing from first day of July of a Calendar year, therefore as per facts, both the posts, that of Lecturer in Physics and Lecturer in Sanskrit which respectively fell vacant on 31.8.2019 and 20.9.2019 actually became available in the same 'year of recruitment'. Therefore, the argument that since post of Lecturer, Physics had fallen vacant at an earlier point of time has no meaning in terms of the definition of 'year of recruitment', which is when read with the provisions contained in Rule 14(1), makes it apparent that any vacancy which has occurred during the same recruitment year, is to be considered together for being filled up by promotion and for that purpose all teachers, working in trained graduates Grade or certificate of teaching Grade possessing the prescribed qualification for the post and having completed five years continuous service as such on the first day of the year of recruitment, are to be considered. (Para 15)

From the perusal of the impugned order dated 23.07.2020, Court observed that Sri Mahtab Ahmad is senior to the petitioner and, therefore his name should have been recommended for promotion to the post of Lecturer, Sanskrit to fill the vacancy of a Lecturer under 50% quota prescribed for promotion. (Para 18, 20)

Writ petition dismissed. (E-4)

Precedent followed:

1. U.P. Junior Doctors' Action Committee Vs B. Sheetal Nandwani (Dr.), AIR 1991 SC 909 (Para 23)

2. U.O.I. Vs. O. Chakradhar, (2002) 3 SCC 146 (Para 24)

Precedent distinguished:

1. Pati Ram Pal Vs District Inspector of Schools & ors., 1993 (1) UPLBEC 319 (Para 9, 21)

2. B.P. Tripathi Vs St. of U.P. & ors., 1985 UPLBEC 669 (Para 10, 21)

Present petition challenges order dated 23.07.2020, by which the petitioner's promotion has been set aside.

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

1. Heard Sri Ashok Khare, learned Senior Advocate assisted by Sri Siddharth Khare for the petitioner and Sri Radha Kant Ojha, learned Senior Advocate assisted by Sri Harish Chandra Dubey for the respondent no.5.

2. Petitioner who is a Assistant Teacher in L.T. Grade, a post on which he was appointed on 03.12.2010 on the recommendations of the U.P. Secondary Education Services Selection Board and was recommended to be appointed in the Balmiki Inter College, Balua, District-Chandauli has filed this petition mentioning therein that he possesses a Post-graduate Degree in physics and is fully qualified for holding the post of Lecturer in Physics.

3. It is submitted that there are 10 sanctioned post of Lecturer in the Balmiki Inter College, Balua. In the year 2019, the U.P. Secondary Services Selection Board (hereinafter referred to as "Board') notified the select list of Principals of privately managed aided Institutions. In the select list published by the Board, two Lecturers of the Balmiki Inter College, Balua namely Virednra Pratap Tiwari, Lecturer in Sanskrit and Ashok Kumar Singh, Lecturer in Physics were selected for appointment as Principal of different Institutions. It is submitted that Sri Ashok Kumar Singh, Lecturer in Physics joined at his place of posting as Principal on 31.08.2019 while Sri Virendra Pratap Tiwari joined at his place of posting as Principal on 20.09.2019.

4. It is submitted that since vacancy in the cadre of Lecturer in the subject of Physics had occurred on 31.08.2019, therefore, petitioner being the senior most Assistant Teacher in L.T. Grade possessing requisite qualifications for promotion to the post of Lecturer in Physics should have been promoted and to this effect petitioner had moved an application before the College-Authority, therefore when the Committee of Management convened its Meeting on 19.01.2020 it passed a Resolution recommending the name of the petitioner for promotion to the post of Lecturer, Physics, copy of such resolution is enclosed as Annexure-2.

5. It is petitioner's case that when the Resolution passed by the Committee of Management was forwarded to the District Inspector of Schools for onward transmission to Regional Promotion Committee, then vide communication dated 19.05.2020, District Inspector of Schools, Chandauli raised various objections which were duly replied by the Management vide reply dated 29.05.2020. Thereafter, according to the petitioner, Joint Direction of Education, Varanasi Region, Varanasi, vide order dated 05.06.2020 approved the proposed promotion of the petitioner as a result of which, the District Inspector of Schools informed the Management of Balmiki Inter College to pass orders of promotion for the petitioner as Lecturer, Physics and accordingly the Management of the College had issued appointment order dated 08.06.2020 in favour of the petitioner and accordingly petitioner had joined on the post of Lecturer, Physics on 08.06.2020.

6. It is submitted that a communication was sent by the former M.L.C. who has been impleaded as respondent no.6 addressed to the Joint Director of Education, 5th Mandal, Varanasi highlighting the irregularities in the promotion process when District Inspector of Schools, taking cognizance of such communication asked the Management of the Inter College to submit its explanation along with all the relevant documents.

7. To this D.O. letter, reply was furnished by the College Management pointing out that Ashok Kumar Singh was appointed on the vacant temporary post on

11.01.1996 and he continued to work upto 31.08.2019. He was paid salary in terms of the orders of the High Court. It is mentioned that on 01.09.2019 when the post of Lecturer, Physics became vacant, then promotion of the petitioner was made under the prescribed 50% quota for promotion.

8. It is petitioner's contention that thereafter, vide order dated 22.06.2020, it was proposed to cancel the promotion of the petitioner and thereafter vide order dated 23.07.2020, promotion of the petitioner has been set aside.

9. Petitioner's contention is that since the post of Lecturer, Physics had fallen vacant on 31.08.2019 and that of the Lecturer, Sanskrit on 20th September, 2019, therefore, in terms of the provisions contained in Rule 14 of the U.P. Secondary Education Services Selection Board Rules, 1998 (hereinafter referred to as "1998' Rule), case of the petitioner was considered and he was promoted. It is submitted that petitioner's case is identical to the judgment of Division Bench of this Court in case of ***Pati Ram Pal*** *Vs.* ***District Inspector of Schools and others*** as reported in ***1993 (1) UPLBEC 319*** wherein, referring to the provisions contained in U.P. Intermediate Education Act, 1921 and the regulations framed under Chapter 2 and more specifically Regulation 6(1) which provides that if the vacancy of L.T. Grade teacher is caused by promotion and the promoted teacher was teaching Hindi then it is not necessary that the post be filled by promoting only Hindi teachers.

10. Similarly, reliance has been placed on the judgement of Division Bench of this Court in case of ***B.P. Tripathi*** Vs. ***State of U.P.*** **and others** as reported in ***1985 UPLBEC 669*** wherein, it has been held, again in reference to, U.P. Intermediate Education Act, 1921 and Regulation 6(1) and 6(5) that even if the vacancy occurred due to death of teacher teaching English and Hindi, yet for filling the vacancy, all teachers eligible for being promoted may be considered and it is not necessary that teachers teaching that particular subject only be considered.

11. In view of such facts, learned counsel for the petitioner submits that impugned order is arbitrary and discriminatory and in fact, the decision has been taken ex parte. It is also submitted that since the vacancy of Lecturer in Physics came into existence, first in point of time i.e. on 31.08.2019 in contrast to the vacancy of the Lecturer in Sanskrit which arose on 20th September, 2019 i.e. on a subsequent date, therefore, the post of Lecturer falling vacant, 1st in time was required to be filled by promotion. Thus, the decision of the Management Committee to fill that first post through promotion cannot be faulted with.

12. In fact, learned counsel for the petitioner during the course of argument has placed weightage on this argument only that since the vacancy of Lecturer in Physics arose first in time, therefore, the decision of the Management to fill it through promotion cannot be faulted with.

13. On the other hand, learned counsel for the respondents has drawn attention of this Court to the definitions mentioned in Section 2, of the Uttar Pradesh Secondary Education (Services Selection Boards) Act, 1982 and submits that as per Section 2(l), "year of recruitment', means a period of 12 months commencing from first day of July of a

Calender year. He submits that it is not the date on which a vacancy occurs which is to be given preference but it is the year of recruitment during which a particular vacancy/vacancies arise which are relevant for the purposes of the Act of 1982 and the Rules of 1998.

14. Learned counsel for the respondent, therefore, submits that Rule 10 of the Rules of 1998 in Clause-B provides that vacancies of Lecturer Grade are to be filled, 50% by direct recruitment; and 50% by promotion from amongst substantively appointed teachers of the trained graduate Grade. Thus, there is no illegality in the impugned order dated 23.07.2020.

15. After hearing arguments of learned counsel for respective parties and going through the material available on record, it is evident that the fact of the matter is that Section 2(l) of the Act of 1982, defines "year of recruitment', as a period of 12 months commencing from first day of July of a Calender year, therefore, both the posts that of Lecturer in Physics and Lecturer in Sanskrit which respectively fall vacant on 31.08.2019 and 20.09.2019 actually became available in the same "year of recruitment'. Therefore, the first argument that since post of Lecturer, Physics had fallen vacant at an earlier point of time has no meaning in terms of the definition of the "year of recruitment', which is when read with the provisions contained in Rule 14(1), then it is apparent that any vacancy which has occurred during the same recruitment year then, they are to be considered together for being filled up by promotion for which purpose all teachers working in trained graduates Grade or certificate of teaching Grade possessing the prescribed qualification for the post and having completed five years continuous service as such on the first day of the year of recruitment are to be considered for promotion to the Lecturers Grade.

16. For ready reference Rule 14 of the Rules of 1998 is reproduced here-in-under:-

Rule 14 of the Rules of 1998 provides a procedure for recruitment by promotion and Rule 14(1)(2)&(3) reads as under:-

"14. Procedure for recruitment by promotion. *-(1) Where any vacancy is to be filled by promotion, all teachers working in Trained graduates grade or Certificate of Teaching grade, if any, who possess the qualifications prescribed for the post and have completed five years continuous regular service as such on the first day of the year of recruitment shall be considered for promotion to the Lecturers grade or the Trained graduates grade, as the case may be, without their having applied for the same.*

Note. *- For the purposes of this sub-rule, regular service rendered in any other recognised institution shall be counted for eligibility, unless interrupted by removal, dismissal or reduction to a lower post.*

(2) The criterion for promotion shall be seniority subject to the rejection of unfit.

(3) The Management shall prepare a list of teachers referred to in sub-rule (1), and forward it to the Inspector with a copy of seniority list, service records, including the character rolls, and a statement in the pro forma given in Appendix 'A'."

17. This when sub-rule 2 of Rule 14 is read, it implies that a list of all the Lecturers in different subjects working in

the College is to be prepared in the order of seniority and promotion is to be granted on the basis of seniority in the feeder cadre subject to the rejection of unfit.

18. As is evident from the order dated 23.07.2020 that Sri Mahtab Ahmad is senior to the petitioner and, therefore his name should have been recommended for promotion to the post of Lecturer, Sanskrit so to fill the vacancy of a Lecturer under 50% quota prescribed for promotion, then the petitioner has no case in the light of the provisions contained in Rule 14 of 1998 Rules when, they are read in the light of the definition of the "recruitment year', as provided under Section 2(l) of the Act of 1982.

19. It is not the case of the petitioner that in the cadre of Assistant Teacher, L.T. Grade, he is senior to said Sri Mahtab Ahmad i.e. respondent no.5.

20. In absence of any challenge to the seniority of Sri Mahtab Ahmad in the feeder cadre of Assistant Teacher, L.T. Grade over the petitioner, when Scheme of Promotion is examined as contained in Rule 14 then it is evident that the Management of the College acted illegally and arbitrarily in forwarding the name of the petitioner for promotion to the post of Lecturer, Physics in preference to the respondent no.5 who is admittedly senior to the petitioner in the feeder cadre.

21. Therefore, the ratio of the law laid down in case of B.P. Tripathi **(supra)** and Pati Ram Pal **(supra)** in fact are against the petitioner and have no application to his benefit. Thus, the impugned order dated 23.07.2020 cannot be faulted with.

22. Other grounds like violation of principles of natural justice and not providing complete opportunity of hearing to the petitioner is not germane in cases where there is clear infraction of the statutory provisions.

23. In this regard, law laid down by Hon'ble Supreme Court in case of ***U.P. Junior Doctors' Action Committee*** Vs. ***B. Sheetal Nandwani (Dr.)*** as reported in ***AIR 1991 SC 909*** is relevant wherein, it has been held that where a benefit is obtained by committing fraud, the Authorities are not obliged to comply with the principles of natural justice before cancelling the advantage obtained by such fraud.

24. Similarly, in the case of ***Union of India*** Vs. ***O. Chakradhar*** as reported in ***2002 (3) SCC 146***, it has been held that where because of widespread illegalities and irregularities committed in conducting a selection, the process is cancelled, the same cannot be faulted on the ground of violation of principles of natural justice because individuals in the select list were not given an opportunity of being heard before such cancellation.

25. In the present case, it is apparent that the benefit of promotion was obtained by committing fraud in collusion with the Management Committee and in violation of the statutory rules and regulations. The act of the Management Committee in favouing the petitioner is fraught with illegalities and irregularities, therefore, cancellation of such promotion order cannot be faulted on the ground of violations of principles of natural justice saying that petitioner was not given full opportunity of hearing before passing of the impugned order.

26. Thus, the petition fails and is, accordingly, **dismissed.**

(2020)10ILR A415
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.10.2020

BEFORE
THE HON'BLE RAJAN ROY, J.

Service Single No. 8234 of 2020

Saurabh Gupta ...Petitioner
Versus
UIDAI & Ors. ...Respondents

Counsel for the Petitioner:
Shireesh Kumar

Counsel for the Respondents:
Suryabhan, Zoheb Hossain

A. Service Law - Adhaar (Targeted delivery of Financial and other subsidies, benefits and services) Act, 2016: Section 1(3), 2(e), 21(1)/54(1)/54(2)(x), 11, 18, 22, 59 - Adhaar and other laws (Amendment) Act, 2019 - Appointment & selection - Unique Identification Authority of India (appointment of officers and employees) Regulations, 2020: Regulation 2(1)(b), 3, 5, 11

The petitioner came on deputation in the year 2014 when UIDAI was still functioning as an attached office of the Planning Commission/ Department of Electronics and Information Technology of the Government of India and his selection as also tenure of deputation were governed by the aforesaid Department of Personnel and Training (DoPT) Office Memorandum's (OM) dated 17.06.2010 which was subsequently modified by OM dated 17.02.2016 and this fact was mentioned in the OM dated 10.10.2013 in pursuance to which the petitioner applied for deputation. Clause 6 of the DoPT OM dated 17.02.2013 therefore did not make these OM's inapplicable, at least till 11.07.2016 i.e., prior to Act, 2016 coming into force. (Para 25)

The exercise of selection and appointment of the petitioner on deputation was initiated by UIDAI after its constitution by the notification dated 28.01.2009 but prior to 12.07.2016, therefore, this action is to be treated as validly done under the Act, 2016 in view of Section 59. The tenure of deputation of the petitioner continued to be governed by the DoPT OM's dated 17.06.2010and 17.02.2016. (Para 30, 31)

In case of appointment on deputation based on selection, repatriation to parent organization is permissible on ground of unsatisfactory work or unsuitability. There has to be some rationale behind such decision. There is o specific provision of recruitment and appointment by way of deputation but a general provision contained in Section 21 as amended by the Act, 2019 which specifies the terms and conditions of officers and employees of UIDAI by regulations to be made by the UIDAI. There is nothing in the Regulation, 2020 which expounds that a person on deputation cannot be repatriated, not even on grounds of unsuitability and unsatisfactory work. More so, the Court observed that even in the absence of any specific provision of repatriation of a deputationist or curtailment of deputation in the Regulation, 2020 it cannot be said that such a person cannot be repatriated. **Absorption under the Regulations, 2020 is not a matter of right but is based on consideration by a selection committee on being find suitable for the position. Further, the petitioner has not been absorbed in the borrowing department not has his lien been terminated in the parent organization, therefore, he could, for justifiable reasons based on his unsuitability and unsatisfactory work, be repatriated to his parent organization by a bonafide decision of the competent authority.** (Para 33, 34, 36, 37, 38)

Order of the deputation mentioned that the deputation of the petitioner was for a period of 3 years or until further orders. The words 'until further orders' is indicative of the clear intent that deputation could be curtailed prior to 3 years and could be repatriated even earlier. (Para 39)

B. Nature of the Order - Mentioning of all facts by opposite parties by itself cannot and does not persuade the Court to hold that the impugned decision is punitive. The application of the concept of "motive" and foundation for determining the nature of the order is quite tricky and the line which divides the two is rather thin. (para 47)

In absence o any allegation of personal malafide against the officer or employee of UIDAI who may have been involved in the decision making process leading to it, it cannot be said that the repatriation of the petitioner is punitive or arbitrary. It is an order simplicitor. (Para 56)

Writ Petition Rejected. (E-10)

List of Cases cited:-

1. Chandra Prakash Shahi Vs St. of U.P. &ors. (2000) 5 SCC 152 *(distinguished)*

2. S.B.I. & ors. VS Palak Modi & ors. (2013) 3 SCC 607

3. Anoop Jaiswal Vs Govt. of India & ors. (1984) 2 SCC 369

4. St. of A.P. & ors. Vs Goverdhanlal Pitti (2003) 4 SCC 739

5. St. of Bihar Vs P.P. Sharma 1992 Supp. (1) SCC 222

6. Rameshwar Prasad Vs M.D., U.P.R.N.I (1999) 8 SCC 381

7. U.O.I. & anr. Vs S.N. Maity & anr. (2015) 4 SCC 164 *(followed)*

8. U.O.I. Vs V. Ramakrishnan (2005) 8 SCC 394

9. St. of Raj. & ors. Vs Trilok Ram (2019) 10 SCC 383

10. Bank of India & ors.. Vs Degala Suryanarayana (1999) 5 SCC 762

11. Bhaskar Gajanan Kajrekar Vs Administrator, Dadar & Agar Haveli & ors. (1993) 3 CC 237

12. Delhi Jal Board Vs Mahinder Singh (2000) 7 SCC 210

13. Uttar Pradesh Gram Panchayat, Adhikari Sangh Vs Dayaram Saroj (2007) 2 SCC 138

14. Union of India & anr. Vs S.N. Maity & anr. (2015) 4 SCC 164

15. Dayanand Katariya Vs U.O.I. 2015 SCC Online Delhi

16. Umesh Kumar Vs U.O.I. & ors. 2013 SCC Online Delhi 2768

17. U.O.I. Vs Bhanwar Lal Mundan (2013) 12 SCC 433

18. Ashok kumar Patil Vs U.O.I. (2012) 7 SCC 757 *(followed)*

19. Kaushal Kishore Shukla Vs State of U.P. (1991) 1 SCC 691 *(followed)*

20. L/NK V.H.K. Murthy Vs Special Protection Group ILR (2000) Delhi 26 *(followed)*

(Delivered by Hon'ble Rajan Roy, J.)

1. By means of this Writ Petition the petitioner has challenged the curtailment of his deputation and his repatriation by the Unique Identification Authority of India (herein after referred as UIDAI) to his parent corporation namely Metals and Minerals Trading Corporation, Jaipur (herein after referred as MMTC). The petitioner has challenged two orders, one dated 16.03.2020 which is the notice of his repatriation and by an amendment in the writ petition another order dated 28.05.2020 passed by the Chief Executive Officer of UIDAI rejecting the petitioner's representation against the order dated 16.03.2020 has also been challenged.

2. The petitioner is an employee of MMTC, Jaipur. In pursuance to office memorandum dated 10.10.2013 inviting

applications from eligible persons for filling up various posts including that of Deputy Director in the UIDAI on deputation basis at its regional office, Lucknow, the petitioner also applied and was selected for such deputation. He was appointed on deputation, consequent to his selection, as Deputy Director at the regional office of UIDAI, Lucknow vide a order dated 05.02.2014 for a period of 3 years from the date of taking over charge of the post or until further orders, whichever event takes place earlier. The terms and conditions of deputation during his tenure of deputation in UIDAI were to be governed by the Department of Personnel and Training (herein after referred as DoPT) OM dated17.06.2010 and this fact was mentioned in the order of deputation dated 05.02.2014 as also the OM dated 10.10.2013. In pursuance to the aforesaid, the petitioner joined at the regional office, Lucknow in 2014 itself. The deputation period was extended sometime in 2017/2018. In August, 2019 the opposite party no. 2 sought explanation from the petitioner regarding his day to day work and the reasons for non submission of reports on time. The petitioner submitted a written reply on 30.08.2019, a copy of which is annexed as Annexure-10 to supplementary affidavit filed by the petitioner. The reply of the petitioner was not found to be satisfactory and a comment was recorded by the opposite party no. 2 who was the head of the regional office at Lucknow to the effect- ***"not so much that reports will not go on time. The explanation not acceptable."***

3. Be that as it may, on 21.01.2020, the Unique Identification Authority of India (appointment of officers and employees) Regulations, 2020 framed under Section 21 (1) read with Sub-section 1 of Section 54 and Clause (x) of Sub-section 2 of Section 54 of the Adhaar (Targeted delivery of Financial and other subsidies, benefits and services) Act, 2016 (herein after referred as Act, 2016) , as amended vide the Adhaar and other laws (Amendment) Act, 2019 (herein after referred as Act, 2019), were notified.

4. On 29.01.2020, applications were invited from eligible candidates for permanent absorption in the cadre of UIDAI under Regulation 5 of the Regulations, 2020 but with the clear stipulation that mere fulfillment of the eligibility criteria by a candidate and submission of application form by him/her would not confer a right to get him/her absorbed in the cadre of UIDAI which shall be contingent upon the recommendations of the selection Committee etc. as mentioned in Paragraph 4 of the said office memorandum dated 29.01.2020, a copy of which is annexed as Annexure-6 to the writ petition. The petitioner claiming himself to be eligible for such permanent absorption is said to have applied on 07.02.2020 which was forwarded by his superior officer on 12.02.2020.

5. The undisputed fact is that the absorption process did not take place and it was held up in view of certain queries made by the Officers' from the UIDAI which in turn made queries in this regard from the concerned departments but the said queries had not been resolved.

6. It is not out of place to mention that 18.02.2020 was the last date for submitting an application for consideration for permanent absorption as aforesaid in terms of the OM dated 29.01.2020.

7. It is not in dispute that on 13.02.2020 the petitioner's deputation was

extended. This extension order has been filed by the opposite party along with their written submissions in pursuance to the liberty granted by this Court while reserving the judgment on 10.07.2020, with the consent of the Counsel for the petitioner.

8. On 26.02.2020 and 27.02.2020, two complaints were received by the opposite parties against the petitioner, one by Shri Devashish Bhatt, Assistant Section Officer and the other by Shri Praveen Dixit, driver in the general pool. Both were employees working at the regional office at Lucknow. In both the complaints misbehaviour and improper conduct by the petitioner towards them was alleged. The opposite party no. 2 being Head of the regional office constituted an internal inquiry committee on 27.02.2020 comprising of Shri Dev Shankar, Assistant Director General, Regional Office, Ranchi and Shri Anil Kumar, Deputy Director, Regional Office, Ranchi (at Patna). It is said that the opposite party no. 2 i.e. the Deputy Director General, Regional Office, Lucknow was also holding the charge of Deputy Director General, Regional Office, Ranchi at the relevant time. The aforesaid inquiry committee is said to have recorded the statement of aforesaid complainants as well as other Officers' and employees' of the Regional Office. Accordingly, it submitted its report on 04.03.2020 which was adverse to the petitioner. This was in the nature of a fact finding inquiry on the complaints.

9. In the meantime, Shri Vivek Kumar Daksh was posted as Assistant Director General in the Regional Office, Lucknow on 05.02.2020 and from the said date he became the Reporting Officer of the petitioner. On 02.03.2020, while the inquiry against the petitioner instituted on 27.02.2020 was still pending, an explanation was called from him by the aforesaid Assistant Director General, Vivek Kumar Daksh regarding huge pendency of grievances/complaints, which, as per the work distribution order dated 21.12.2018, he was required to dispose of. A copy of the show cause is annexed as Annexure - R14 at Page 171 to the supplementary affidavit filed by the opposite parties. The said letter mentioned about the review of work on 28.02.2020 which revealed that more than 7000 cases were pending for exceptional handling of date of birth cases in the Regional Office at Lucknow, many cases were pending for more than a year which had caused substantial delay in disposal of sensitive public complaints. It was alleged that the petitioner had neither taken any prompt action to dispose of these cases at his end as Supervisor nor reported this issue to his superior's for prompt handling. It was also alleged that he had not devised any mechanism to supervise this issue at regular intervals at his level as Deputy Director. Coordination mechanism among staff which was handling this issue was also not put in place. He was therefore asked to explain that why this non monitoring, non reporting and non disposal of pendency has been continuing in this fashion, within 3 days. The petitioner replied on 05.03.2020. A day prior to this i.e. on 04.03.2020, the report of the internal inquiry committee referred earlier had already been submitted.

10. On 05.03.2020, the Assistant Director General (Admn./HR) in the office of Deputy Director General, Regional Office, Lucknow sought inputs from Shri Vivek Kumar Daksh, Assistant Director General regarding performance of the petitioner and on 06.03.2020 the said

Officer reported that the work of the petitioner was unsatisfactory and not up to the mark.

11. On 06.03.2020, the Deputy Director General, Regional Office, Lucknow (opposite party no. 2) communicated to the Assistant Director General (Admn./HR), UIDAI Headquarters, New Delhi through Shri Nitish Sinha, Assistant Director General at the Regional Office, Lucknow about the report dated 04.03.2020 against the petitioner and the assessment of his performance by the Reporting Officer, Shri Vivek Kumar Daksh dated 06.03.2020 as noticed hereinabove and recommended his premature repatriation to his parent Department/Office for kind consideration of the Headquarters at New Delhi.

12. On 12.03.2020, the competent authority, who is said to be the Chief Executive Officer is said to have granted approval for premature repatriation of the petitioner and the same was conveyed to the Regional Office, Lucknow. On the same date i.e. 12.03.2020, the absorption process was put on hold on account of certain unresolved issues by the Headquarters of UIDAI, New Delhi as mentioned earlier.

13. On 16.03.2020, the impugned order curtailing the deputation of the petitioner and giving notice for his repatriation citing Clause 9 of the OM dated 17.06.2010 was issued. The notice period being 3 months, the Court was informed, during the course of arguments, that the petitioner had been relieved on completion of the said period but with the condition that the relieving would be subject to further orders/result of this writ petition in view of the interim orders passed herein to the said effect.

14. Against the aforesaid order dated 16.03.2020, the petitioner preferred a representation to the Chief Executive Officer which was rejected on 28.05.2020 and the said order is also under challenge.

15. It is not out of place to mention that the reply submitted by the petitioner on 05.03.2020 to the show cause dated 02.03.2020 given by Shri Vivek Kumar Daksh, Assistant Director General, Regional Office, Lucknow was ultimately decided by the Officer on 18.05.2020, however, the said order has not been challenged specifically in this writ petition.

16. It is not out of place to mention that the Act, 2016 came into force on 12.07.2016. Prior to establishment of UIDAI as a statutory authority under Section 11 of the said Act, 2016, it was functioning as an attached office of the Planning Commission/NITI Aayog under the notification of the Government of India, Planning Commission dated 28.01.2009 and thereafter it functioned as an attached office of Department of Electronics and Information Technology w.e.f. 12.09.2015 till it became a statutory authority w.e.f 12.07.2016. These facts are borne out from Section 22 and 59 of the Act, 2016, a copy of which is on record, as, also from the written submissions of the opposite parties.

17. It is not in dispute that after the establishment of UIDAI under Section 11 of the Act, 2016 it has become a statutory authority and is no longer an attached office of the Government of India or the Planning Commission. Nor is it in dispute that the parent corporation of the petitioner is also an autonomous body, therefore, both the lending and borrowing corporation/authority are not departments of the Government of India but are

autonomous bodies as of now and they were so on the date of passing of the impugned order dated 16.03.2020 and 28.05.2020.

18. Against the aforesaid factual background the arguments of Shri Shireesh Kumar, learned Counsel for the petitioner can be summarised as under:-

i.) Repatriation of the petitioner to his parent corporation invoking Paragraph 9 of OM dated 17.06.2010 was legally unsustainable as the said OM ceased to be applicable to the case of the petitioner in view of Paragraph 6 of the subsequent OM dated 17.02.2016. According to the learned Counsel for the petitioner, in view of Clause 6 of the OM dated 17.06.2010, as neither borrowing nor the lending departments/corporations were a department of the Central Government, therefore, deputation of the petitioner would not be governed by the aforesaid OM's issued by the Government of India.

ii.) The aforesaid OM's issued by DoPT dated 17.06.2010 and 17.02.2016 ceased to apply to UIDAI w.e.f. 21.01.2020 when the Regulations, 2020 made under the Act, 2016 came into force and the same would be governed by the Regulations, 2020, as such, the order dated 16.03.2020 which is based on the aforesaid OM's is not sustainable.

iii.) There was no provision for premature repatriation of a deputationist in the Regulations, 2020 nor for curtailment of the term of appointment on deputation, hence the order dated 16.03.2020 was ultra vires the Regulations, 2020. Regulation 11 provides for deputation and Sub-regulation 3 thereof provided for the maximum term of deputation of 5 years which could be extended for such period and in such manner as prescribed by the Authority from time to time. The opposite parties having extended the deputation of the petitioner vide a order dated 13.02.2020 till 18.02.2021, they could not have curtailed it nor could they have ordered for premature repatriation, as such, they had violated Regulation 11 (3) of the Regulations, 2020. Section 16 of the General Clauses Act, 1897 would have no application in the matter, as, they relate to competence of the authority to appoint or to suspend or dismiss whereas the present case was not of competence of the authority but of malicious exercise of power which rendered the order dated 16.03.2010 bad.

iv.) The impugned order dated 16.03.2020 was not an order simplicitor but was punitive. The counter affidavit of the opposite parties itself reveals the basis for passing the said order as being two complaints against the petitioner and the report dated 04.03.2020 by the Inquiry Committee in this regard as also the report of Assistant Director General, Mr. Vivek Kumar Daksh dated 06.03.2020. There was no adverse material till 18.02.2020 which was the last date for submission of application for permanent absorption. All adverse material was created within a period of 7 days from 26.02.2020 to 04.03.2020 and on 06.03.2020 curtailment of petitioner's deputation was recommended by the Regional Office, Lucknow to the Headquarters of UIDAI at New Delhi. The order dated 16.03.2020 is thus punitive. He placed reliance upon the decision of the Supreme Court in this regard in the case of Chandra Prakash Shahi Vs. State of U.P. and others; 2000 (5) SCC 152. The petitioner also relied in this regard upon the decision of the Supreme Court in the case of State Bank of India and others Vs. Palak Modi and others; 2013 (3) SCC 607 and in the case of Anoop Jaiswal Vs. Government of India and others; 1984 (2) SCC 369.

v.) The petitioner's Counsel alleged legal malice as accordng to him the issuance of order dated 16.03.2020 was a wrongful act done intentionally without just cause or legal excuse and at the behest of opposite party no. 2 who had no role in the deputation of officers. In this regard he relied upon the decisions of the Supreme Court in the case of State of Andhra Pradesh and others Vs. Goverdhanlal Pitti; 2003 (4) SCC 739; and State of Bihar Vs. P.P. Sharma; 1992 Supp. (1) SCC 222.

It was also contended that the Court is empowered to lift the veil so as to find out the actual nature of the order whether it is punitive or simplicitor based on the principle of motive and foundation. But for the aforesaid adverse material, the petitioner's performance and conduct was throughout outstanding during the period of deputation. The alleged adverse material came to the knowledge of the petitioner only through the counter affidavit.

vi.) The petitioner's repatriation was designed to deprive him of his statutory right of consideration for absorption under Regulation 5 of the Regulations, 2020. Absorption, as it is provided under Regulation 5 of Regulations, 2020, was a right of the petitioner in view of the dictum of the Supreme Court in the case of Rameshwar Prasad Vs. M.D., U.P.R.N.I; 1999 (8) SCC 381. The order dated 16.03.2020 was passed with the intent to deprive the petitioner of the aforesaid right which accrued in his favour by 18.02.2020 as he had applied for such consideration prior.

vii.) The case at hand was one of appointment on deputation which is different from transfer on deputation. In view of the decision of the Supreme Court in the case of Union of India and another Vs. S.N. Maity and another; (2015) 4 SCC 164. The petitioner had an indefeasible right to continue on deputation and could be repatriated only on the ground of non suitability and unsatisfactory work which had to be assessed in a fair and reasonable manner and not arbitrarily. The petitioner's Counsel also relied upon the decision of the Supreme Court in this regard in the case of Union of India Vs. V. Ramakrishnan; 2005 (8) SCC 394; The adverse material against the petitioner was created between 26.02.2020 to 16.03.2020 but none of the documents established that the petitioner was not suitable for the post. False complaints were made which did not disclose any specific instance or illustration of misbehaviour. The Inquiry report dated 04.03.2020 mentioned the statements of various officials/ employees which had not been brought on record of this writ petition. Moreover, in none of the statements any specific instance of misbehaviour or misconduct by the petitioner had been alleged. None of the said persons were examined in the presence of the petitioner. The driver and the Assistant Section Officer who submitted the complaint on 26.02.2020 and 27.02.2020 were not under the jurisdiction and control of the petitioner and did not report to him directly. The report/input of Shri Vivek Kumar Daksh dated 06.03.2020 regarding unsatisfactory performance of the petitioner was not valid as his reply dated 05.03.2020 was decided by him only on 18.05.2020. Therefore, any opinion formed by him prior to it could not have been acted upon. The petitioner disposed of 95,000 grievances in the year 2019 and this fact was not denied by the opposite parties. The petitioner was always categorised as an officer of outstanding category in his annual appraisal report and this fact had also not been disputed by the opposite parties. As such, the material for premature repatriation of the petitioner is motivated and fabricated. It cannot be said

to be an exercise free from arbitrariness. Therefore, the order dated 16.03.2020 was not sustainable in law. The service record of the petitioner only up to 18.02.2020 was required to be considered for the purposes of absorption. Reliance was placed in this regard upon decision of the Supreme Court in the case of State of Rajasthan and others Vs. Trilok Ram; 2019 (10) SCC 383.

viii.) The petitioner was entitled to be considered for absorption under Regulation 5 of the Regulations, 2020 irrespective of the order of repatriation as the right had accrued in his favour prior to 18.02.2020 when he had applied for the same. In this regard he relied upon the Supreme Court in the case of Bank of India and others Vs. Degala Suryanarayana; 1999 (5) SCC 762; Bhaskar Gajanan Kajrekar Vs. Administrator, Dadar and Nagar Haveli and others; 1993 (3) SCC 237; and Delhi Jal Board Vs. Mahinder Singh; 2000 (7) SCC 210.

ix.) The appointment of the petitioner on deputation having been made after approval by the Chairman, UIDAI who was of the rank of Cabinet Minister of the Government of India, repatriation order could not have been passed without the approval of such Chairman or the Hon'ble Minister concerned in the Government of India. Therefore, the impugned action is not sustainable on this ground.

19. On the other hand Mr. Zoheb Hossain, learned Counsel for the opposite parties no. 1 & 2 contended as under:-

i.) He refuted the submission of Shri Shireesh Kumar, learned Counsel for the petitioner, that the OM dated 17.06.2010 did not apply in view of Clause 6 of the subsequent DoPT OM dated 17.02.2016 by which it was modified and which contained a provision for premature repatriation. He contended that on the date of taking the petitioner on deputation, the UIDAI was not a statutory authority, as, the Act, 2016 had not been promulgated nor had the Regulations, 2020 been made under the said Act. The UIDAI was at the relevant time functioning in pursuance to a notification of the Planning Commission/NITI Aayog dated 28.01.2009 as it's attached office and thereafter, it functioned in pursuance to the notification of the Department of Electronics and Information Technology, Government of India dated 12.07.2016, accordingly. Therefore, in these circumstances, the DoPT OM dated 17.06.2010 was clearly applicable and in fact it was specifically mentioned in the OM dated 10.10.2013 by which applications were invited from eligible persons desirous of coming on deputation to UIDAI and in pursuance to which the petitioner also applied, that the terms and conditions of deputation would be governed by the DoPT OM dated 17.06.2010. Furthermore, even in the order of deputation of the petitioner dated 05.02.2014, it was clearly mentioned that the terms and conditions of his deputation during his tenure of deputation at UIDAI would be governed by the DoPT OM dated 17.06.2010. Therefore, reliance placed upon Clause 6 of the subsequent DoPT OM dated 17.02.2016 by the learned Counsel for the petitioner to contend that the OM dated 17.06.2010 was not applicable, as, the Central Government was neither the lending department nor the borrowing department, was not tenable, as, at the relevant time UIDAI was functioning as an attached office of the Planning Commission and, thereafter, of the Department of Electronics and Information Technology of the Government of India. He contended that the petitioner having come on deputation as per the terms and conditions

mentioned in the OM dated 10.10.2013 and as the order of deputation dated 05.02.2014 clearly mentioned about the applicability of the DoPT OM dated 17.06.2010, therefore, it was not open for him to resile from the said condition and take a contrary stand after having taken the benefit of same for 6 years. He also submitted that extension of deputation of the petitioner after the third year had been made with the specific condition that the said deputation shall be governed by the aforesaid DoPT OM, which the petitioner accepted without demurr. The last extension dated 13.02.2020 refers to the DoPT OM dated 23.02.2017 which in turn relies upon earlier DoPT OM dated 17.06.2010 and 17.02.2016.

He further contended that Section 21 of the Act, 2016 regarding the terms and conditions of the officers and employees of the UIDAI was not notified till 25.07.2019, when the Amending Act came into force. Therefore, in view of Section 59 of the Act, 2016, the aforesaid notifications of the Planning Commission dated 28.01.2009 and of the D.I.E.T. dated 12.09.2015 were deemed to be operative even after coming into force of the Act, 2016 till Section 21 was notified on 25.07.2019 with certain modifications by the amending Act, 2019. The contention was that the deputation of the petitioner having been made prior to the Act, 2016, it was governed by the DoPT OM referred hereinabove and the subsequent enactment of 2016 and the Regulations of 2020 did not make them inapplicable in his case, especially as, there was nothing contrary in the said Act and Regulations to the DoPT OM as regards the subject matter covered by it. It was submitted that the very extension of the deputation of the petitioner was under Clause 3 of the DoPT OM dated 17.02.2016.

ii.) He contended that a deputationist does not have a vested right to continue on the post of deputation. If the deputation is for a fixed period, even then, it can be curtailed on grounds of unsuitability or unsatisfactory work. The scope of judicial review in such cases is very limited and the Courts are loathe to interfere with the subjective decision of the employer/borrowing department to repatriate a deputationist based on some rationale. The principles of natural justice did not apply in such cases. A deputationist can always be repatriated even if the deputation is for a fixed term. He placed reliance upon the decisions reported in (2007) 2 SCC 138; Uttar Pradesh Gram Panchayat, Adhikari Sangh Vs. Dayaram Saroj; (2015) 4 SCC 164; Union of India and another Vs. S.N. Maity and another; 2015 SCC Online Delhi; Dayanand Katariya Vs. Union of India and others; 2013 SCC Online Delhi 2768; Umesh Kumar Vs. Union of India and others; (2013) 12 SCC 433; Union of India Vs. Bhanwar Lal Mundan.

iii.) The petitioner's deputation had been curtailed on grounds of unsuitability or unsatisfactory work which was permissible even as per the dictum of the Supreme Court in S.N. Maity's Case (Supra) which had been relied upon by the petitioner. The Regional Office of UIDAI recommended to the Headquarters at New Delhi for repatriation of the petitioner in view of the report of the internal Inquiry Committee dated 04.03.2020 and the assessment of the petitioner's work by his immediate superior Officer, Shri Vivek Kumar Daksh, Assistant Director General as contained in his input dated 06.03.2020. Therefore, not only there was rationale behind the decision to curtail the petitioner's deputation and to repatriate him to his parent organisation but there also

existed requisite material on which such decision was based. He referred to the aforesaid documents which are on record.

As regards the contention made on behalf of the petitioner that he had decided 95,000 complaints in the year 2019 he submitted that out of these 80,000 were CRM complaints which were resolved automatically at the level of the Operator without the petitioner having to do anything. He invited the attention of the Court to the work distribution order to drive home the point that the petitioner was given the work of grievance redressal which was an important facet of functioning of UIDAI. Based on the aforesaid documents he contended that there were several complaints pending regarding which the petitioner did not take requisite steps as had been stated by his Reporting Officer in his report dated 06.03.2020 wherein he had expressed dissatisfaction with the functioning of the petitioner. Some of the complaints were pending for more than a year. His behaviour towards his colleagues and lower rank officers as mentioned in the internal inquiry report dated 04.03.2020 was also not conducive to his continuance on deputation at UIDAI. The decision was thus bonafide, justified and permissible in law and there was no scope for interference with this decision under Article 226 of the Constitution of India.

iv.) He invited the attention of the Court to Section 18 (4) of the Act, 2016, Regulation 2 (1) (b) of the Regulations, 2020 to contend that the Chief Executive Officer had administrative control over the officers and other employees of the authority. He also invited the attention of the Court to Regulation 3 of the Regulations, 2020 which empowered the Chief Executive Officer to implement the said Regulations. Based on it he contended that the decision communicated to the petitioner vide order dated 16.03.2020 had been taken with the approval of the Chief Executive Officer who was competent to take a decision in this regard, as such, the contention of the petitioner to the contrary was not tenable on facts and in law. There was no requirement under the Act, 2016 or the Regulations, 2020 of taking the approval of the Hon'ble Minister for Electronics and Information Technology in the Government of India before repatriating the petitioner. He also contended that the petitioner had taken contradictory stand on this issue in his pleadings. At Page 6 of his petition (synopsis), he concedes that the Chief Executive Officer is the competent authority to curtail his period of deputation whereas at Page 15 of his Rejoinder Affidavit dated 01.06.2020, he says that his deputation can only be curtailed by the Hon'ble Minister. The petitioner was not brought on deputation to UIDAI with the approval of the Hon'ble Minister but on the recommendation of the Departmental Selection Committee.

v.) The petitioner has admittedly not raised any plea of personal malafide against any Officer who may have had some role to play in the decision making, resulting in curtailment of his deputation and his repatriation. The Chief Executive Officer joined towards the end of 2019 and there are no allegations of personal malafide against him. It is he who took the decision to repatriate the petitioner albeit on the recommendation of the Regional Office at Lucknow. The immediate superior Officer of the petitioner who was also his Reporting Officer was posted in UIDAI since 2016 but became the immediate superior Officer of the petitioner on 05.02.2020 and even against him no personal malafides have been alleged. No malafides had been alleged against the

opposite party no. 2 who was Head of the Regional Office at Lucknow.

He submitted that as far as the plea of legal malice was concerned, it is evident from the records that the required norms had been followed and there had been no deviation from the settled norms while deciding to curtail the deputation of the petitioner and to repatriate him, therefore, there is no question of any legal malafide. He said that the submission of Shri Shireesh Kumar, learned Counsel for the petitioner that the entire UIDAI was against the petitioner was unacceptable on facts and in law. The decision had been taken bonafide and there was no malafide involved in it at all. He also contended that the members of the internal Inquiry Committee belonged to the Regional Office, Ranchi and there is no allegation of malafide against the said members also. As regards the contention that they were under the supervision of the Head of the Regional Office at Lucknow, i.e. opposite party no. 2, during the course of arguments Shri Hossain stated that he was merely looking after the Regional Office at Ranchi additionally and as it was an internal fact finding by the Regional Office, therefore, the opposite party no. 2 was justified and well within his jurisdiction to constitute such an internal Inquiry Committee so as to ensure fairness by not including any officers from the Regional Office, Lucknow where the petitioner was posted.

vi.) He invited the attention of the Court to the statement of the petitioner as recorded on 03.03.2020 during the internal inquiry which clearly demonstrated that he was shown the complaints dated 26.02.2020 and 27.020.2020 and was confronted with the same, therefore, the contention of the petitioner to the contrary that he came to know about the complaints only through the counter affidavit was blatantly false and an attempt to mislead the Court. He said that considering the nature of the fact finding inquiry, there was sufficient compliance of principles of natural justice though these were not attracted in case of deputation and repatriation. Furthermore, the petitioner availed the remedy of representation to the Chief Executive Officer vide e-mail dated 24.03.2020 which was dismissed by the Chief Executive Officer on 28.05.2020, therefore due process of law has been followed. The Regional Office at Lucknow comprised of only 18 officers/employees out of which a substantial number of them complained about the inappropriate behaviour of the petitioner towards them.

vii.) The process of absorption was put on hold on 12.03.2020 on account of certain queries made by the eligible Officers which remained unresolved and not, as stated by the petitioner, to oust him from the zone of consideration. The Chief Executive Officer took the decision and approved the recommendation of the Regional Office at Lucknow to repatriate the petitioner on 12.03.2020 itself which was communicated to the Regional Office by the Headquarters on 16.03.2020. After, 12.03.2020, 16 officers had been repatriated back to their parent organisation from UIDAI, therefore, it is not as if the absorption was put on hold merely to harm the petitioner. Out of the 3 Deputy Directors, 2 at Regional Office, Lucknow, including the petitioner had been repatriated.

viii.) The order of deputation is a simplicitor order which has been made well within the ambits of law considering the nature of deputation and the status of a deputationist, for justifiable and bonafide

reasons and not by way of punishment. Disputed questions of facts cannot be gone into by this Court under Article 226 of the Constitution of India.

20. Having noticed the facts, issues and arguments advanced by the learned Counsel for the parties, the Court now proceeds to decide the relevant issues involved.

21. Impugned order of repatriation has been passed relying upon Clause 9 of DoPT OM dated 17.06.2010. Clause 9 reads as under:-

" 9. Premature reversion of deputationist to parent cadre.

Normally, when an employee is appointed on deputation / foreign service, his services are placed at the disposal of the parent Ministry / Department at the end of the tenure. However, as and when a situation arises for premature reversion to the parent cadre of the deputationist, his services could be so returned after giving an advance notice of at least three months to the lending Ministry / Department and the employee concerned."

22. It is in this context that the petitioner relies upon Clause 6 of the DoPT OM dated 17.02.2016 by which the earlier OM dated 17.06.2010 was modified. Clause 6 referred above reads as under:-

" 6. It is also clarified that cases which are not covered by the OM dated 17.06.2010 including those where Central Government is neither lending authority nor borrowing authority, will continue to be decided in terms of the relevant provisions / rules / instructions etc. governing them."

23. The contention on behalf of the petitioner was that the lending and borrowing organisations, neither being departments of the Central Government, OM dated 17.06.2010 became inapplicable in view of Clause 6 of OM dated 17.02.2016, hence, reliance upon Clause 9 thereof to repatriate the petitioner was bad.

24. UIDAI became a statutory authority and an autonomous body w.e.f 12.07.2016 when it was notified as such under Section 11 of the Act, 2016. Prior to 12.07.2016, UIDAI functioned as an attached office of the Planning Commission having been established as such by the notification dated 28.01.2009 and thereafter it functioned accordingly as an attached office of the Department of Electronics and Information Technology of the Government of India in view of notification dated 12.09.2015 by which the allocation of business rules were revised by the Government of India. Thus, till 11.07.2016 UIDAI functioned as part of the Planning Commission/Department of Electronics and Information Technology of the Government of India and Rules/OM of DoPT, Government of India regarding deputation etc. including the DoPT OM dated 17.06.2010 and 17.02.2016 were applicable to UIDAI. The Act, 2016 had not even been promulgated by then, therefore, the status of UIDAI was that of an attached office in the aforesaid Commission/Department under the Government of India.

25. At this very stage it needs to be mentioned that the petitioner came on deputation in the year 2014 when UIDAI was still functioning as an attached office of the Planning Commission of the Government of India and his selection as also tenure of deputation were governed by

the aforesaid DoPT OM's dated 17.06.2010 which was subsequently modified by OM dated 17.02.2016 and this fact was mentioned in the OM dated 10.10.2013 in pursuance to which the petitioner applied for being appointed on deputation as also in the order of his deputation dated 05.02.2014. Clause 6 of the DoPT OM dated 17.02.2016 therefore did not make these OM's inapplicable, at least till 11.07.2016 i.e. prior to Act, 2016 coming into force, if not, even thereafter.

26. It is not out of place to mention that the Act, 2016 came into force on 12.07.2016 and the UIDAI was established by a notification under Section 11 of the said Act on 12.07.2016 itself. However, all the provisions of the Act, 2016 were not notified in terms of Section 1 (3) of the said Act, instead, Section 11 - 20, 22 - 23 and Section 48 - 59 came into force on 12.07.2016 as per notification issued in this regard under Section 1 (3) of the Act, 2016. Section 1 - 10 and 24 - 47 of the said Act came into force on 12.09.2016 vide a notification of the same date under Section 1 (3) of the Act, 2016.

27. Section 21 of the Act, 2016 dealing with terms and conditions of service of officers and employees of UIDAI was not notified as per Section 1 (3) of the said Act at that time nor any regulations as are referred therein were framed prescribing the terms and conditions of service of officers and employees. In fact, the said provision, without being notified, was amended vide Act, 2019, which was published in the Gazette on 23.07.2019 and Section 1 to 30 of the Act, 2019 came into force on 25.07.2019 by a notification of the same date issued under Section 1 (2) of the Act, 2019. By the amendment in Section 21, the requirement of approval of the Central Government as was required under the unamended Section 21 was done away with.

28. The regulations as are referred in Section 21 of the Act, 2016 were framed and notified only on 21.02.2020. Regulations no. 1 of 2020 which has already been referred earlier are relevant for the case at hand.

29. In this context Section 59 of the Act, 2016 is relevant and it reads as under:-

" 59. Anything done or any action taken by the Central Government under the Resolution of the Government of India, Planning Commission bearing notification number A-43011/02/2009-Admin. I, dated the 28th January, 2009, or by the Department of Electronics and Information Technology under the Cabinet Secretariat Notification bearing notification number S.O. 2492(E), dated the 12th September, 2015, as the case may be, shall be deemed to have been validly done or taken under this Act. "

30. In view of the above quoted provision as UIDAI functioned as an office of the Central Government therefore, any action taken under the notification dated 28.01.2019 by which it was established as an attached office of the Planning Commission and the subsequent notification dated 12.09.2015 by which it was made an attached office of DIET, Government of India, are to be deemed to have been validly done or taken under the Act, 2016. The exercise of selection and appointment of the petitioner on deputation was initiated by UIDAI after its constitution by the notification dated 28.01.2009 but prior to 12.07.2016,

therefore, this action is to be treated as validly done under the Act, 2016 in view of Section 59.

31. In view of the above as unamended Section 21 of the Act, 2016 had not been notified under Section 1 (3) of the said Act and as no regulations had been framed as referred therein regarding terms and conditions of service of officers and employees of UIDAI, the tenure of deputation of the petitioner continued to be governed by the DoPT OM's dated 17.06.2010 and 17.02.2016 in accordance with the terms of deputation mentioned in the OM dated 10.10.2013 and the order of deputation of the petitioner dated 05.02.2014 at least till 21.02.2020, when, the regulations namely UIDAI (appointment of officers and employees) Regulations, 2020 were notified under Section 21 of the Act, 2019.

Question is, whether, once the Regulations, 2020 were notified, the OM's dated 17.06.2010 and 17.02.2016 became inapplicable?, and, whether, in the absence of any provision for repatriation or curtailment of deputation in the Regulations, 2020, the impugned order of repatriation dated 16.03.2020 is illegal?

32. Firstly, even in case of appointment on deputation based on selection, repatriation to parent organisation is permissible on grounds of unsatisfactory work or unsuitability. It cannot be done capriciously or arbitrarily but, if there is a rationale behind such decision it is permissible to do so. This legal positon is clear even from the dictum of the Supreme Court in S.N. Maity's (Supra) case upon which heavy reliance was placed by the petitioner's Counsel as also the earlier decision in Ashok kumar Patil Vs. Union of India; (2012) 7 SCC 757.

33. Moreover, permissibility of repatriation during period of deputation as aforesaid is implicit in the very concept of deputation and it is not dependent on existence of a specific provision for repatriation in the statute or rules, unless the scheme of the Act/Rules intends otherwise. Concept of repatriation is inherent in the concept of deputation as long as the deputationist has not been permanently absorbed in the borrowing department and his lien has not been terminated in his parent organisation. This is considering the very nature of deputation and the absence of any indefeasible right to continue in the borrowing department. This is so even in case of an appointment on deputation based on selection, which is to be treated as slightly different from conventional deputation, in view of S.N. Maity's case (Supra) and the case of Ashok Kumar Patil (Supra). The only requirement in a case of appointment by deputation based on selection is repatriation cannot be done malafide, arbitrarily or merely because a person is on deputation. It can only be resorted on bonafide grounds of unsuitability or unsatisfactory work. There has to be some rationale behind such decision. Meaning thereby, even if the aforesaid OM's are held to be inapplicable w.e.f. 20.01.2020, repatriation was permissible for the reasons already given hereinabove.

34. On perusal of the Act, 2016, the Court finds that there is no specific provision of recruitment and appointment including by a way of deputation instead there is a general provision contained in Section 21 as amended by the Act, 2019 which speaks of

determination/specification of terms and conditions of officers and employees of UIDAI by regulations to be made by the UIDAI. Section 54 of the Act also empowers the UIDAI to frame such regulations. As already stated, Regulations, 2020 made by UIDAI were notified on 21.02.2020. Regulation 11 thereof deals with deputation and reads as under:-

*" **11. Deputation.**- (1) The posts which are to be filled up by the method of deputation would be widely circulated among such Ministries or Departments of the Central Government, State Governments, Administration of Union Territories, Public Sector Undertakings and Statutory and Autonomous Bodies which are expected to have people with the qualifications and experience matching the requirements of the Authority and willing to join the Authority on deputation.*

(2) The selection of candidates for appointment on deputation basis shall be made on the recommendations of the Selection Committee.

(3) All appointments made on deputation in the Authority under these regulations shall initially be for a period not exceeding five years which may be extended for such period and in such manner as prescribed by the Authority from time to time."

35. As per Sub-regulation (3) initially all appointments made on deputation are required to be made for a period not exceeding 5 years which may be extended for such period and in such manner as prescribed by the authority i.e. UIDAI from time to time. No such decision of the "authority" as defined in Section 2 (e) of the Act, 2016 i.e. UIDAI, has been placed before the Court prescribing any period beyond 5 years up to which the deputation under Regulation 2020 could be extended nor the manner of such extension as having been prescribed by UIDAI has been placed before the Court. It being a specific power of regulation of the terms and conditions of service vested with the UIDAI, it has to be performed by it and none else. If the argument of the petitioner's Counsel that DoPT OM's dated 17.06.2010 and 17.02.2016 became inapplicable w.e.f. 21.02.2020, in view of Regulations, 2020, then, the logical corrollary of it would be that he would have to be repatriated, as his term of 5 years expired in February, 2019 and no such decision of the authority as defined in Section 2 (e) of the Act, 2016 has been brought on record prescribing the permissible period of extension of deputation beyond 5 years and the manner of doing it under Regulation 11 (3) of the Regulations, 2020. Thus, the extension of petitioner's deputation vide order dated 13.02.2020 wherein an OM dated 23.02.2017 has been referred which according to the opposite party is in continuation of the OM's dated 17.06.2010 and 17.02.2016 will itself fall in jeopardy being contrary to Regulations, 2020.

36. Irrespective of the aforesaid, there is nothing in the Regulations, 2020 which may persuade this Court to hold that a person on deputation cannot be repatriated, not even on grounds of unsuitability and unsatisfactory work even though he has not been absorbed in UIDAI under the said Regulations. The scheme of the Regulations, 2020 do not lend support to such a view, which is also contrary to the general concept of deputation and repatriation as already discussed.

37. Regulation 5 of the Regulations, 2020 merely gives such deputationist the right of being considered for absorption

and of being offered absorption in UIDAI if they continue to hold the post mentioned in the Schedule annexed to the said regulations that too subject to conditions contained therein. Absorption under the Regulations, 2020 is not as a matter of right but is based on a consideration by a selection committee on the parameters mentioned in the said regulation. It does not promise absorption as a matter of right. A deputationist could be considered for absorption under the Regulations, 2020 but he may not be found suitable. Moreover, the petitioner has not been absorbed in the borrowing department nor has his lien been terminated in the parent organisation, therefore, he could, for justifiable reasons based on his unsuitability and unsatisfactory work, be repatriated to his parent organisation by a bonafide decision of the competent authority.

38. Merely because there is no specific provision of repatriation of a deputationist or curtailment of deputation in the Regulations, 2020 it cannot be said that such a person cannot be repatriated as aforesaid or his deputation cannot be curtailed. As already stated, repatriation is implicit in the very nature of deputation. In the case of appointment by deputation also this can be done on grounds of unsuitability and unsatisfactory work, by a bonafide decision. This is the position even after assuming that w.e.f. 21.02.2020 DoPT OM's dated 17.06.2010 and 17.02.2016 became inapplicable as otherwise the said OM contains a specific provision governing repatriation by way of Clause 9 of OM dated 17.06.2010.

39. Most importantly the order of petitioner's deputation dated 05.02.2014 categorically mentioned that the deputation of the petitioner was for a period of 3 years or until further orders. The word 3 years from the date of taking charge are followed by the words 'until further orders' which is indicative of the clear intent that deputation could be curtailed prior to 3 years and petitioner could be repatriated even earlier. Of course, there is no magic attached to the words "until further orders" as observed by the Supreme Court in S.N. Maity's case (Supra) but in the said decision itself repatriation has been held to be permissible even in a case of selection based deputation albeit on ground of unsatisfactory work, unsuitability and rationality. In view of the above, repatriation was permissible even under the Regulations, 2020.

40. Now coming to the applicability of the OM's, once the UIDAI became a statutory authority under Section 11 of the Act, 2016 w.e.f. 12.07.2016 then it became an autonomous body and did not remain an office of the Government of India and DoPT OM's were not automatically applicable to it from 12.07.2016, however, in view of Section 59 of the Act, as the actions of the Central Government taken in respect of UIDAI prior to 12.07.2016 under the notification dated 28.01.2009 and 12.09.2016 were protected as being validly taken under the Act, 2016, therefore, as UIDAI functioned as an attached office of the Planning Commission and DIET, Government of India prior to 12.07.2016 when the petitioner was taken on deputation in UIDAI by the order dated 05.02.2014 according to which his tenure of deputation was to be governed by DoPT OM dated 17.06.2010 (which was modified by OM dated 17.02.2016), therefore, in view of Section 59 of the Act, 2016, the said OM's, in the absence of any regulations under Section 21 of the Act, 2016 to the contrary, continued to govern the terms of his deputation at least till

20.01.2020 and they continued to apply to his deputation to the extent they were not inconsistent with the Act, 2016, which they were not.

41. If the aforesaid OM's are held to be inapplicable w.e.f. 12.07.2016 then it would create a situation where in the absence of notification of Section 21 of the Act, 2016 under Section 1 (3) thereof and in the absence of any regulations made by UIDAI under the said provision, there would be no provision for bringing persons on deputation to the UIDAI, as there was no such procedure in the Act, 2016, whereas, in the very nature of establishment of UIDAI most of the officers and employees were to be brought on deputation from other departments/organisations, and the terms and conditions of the deputationist who had already been brought to UIDAI prior to 12.07.2016 would also be put in jeopardy which can never be the intent of the rule making authority or of this Court.

42. As the terms of deputation applicable to the petitioner's tenure of deputation vide order dated 05.02.2014 were in no manner in conflict with the Regulations, 2020 so far as repatriation is concerned, they continued to be applicable by of the order of deputation.

43. Even if the OM's referred above were inapplicable w.e.f. 21.02.2020, it does not help the petitioner as even under the Regulations, 2020 which came into effect from 21.02.2020, for the reasons already given hereinabove, repatriation of the petitioner was permissible, therefore, merely because the order of repatriation dated 16.03.2020 refers to Clause 9 of the OM dated 17.06.2010, it cannot be held to be illegal whether repatriation was permissible and justified on facts is another aspect.

44. The next question to be considered is whether in the garb of an order simplicitor a punitive order has been passed by the opposite parties? There can be no doubt that this Court can lift the veil to find out the true nature of the order based on the theory of motive and foundation. This Court would however like to refer to a 3 Judge Bench decision of the Supreme Court in the case of Kaushal Kishore Shukla Vs. State of U.P.; (1991) 1 SCC 691, wherein, the Supreme Court had the occasion to consider the nature of an order of termination in respect of a temporary employee, whether it was punitive or an order simplicitor? It opined that merely because a preliminary inquiry had been conducted on the basis of which the suitability of such temporary employee and his work and conduct was assessed so as to form the requisite satisfaction for the continuance of such officiating Government servant and based thereon an innocuous order of termination simplicitor was passed without referring to any misconduct instead of initiating formal disciplinary proceedings and issuing a charge sheet for punishing him, it would not render the order punitive. If however, the Government decides to take punitive action then formal proceedings will have to be undertaken as per law/rule. The Supreme Court also went on to observe that allegations made against the respondent in the counter affidavit by a way of defense filed on behalf of the appellant also do not change the nature and character of the order of termination.

45. To the same effect is a decision of the Delhi High Court in the case of L/NK V.H.K. Murthy Vs. Special Protection

Group; ILR (2000) Delhi 26 which was a case of repatriation of a deputationist wherein it was as under:-

" 29. I do not agree with the submissions of the petitioner that the impugned order visits with any stigma. Admittedly, the impugned order does not make any reflection on the work and conduct of the petitioners. Only when the petitioners filed the writ petitions and to meet the challenge of arbitrariness, respondents have stated in the counter-affidavit the reasons which compelled the respondents to repatriate the petitioners. The petitioners have tried to highlight the reasons stated in the counter-affidavit and argue on that basis that order is stigmatic. I do not agree. It may be mentioned that the respondents are in Catch- 22 situation. Had the counter-affidavit would not disclose any reason for repatriation of these petitioners, the petitioners would have contended that the impugned repatriation orders are passed without any basis and or material and, therefore, these orders are arbitrary. If the reasons are disclosed in the counter-affidavit to show that the exercise of power by the respondents was bona fide and it was on the basis of material on record which compelled the respondents to form an opinion about the unsuitability of the petitioners to retain them further in the SPG petitioners are challenging the action as sigmatic. It is only to satisfy the conscious of the Court and to further show that the impugned action was not arbitrary but based on relevant considerations and bona fide exercise of power that the reasons are disclosed in the counter-affidavit. From these reasons disclosed in the counter-affidavit, petitioners cannot be allowed to argue that the orders are stigmatic. No doubt it is the power of the Court to go behind the order passed and see the real motive by piercing the veil. However, as mentioned above, in such cases where the person come on deputation and has no vested right to remain with the host department, the Court has to interfere only when the order is passed arbitrarily and mala fide. If there was some material which shows some negligence or conduct of the petitioner and becomes the basis of decision of the respondents to repatriate such an officer, it cannot be called as a stigmatic, more so when the impugned order is innocuous and silent on the conduct of the petitioners. Once I take the aforesaid view, various judgments cited by the petitioners may not be of any consequence. I have already referred to the constitutional Bench Judgment of the Supreme Court in the case of K.H. Phadnis (supra) and observed that even as per that judgment a person who is unsuitable can be sent back to his parent department."

46. The ratio of the aforesaid decisions of the Supreme Court and Delhi High Court apply on all its fours to the case at hand which is one of repatriation of a deputationist. A fact finding internal inquiry was instituted by the opposite party no. 2 who was the head of the regional office at Lucknow where the petitioner was posted as Deputy Director regarding two complaints dated 26.02.2020 and 27.02.2020 against the petitioner's conduct and behaviour by certain employees of the said office. This apart, inputs were sought by him regarding the work of the petitioner whether it was satisfactory or not from his reporting officer i.e. the Assistant Director General in the said office and based on these two exercises he recommended premature repatriation of the petitioner to the Chief Executive Officer of UIDAI at its headquarters at New Delhi who approved

the same. Consequently, in pursuance to the communication of the decision of the Chief Executive Officer, UIDAI from the headquarters at New Delhi vide letter dated 12.03.2020 to the Regional Office at Lucknow, the impugned order dated 16.03.2020, communicating such decision to repatriate the petitioner prematurely was issued which is an order simplicitor without any reference to any misconduct or unsatisfactory work or unsuitability of the petitioner.

47. It is only when this petition has been filed by the petitioner challenging the said decision on various grounds that the opposite parties have filed counter affidavit's mentioning therein the rationale and the material which is the basis for the impugned decision. As already held by the Supreme Court in Kaushal Kishore Shukla Case (Supra) and by the Delhi High Court in L/NK V.H.K. Murthy's case (Supra) merely because in the counter affidavit the reasons for taking the decision have been disclosed, obviously as a defense, this cannot be the basis for alleging or for treating the impugned decision as punitive by itself. After all what other course of action was open to the opposite parties. If they did not disclose the basis for the impugned decision then they would not be able to justify it in the eyes of law. As stated, mentioning of all the facts, as mentioned hereinabove, in the counter affidavit of the opposite parties by itself cannot and does not persuade the Court to hold that the impugned decision is punitive. In view of the aforesaid dictum of the Supreme Court in Kaushal Kishore Shukla's case (Supra) and the decision of the Delhi High Court in L/NK V.H.K. Murthy's case (Supra) it cannot be said that the order of repatriation in the facts of the present case was punitive. The application of the concept of "motive" and "foundation" for determining the nature of the order is quite tricky and the line which divides the two is rather thin. In the present case, no disciplinary proceedings were initiated against the petitioner by the borrowing department nor was it recommended to the lending department prior to passing of the impugned order or thereafter. An assessment of suitability of the petitioner for his continuance on deputation in UIDAI was made by calling an input regarding his work performance from his Reporting Officer which was rendered on 06.03.2020 and also based upon the fact finding report of the internal Inquiry Committee dated 04.03.2020 regarding the complaints referred hereinabove and this was followed by an order of repatriation simplicitor. Of course on 13.02.2020, the deputation of petitioner had been extended for one year but prior to it in in August, 2019, the opposite party no. 2 i.e. Deputy Director General of the Regional Office at Lucknow had called for an explanation from the petitioner regarding huge pendency of grievance redressal complaints etc. under him as has already been mentioned while narrating the facts of the case and the explanation of the petitioner which is on record was not found satisfactory. In fact on the said explanation itself, the opposite party no. 2 observed ***"not so much that reports will not go on time. Explanation not acceptable."*** which was obviously a comment and an implicit caution regarding unsatisfactory working of the petitioner so that he may improve. In August, 2019, the process for absorption under Regulation 5 of the Regulations, 2020 had not even been initiated. It is true that thereafter on 13.02.2020, petitioner's deputation was extended for one year but then it is equally true that thereafter on 28.02.2020, work of the petitioner was

reviewed by his immediate superior officer who was also his reporting officer for the purposes of performance appraisal after he took charge as such on 05.02.2020 and he found that about 7000 grievances/complaints, which the petitioner was required to supervise and ensure disposal in terms of the work distribution order dated 21.12.2018, were pending with the petitioner some of which were more than one year old, accordingly on 02.03.2020 he called for the explanation of the petitioner in this regard. By then the internal inquiry committee on the complaint of other employees had already been constituted and the fact finding inquiry (with regard to rude behaviour etc. of the petitioner) was underway. The show cause letter dated 02.03.2020 referred hereinabove reads as under:-

" Subject: Regarding huge pendency in cases related to Date of Birth, Name/Gender change and other exception cases.

As per the work allocation dated 21.12.2018, the works related to Date of Birth, Name/Gender change and other exceptional cases were assigned to you with provision of sufficient staff. It is notices during review on 28.02.2020 that more than 7000 cases are pending for exceptional handling of Date of Birth in this RO. Many cases are pending for more than a year time. This has caused substantial delay in disposal of sensitive public complaints.

2. It is noticed that you have neither taken any prompt action to dispose off these cases at your end as supervisor nor reported this issue to your superiors for prompt handling. You have also not devised any mechanism to supervise this issue at regular intervals at your level as a Deputy Director. Coordination mechanism among staff which is handling this issue is also not put in place.

3. You are therefore asked to explain that why this non-monitoring, non-reporting and non-disposal of pendency has been continuing in this fashion?

Your reply shall reach to the undersigned within three days."

48. Petitioner submitted his reply on 05.03.2020 which is also on record.

49. On an input being sought by the opposite party no. 2, the reporting officer i.e. the Assistant Director General, Shri Vivek Kumar Daksh sent the input to him on 06.03.2020 as under:-

" Subject: Regarding inputs on the performance of Shri Saurabh Gupta, Deputy Director, UIDAI Regional Office Lucknow.

Reference: Your letter no. F-23015/02/2019MISC (Estt.)/UIDAI/Lko dated 05.03.2020

Shri Saurabh Gupta, Deputy Director of this office has started reporting to the undersigned after issuance of Order No. A-22013/01/2011-UIDAI/LKO Dated 05.02.2020

2. I have reviewed two major works which are assigned to ShriSaurabh Gupta, Deputy Director, after reporting has been started-

a. Exceptional handling of Date of birth cases &

b. General Grievances.

a. Exceptional handling of Date of birth cases: As on 28.02.2020 ***7226 cases*** *of Exceptional cases handling of date of Birth were pending in this office (Copy enclosed). Some of the cases were found pending for more than a year time. The officer has not put any extra/special efforts to dispose of this huge number of*

grievances. For this, he has been asked to explain vide letter no. C-11018/02/2020/UIDAI/LKO Dated 02.03.2020 (Copy enclosed). His reply has not been found satisfactory and was vague and irrelevant (Copy enclosed).

b. General Grievances- As far as other general complaints are concerned, ***3168 complaints*** *are pending in this office of different nature (Copy enclosed). No monitoring mechanism has been found in place for monitoring and prompt disposal at Deputy Director level.*

As such, more than 10000 grievances of different nature are pending which are being looked after by Shri Saurabh Gupta. He has neither taken any prompt action to dispose of these cases as supervisor at his level nor reported this issue to his superiors. As such, the performance of Shri Saurabh Gupta, Deputy Director in handling of official work, is found to be 'Unsatisfactory' and 'Not upto the mark'.

This is for your kind information please."

50. He reported the work of the petitioner to be unsatisfactory and gave reasons for the same. Thus, in spite of the displeasure shown by opposite party no. 2 in August, 2019 and rejection of petitioner's explanation regarding huge pendency and non-submission of reports timely etc. in August, 2019 there was no improvement in petitioner's functioning till 28.02.2020 when his work was reviewed as already stated hereinabove.

51. The fact that petitioner's deputation was extended in the interregnum on 13.02.2020 does not wash off what is evident from the records as aforesaid regarding the working of the petitioner. This apart, there was a report of an internal inquiry committee dated 04.03.2020 against the petitioner which was in the nature of a fact finding report. One of the complainants Shri Devashish Bhatt was Assistant Section Officer under the petitioner with one Rajeev Srivastava as an intermediary officer between the two and the contention that he was not under his direct control is nothing but an eye wash. Reference may be made in this regard to the document annexed as Annexure R-9 to the supplementary affidavit of opposite parties no. 1 & 2 i.e. the work distribution order dated 21.12.2018 which clearly says that Shri Saurabh Gupta, Deputy Director (Petitioner) will be assisted by Rajeev Srivastava, SO and Devashish Bhatt, ASO.

52. The other complainant, though he was a driver in the general pool and not attached to the petitioner, but, petitioner in his statement before the internal inquiry committee has accepted being driven by the said driver on the date of the incident wherein he is alleged to have conducted himself in a manner not befitting an officer of his rank, though he has denied these allegations. The conclusion of the internal inquiry committee report dated 04.03.2020 is as under:-

*" **Recommendations:** Committee feels that in an office like UIDAI where project work in being completed in a mission mode and officers have to interact with various eco partners including residents, cordial behaviour is utmost required. The behaviour of Shri Gupta, as intimated by various officials is undesirable and may hamper the work flow and ultimately damage the image of the organization."*

53. The recommendation dated 06.03.2020 for premature retirement of the

petitioner is also on record. It refers to the aforesaid two exercises which pertain to petitioners functioning and his suitability to continue on deputation.

54. The Court has perused the statement of the petitioner recorded by the internal inquiry committee wherein there is a reference to the complaints being shown to him while putting a question to him and he being confronted with its contents. Therefore, it is incorrect to say, as was stated by the learned Counsel for the petitioner that he came to know about the complaints only through the counter affidavit. The material aforesaid forms the basis for recommending the premature repatriation of the petitioner on the ground of unsatisfactory work and unsuitability for continuation on deputation in UIDAI.

55. Based on the said recommendations, the Chief Executive Officer took the decision and approved the same on 12.03.2020 for premature repatriation of the petitioner. Consequently the impugned simplicitor order dated 16.03.32020 was issued mentioning the approval by the competent authority. No proceedings preliminary or otherwise were initiated against the petitioner by the disciplinary authority for punishing the petitioner for any misconduct, therefore, reliance placed by the learned Counsel for the petitioner in this regard on the decision of the Supreme Court in Chandra Prakash Shahi's case (Supra) does not help his cause, specially considering the status of the petitioner which was that of a deputationist even if based on selection as he was liable to be repatriated on account of unsatisfactory work or unsuitability even as per the decision in S.N. Maity's case (supra) and the decision in Ashok Kumar Patel's case (supra).

56. In these circumstances, especially in the absence of any allegation of personal malafide against any officer or employee of UIDAI who may have been involved in the decision making process or in the process leading to it, it cannot be said that the repatriation of the petitioner is punitive or arbitrary. The reasons and material mentioned in the counter affidavit as noticed hereinabove may have been the motive but not the foundation of the order. In view of the above discussion, the impugned order cannot be said to be punitive. It is an order simplicitor.

57. It can also not be said that the impugned decision suffers from legal malice as it was preceded by an assessment of petitioner's work and conduct i.e. his suitability for being continued on deputation and a decision was taken based on such exercise, therefore, it cannot be said to be whimsical or a motivated decision. No such norm or rule has been placed before the Court deviation of which may have occurred so as to form the basis for the plea of legal malice. The decision has been taken as per norms and the law applicable to the subject. To say, as Shri Shireesh Kumar, learned Counsel for the petitioner did, that the entire UIDAI ganged up against petitioner is unacceptable in law and on facts both. There cannot be a plea of malafide against the entire organisation, certainly not in the absence of any tangible material.

58. At least two statements of the complainants and the petitioner's statement are on record so is a copy of the internal inquiry report dated 04.03.2020 which have been perused. The fact that the statement of other employees who had deposed against the petitioner before the fact finding internal Inquiry Committee is not on

record, though their statements are mentioned in the report, does not make much of a difference. Considering the nature of the issue involved in a fact finding inquiry petitioner was sufficiently heard.

59. There is nothing in law which restrains the borrowing department from curtailing the deputation after it has been extended i.e. during the extended period, if it finds the deputationist unsuitable for further continuance based on an assessment of his work and conduct. The only requirement is that such decision should be free from arbitrariness and malafide, which, it is, in this case. It appears that prior to extending the period of deputation of the petitioner on 13.02.2020, a proper assessment of the work and conduct of the petitioner was not undertaken and in any case in spite of the caution given to the petitioner in August, 2019, there was no improvement in his work when it was again reviewed on 28.02.2020 as has already been discussed.

60. As regards, the contention, that the performance appraisal report of the petitioner for all the years during deputation were outstanding, there is material before this Court pertaining to the year 2019-20 in the form of comment of the opposite party no. 2 of August, 2019, report dated 04.03.2020 and input dated 06.03.2020 by the petitioner's Reporting Officer especially regarding 7000 complaints being pending, some for more than a year, which are adverse to the petitioner and which he has not been able to satisfactorily rebut. Therefore, this plea also does not cut much ice so far as the issue of repatriation is concerned.

61. It is not open for this Court to dwell into factual issues regarding assessment of work and conduct of the petitioner and to draw inferences based on "a hunch" or "gut feeling" so long as there is absence of malafide and there is material or rationale to support the impugned decision. Since 12.03.2020, 16 officers who are on deputation in UIDAI have been repatriated as informed by the Counsel for the opposite parties. Out of 3 Deputy Directors i.e. the post which was held by the petitioner, 2 have been repatriated, therefore, it is not as if petitioner has been singled out for special treatment.

62. The contention on behalf of the petitioner that repatriation was designed to deprive the petitioner of absorption in UIDAI is also not acceptable, firstly for the reason, there is no allegation of personal malafide against any officer or employee, secondly, legal malice is also not made out as already discussed, thirdly as already stated, absorption under Regulation 5 of Regulations, 2020 is not as a matter of right. It is not automatic. It is subject to consideration by a selection committee in terms of Sub-regulation 2 of Regulation 5 and on being found suitable for the same. A deputationist who is considered for absorption under Regulation 5 ultimately may not be found suitable for the same and there is no indefeasible right in this regard in the said Regulation. The right at best is/was of consideration for absorption but subject to the conditions mentioned therein. Apart from the conditions contained in Sub-regulation 2, 3 and 4 of Regulation 5, the authority could prescribe such further conditions for said absorption under Sub-regulation 6 of Regulation 5 as it may deem fit from time to time. Moreover, till passing of the order of repatriation, petitioner had merely applied for absorption but had not been considered, therefore, this plea for the reasons already discussed is also not acceptable.

63. To contend, as the learned Counsel for the petitioner did, that even after passing of the order of repatriation petitioner is entitled to be considered for absorption is unacceptable and contrary to Regulation 5 which speaks of an offer of absorption to be given to such officers and employees "who are holding any post provided under the Schedule", therefore, a deputationist who has been repatriated to his parent organisation is not entitled to be considered as he does not hold any post referred in the Schedule to the regulation under UIDAI which includes the post of Deputy Director on which the petitioner was earlier working and as such he cannot be offered absorption, specially as this Court is upholding this repatriation. This plea is also **rejected**.

64. This Court does not find any such requirement of seeking approval of the Chairman, UIDAI or the Minister of Electronics and Information Technology, Government of India before repatriating any officer or employee in the Regulations, 2020. This plea is also **rejected**.

65. The decision to repatriate the petitioner has been taken by the Chief Executive Officer who was competent to take such decision under Regulation 2(1)(b) of Regulations, 2020 read with Section 18 (4) of the Act, 2016.

66. For all these reasons none of the decisions cited by learned Counsel for the petitioner come to his rescue. For the same reasons, the order dated 28.05.2020 passed by the Chief Executive Officer on the representation of the petitioner also does not require any interference.

67. In view of the above, this is not a fit case for exercise of extraordinary jurisdiction of this Court under Article 226 of the Constitution of India for interference with the impugned order in favour of the petitioner.

68. The writ petition is accordingly **dismissed**.

(2020)10ILR A438
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.02.2020

BEFORE
THE HON'BLE SHAMIM AHMED, J.

WRIT - A No. 8273 of 2019

Anirudh Prasad Chaudhary ...Petitioner
Versus
Joint Director, Agriculture, Basti Division Basti & Ors. ...Respondents

Counsel for the Petitioner:
Sri Indra Raj Singh, Sri Adarsh Singh, Sri Dharmraj Chaudhary

Counsel for the Respondents:
C.S.C.

A. Service Law – Recovery of salary amount – A person cannot be asked to repay the amount, which was not due to him, but has been paid to him without any misappropriation or fraud.

SC has held that recovery by the employers would be impermissible in law from retired employees, or employees who are due to retire within one year, of the order of recovery. In the present case, petitioner was to retire on 31.12.2019 and he was served with orders dated 03.01.2019 and 09.05.2019 for recovery of amount. Court observed that there has been no misrepresentation or fraud on the part of the petitioner and the recovery of amount would cause great hardship to the petitioner. Hence, quashed the impugned orders. (Para 4, 6-10)

Writ petition allowed.

Precedent followed:

1. Dr. Gopalji Mishra Vs St. of U.P. & ors., 2004 (2) ESC 791 (Para 6)

2. Dr. Avinash Chand Goel Vs St. of U.P. & ors., 2011 5 ESC 3035 (Para 7)

3. Hansraj Singh & ors. Vs. St. of U.P. & ors., 2015 (2) ADJ 581 (Para 8)

4. St. of Punj. & ors. Vs Rafiq Masih (White Washers) etc., (2014) 8 SCC 883 (Para 9)

Petition challenges orders dated 03.01.2019 and 09.05.2019, passed by Joint Director, Agriculture, Basti Division, Basti and District Plant Protection Officer, District Sant Kabir Nagar.

(Delivered by Hon'ble Shamim Ahmed, J.)

1. This writ petition under Article 226 of the Constitution of India has been filed by the petitioner with the following prayer:-

(I) Issue a writ, order or direction in the nature of certiorari quashing the impugned orders dated 03.01.2019 and 09.05.2019 passed by the respondent nos. 1 and 2.

(II) Issue a writ, order or direction in the nature of mandamus restraining the respondents from recovering the amount as mentioned in the impugned orders dated 03.01.2019 and 09.05.2019 passed by the respondent nos. 1 and 2.

(III) Issue a writ, order or direction in the nature of writs, as this Hon'ble Court may deem fit and proper to meet ends of justice.

(IV) Award the cost of this writ petition to the petitioner.

2. Learned counsel for the petitioner submits that the petitioner was initially appointed on the post of Assistant Soil Conservation Inspector in Agriculture Department of the State Government under the order dated 26.11.1982, in the pay scale of Rs.400-615 and joined his post on 09.12.1982, since then he was performing his duties and never been subjected to any disciplinary proceedings or was awarded any punishment by the department. By virtue of sincere and devoted duties, the petitioner was promoted from time to time and was promoted on the post of Senior Technical Assistant Group-B and in pursuance thereof, he joined on the said promoted post on 30.03.2016 in the office of District Plant Protection Officer, Gonda and thereafter, he was transferred to District Sant Kabir Nagar on 01.09.2017.

3. Learned counsel for the petitioner further submits that the petitioner was holding Class-III post in the Agriculture Department and his salary was voluntarily fixed by the competent Departmental-Authorities from time to time, in which the petitioner had no role. Learned counsel for the petitioner further submits that the petitioner is now been retired from service on 31.12.2019 just before the retirement the petitioner was served with orders dated 03.01.2019 and 09.05.2019 by the respondent nos.1 and 2 by which they have directed to recover an amount of Rs.4,75,011/- from the salary of the petitioner on account of alleged wrong fixation of salary and paid in lieu thereof, w.e.f. 02.06.2007 to December, 2018.

4. Learned counsel for the petitioner further argued that the fixation of salary is the duty of the State Authorities and there is no role of the petitioner nor the petitioner played any fraud or suppression of material fact while the salary of the petitioner was fixed and if any, excess payment in lieu

thereof has been paid is deemed to the fault of the State Authorities and the action of the State Authorities in recovering the said amount from the salary of the petitioner is arbitrary, illegal and against the principles of natural justice.

5. Learned Standing Counsel in counter oppose the submissions made by the learned counsel for the petitioner and submitted that the excess payment made to the petitioner was to be recovered in accordance with law and the petitioner was not holding that post for which the payment was made, therefore, the impugned orders by which the recovery is being made is justified and no interference is required by this Court.

6. Heard the learned counsel for the parties and perused the record, in view of the Court, it is not the case of the respondents that the petitioner has drawn the excess payment by playing fraud or by misrepresenting any fact before the authorities concerned, the excess payment was made by the department cannot be recovered on the ground that the petitioner was not entitled for the same. In this regard reliance is placed on the judgment rendered by the Hon'ble Apex Court in the case of ***Dr. Gopalji Mishra Vs. State of U.P. & Others, 2004 (2) ESC 791*** and was pleased to hold as follows in paragraph 20:

"20. So far as the payment of excess amount, which the petitioner was not entitled is concerned, as there has been no misrepresentation or fraud on the part of the petitioner, he cannot be asked to refund the same. More so, petitioner might have spent the same considering his own money. Recovery thereof would cause great financial hardship to the petitioner. In such circumstances, recovery should not be permitted. [Vide Shyam Babu Verma and Ors. v. Union of India and Ors. 1994 2 SCC 521; Sahib Ram v. State of Haryana and Ors., 1995 Supp1 SCC 18 and V. Gangaram v. Regional Joint Director and Ors., 1997 AIR (SC) 2776]".

7. It is not out of place to mention here that the basic proposition of law laid down in the above decision has been consistently followed by this Court time and again and reiterated in ***Dr. Avinash Chand Goel Vs. State of U.P. & Ors. 2011 5 ESC 3035*** and in paragraph no.7, the following observation was made:

"7. In the present case the established principle of law, that a person cannot be asked to repay the amount, which was not due to him, but has been paid to him without any misappropriation or fraud, is squarely applicable. In this case the petitioner had protested even to the alleged wrong fixation of the pay. He has given details of his entitlement for the correctness of the applicability of the pay scale and the benefits to be drawn by him under the orders of the Supreme Court in Chandra Prakash's case in, which not only the seniority but consequential benefits were also allowed to be given to those medical officers who were to be given promotions. In such case, the principle of law 'no work no pay' will not be applicable."

8. This Court in the case of ***Hansraj Singh and Others Vs. State of U.P. and Others reported in 2015 (2) ADJ 581***, has considered all the judgment in this regard passed by the Hon'ble Apex Court.

9. It is also relevant to mention here that in regard to the proposition of law laid down by the Hon'ble Apex Court and the

different High Courts there arose contradictions on the views of the Hon'ble Judges and the stage of confusion started as to which judgment be implemented for the cause and the issue was settled by the Hon'ble Apex Court in the case of ***State of Punjab & Ors. Vs. Rafiq Masih (White Washer) etc. 2014 8 SCC 883***, and the Hon'ble Apex Court considering all the judgments passed earlier in this regard, was pleased to pass the final direction and the conclusion was given in paragraph no.12 of the judgment, which is given as under:-

"12. It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

(i) Recovery from employees belonging to Class-III and Class-IV service (or Group-C and Group-D service).

(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employees, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

10. From the perusal of the proposition of law laid down in the above mentioned judgment of the Hon'ble Apex Court as well as of this Court, established that the case of the petitioner clearly fall in that category and is not liable to refund any amount in pursuance of the impugned orders passed by the respondent authorities. As there has been no misrepresentation or fraud on the part of the petitioner and petitioner could not be asked by respondent to return the same, the recovery of the amount would cause great hardship to the petitioner.

11. Accordingly, the impugned orders of recovery dated 03.01.2019 and 09.05.2019 passed by the respondent nos. 1 and 2 cannot be sustained and are liable to be quashed.

12. With the aforesaid observations, the writ petition is **allowed** and the impugned orders dated 03.01.2019 and 09.05.2019 are quashed.

13. No order as to costs.

(2020)10ILR A441
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.09.2020

BEFORE
THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

WRIT - A No. 10396 of 2019
with
WRIT – A No. 10448 of 2019
&
other connected cases

Namit Kumar Pandey & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Seemant Singh, Sri Santosh Yadav, Sri Ashok Khare

Counsel for the Respondents:
Sri Alok Kumar Kushwaha, Sri Akhilendra Yadav, Sri Alok Dwivedi, Sri Anil Kumar Yadav, Sri B.S. Pandey, Sri Hritudhwaj Pratap Sahi, Sri Indresh Kumar Singh, Sri J.S. Baghel, Sri Kailash Singh Kushwaha, Sri Kamlesh Kumar Tripathi, Sri Krishna Kant Singh, Sri Mujib Ahmad Siddiqui, Sri Prem Prakash, Sri Rajesh Kumar Singh, Sri Samarth Singh, Sri Sanjeev Kumar Singh, Sri Shikher Trivedi, Sri Shivendu Ojha, Sri Siddharth Singhal, Sri Vijay Kumar, Sri S.M.A. Abidy, Sri Santosh Yadav, Sri G.K. Singh, Sri Radha Kant Ojha

A. Service Law – U.P. Laboratory Technician (Medical, Health and Family Welfare Department) Service Rules, 1994 - Rule 8 - U.P. Procedure for Direct Recruitment against Group 'C' Post (Outside the Purview of Public Service Commission (Fourth Amendment) Rules, 2014 - Selection Process -

(i) Where there is a composite test consisting of a written examination followed by a viva voce test, the number of candidates to be called for interview in order of the marks obtained in the written examination, should not exceed twice or at the highest, thrice the number of vacancies to be filled. But, something more than merely calling an unduly large number of candidates for interview must be shown in order to invalidate the selections made - The writ petitioners have failed to show any prejudice caused to them by including more number of candidates in the zone of consideration for interview by lowering cut off marks. The final list was prepared on the basis of marks obtained in the written examination, interview, academics and sports and even then, final cut off marks still remained high to be 63.5 marks for unreserved, 58.5 marks for OBC, 55 marks for SC and 55.5 marks for ST. (Para 10.02)

(ii) The 3 time formula can be applied uniformly to all the categories reserved as well as unreserved. Therefore, UPSSSC has not committed any error in lowering the cut off marks to call 3 times candidates for interview for all the categories. (Para 10.01)

In the present case 477 posts of General Category were advertised, therefore, 1431 candidates were required to be called for interview applying principle of '3x'. Since, only 1148 candidates were available in the said category, therefore, even the last candidate from General Category was called for interview. Such last candidate had obtained 0.5 marks in the written examination. In terms of ratio of judgment passed by this Court in *Lalit Kumar Vs. State of U.P. & Ors* (infra), cut off marks of other categories were also lowered down. On the basis of new cut off marks, the merit list was redrawn and final merit list on 07.01.2019, declared 3494 candidates eligible for interview. In pursuance of a new information dated 15.01.2019, for candidates who had participated in the written examination to submit their self attested copy of the registration certificate issued by the U.P. State Medical Faculty, 278 candidates submitted their certificates and were declared eligible to participate in the interview. Thus, total number of candidates to appear in the interview became 3772. The final result was declared on 15.06.2019 against 921 posts of Lab Technician. (Para 3.13)

B. The UPSSSC has not committed any fault by granting opportunity to all the candidates to apply for registration with the U.P. State Medical Faculty and submit their registration certificates prior to the prescribed date and in order to include names of such candidates, the UPSSSC has rightly redrawn the merit list - The case set up by the petitioners in the writ petitions is mainly on the ground that under the garb of redrawing of the merit list, large number of candidates who were not able to qualify earlier in the written examination, are now declared to be qualified and made eligible for interview. Even the candidates who did not possess the requisite qualification of Diploma before the cut off date were also declared eligible for interview and finally some meritorious candidates were left out and less meritorious candidates got selected and therefore merit was compromised. (Para 3.15)

Court observed that directions issued by the Division Bench vide judgment and order dated

04.04.2017 (while deciding an appeal against judicial pronouncement dated 25.11.2013, rendering decision in a challenge to the advertisement dated 09.09.2016, issued for conducting Combined Laboratory Technician General Recruitment Competitive Examination, 2016 (examination for selection in question)), for permitting candidates who had passed the diploma course before the cut off date, to get themselves registered before U.P. State Medical Faculty and to present certificates before the Commission for consideration of their names, could be implemented only when merit list was redrawn. (Para 6.06, 8.03, 8.05, 8.06)

C. Constitution of India: Article 14 - The Division Bench directed the candidates to apply for registration certificates from U.P. State Medical Faculty on the ground that the said eligibility condition was not mentioned in the advertisement, therefore, all the candidates who were selected or not selected in the first select list were entitled to rectify it by getting themselves registered with the U.P. State Medical Faculty. The said direction is based on the well recognised principle of Article 14 of the Constitution of India. (Para 3.01- 3.03, 9)

D. Principle of Estoppel - It is well settled that petitioners who have consciously taken part in selection process cannot turn around and question the very selection process - The petitioners neither challenged the redrawn merit list dated 07.01.2019, nor arrayed selected candidates as respondents, this aspect goes against the petitioners. Petitioners have not alleged any malafide or favourism in the entire selection process. (Para 13)

Writ petition dismissed. (E-4)

Precedent followed:

1. Lalit Kumar Vs St. of U.P. & ors, Writ Petition No. 68706 of 2015, decided on 11.01.2016 (Para 3.13)

2. Ashok Kumar Yadav & ors Vs St. of Hary. & ors, (1985) 4 SCC 417 (Para 10)

3. Nitin Kumar & ors. Vs St. of U.P. & ors., 2015 (4) ADJ 701 (Para 10.01)

4. Km. Rashmi Mishra Vs M.P. Public Service Commission & ors. (2006) 12 SCC 724) (Para 13)

5. Ramesh Chandra Shah & ors. Vs Anil Joshi & Ors, (2013) 11 SCC 309 & paras 14, 15, 16, 17 and 18 of Madras Institute of Development Studies & anr. Vs. K. Sivasubramaniyan & ors. (2016) 1 SCC 45 (Para 13)

Present petition challenges final result dated 15.06.2019 of Combined Laboratory Technician General Recruitment Competitive Examination, 2016, held for selection for posts of Lab Technician.

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. Heard Seemant Singh, Mahendra Singh, Jitendra Kumar, Chandra Dutt and Ajay Kumar Sharma, Advocates for petitioners; Neeraj Tripathi, Senior Advocate, Additional Advocate General for State; Siddharth Singhal, Advocate for U.P. Subordinate Service Selection Commission, Radha Kant Ojha, Mujib Ahhmad Siddiqui, B.S. Pandey, Sanjeev Kumar Singh, J. S. Baghel, Kailash Singh Kushwaha and Vijay Kumar Singh, Senior Advocate for private respondents.

2. In all the writ petitions similar relief has been sought, hence they are being decided by this common judgment.

3. Facts of the present case.

3.01 The present set of writ petitions are in regard to selection for the post of Lab Assistant namely: Combined Laboratory Technician General Recruitment Competitive Examination, 2016 (hereinafter referred to as "Examination 2016"). The essential qualifications for the post concerned are prescribed in Rule 8 of the U.P. Laboratory

Technician (Medical, Health and Family Welfare Department) Service Rules, 1994 (hereinafter referred to as the "Rules, 1994") which reads as under:

"8. प्रयोगशाला तकनीशियन के पद पर सीधी भर्ती के लिये आवश्यक है कि अभ्यर्थी ने माध्यमिक शिक्षा परिषद उत्तर प्रदेश की विज्ञान के साथ इण्टरमीडियट परीक्षा या सरकार द्वारा उसके समकक्ष मान्यता प्राप्त कोई परीक्षा उत्तीर्ण की हो और उत्तर प्रदेश स्टेट मेडिकल फेकल्टी, लखनऊ द्वारा दिया गया प्रयोगशाला तकनीशियन डिप्लोमा या किसी मान्यता प्राप्त संस्था से उसके समकक्ष कोई डिप्लोमा रखता हो। "

"8. For direct recruitment to the post of Laboratory Technician, applicant must have passed Intermediate Examination conducted by the Uttar Pradesh Board of High School and Intermediate Education with science or any examination recognized by the government as equivalent thereto and must posses Laboratory Technician diploma awarded by the Uttar Pradesh State Medical Faculty, Lucknow or any equivalent diploma from any recognized institution." (English translation by the Court).

3.02 The State Government issued a Government Order dated 20.12.2003, in compliance of common judgment and order dated 23.5.2003 passed by Lucknow Bench, leading writ petition being Writ Petition No.7001 S/S of 2001, Atul Kumar Bhardwaj & Ors. Vs. State of U.P. & Anr., wherein it is provided in paragraph 11 that the candidates in possession of Diploma in Lab Technician trade shall be required to be registered with the U.P. State Medical Faculty and only such candidates shall be eligible for appointment/selection to the post of Lab Technician.

3.03 The aforesaid Government Order was subject matter of challenge in Writ Petition No.64102 of 2013, (Shailesh Kumar Vs. State of U.P. & Ors), wherein the co-ordinate bench of this court vide judgment and order dated 25.11.2013 rejected the writ petition and refused to interfere with the said government order.

3.04 The selection process was required to be conducted as per the procedure prescribed in U.P. Procedure for Direct Recruitment against Group "C' Post (Outside the Purview of Public Service Commission (Fourth Amendment) Rules, 2014 notified on 29.1.2014 (to be referred as Rules 2002 as amended).

3.05 Initially, U.P. Subordinate Services Selection Commission (hereinafter referred to as "UPSSSC") issued advertisements dated 16.6.2016 and 16.8.2016 for recruitment/appointment on the post of Lab Technician. However, it was challenged and quashed by a co-ordinate bench at Lucknow Bench with the direction to UPSSSC to issue fresh notifications strictly in accordance with the provisions contained in "Rules, 2002 as amended' in the case of Keshv Pal & 2 Ors. Vs. State of U.P. through Principal Secretary, Medical and Health Lucknow & Ors; Service Single No.18077/2016 decided on 19.8.2016.

3.06 In compliance of the abovementioned directions, UPSSSC issued fresh advertisement No.17/Examination/2016 dated 09.9.2016 for conducting Combined Lab Technician Examination, 2016 in accordance with Rules, 2002 as amended by Fourth Amendment Rule 2014. Break up of vacancies is as follows:

General Category – 477

Other Backward Class Category- 225

Scheduled Caste Category- 205

Scheduled Tribe Category-14

Total 1431.

3.07 In pursuance of the abovementioned advertisement, written examination was conducted on 20.11.2016, result thereof was declared on 19.12.2016. The UPSSSC declared cut off marks of all the categories, by office memorandum dated 3.2.2017, which is as follows:

"उत्तर प्रदेश अधीनस्थ सेवा चयन आयोग
पिकप भवन, तृतीय तल, गोमती नगर,
लखनऊ।
संख्या. 1011 /गोपन अनुभाग/2016
लखनऊः दिनांक 03 फरवरी,2017
सम्मिलित प्रयोगशाला प्राविधिज्ञ ;सामान्य चयन) प्रतियोगितात्मक
परीक्षा, 2016

क्रम संख्या	श्रेणी	लिखित परीक्षा कट.आफ अंक
1	अनारक्षित वर्ग	13.00
2	अनुसूचित जाति	12.50
3	अनुसूचित जनजाति	10.50
4	अन्य पिछड़ा वर्ग	13.00

क्षैतिज आरक्षणः-

क्रम संख्या	श्रेणी	लिखित परीक्षा कट. आफ अंक
1	स्व० संग्राम सेनानी आश्रित	11.50
2	विकलांग जन	12.00
3	सैन्य नियोजित/ भूतपूर्व सैनिक	10.50
4	महिलाओं हेतु	13.00

(महेश प्रसाद)
सचिव"

3.08 Meanwhile, the above referred advertisement dated 09.9.2016 was challenged before a co-ordinate bench at Lucknow Bench in Mahendra Veer Vikram Singh and Ors. Vs. State of U.P. & Ors, (S/S) No.2350 of 2017, on the ground that the said advertisement was not issued in tune with the judgment and order dated 23.5.2003 passed by co-ordinate bench at Lucknow Bench in writ petitions, leading being Atul Kumar Bhardwaj (supra) and the same was also in derogation of the Government Order dated 20.12.2003, issued in compliance of said judgment.

3.09 The said writ petitions were disposed of vide order dated 14.2.2017 with certain directions. The relevant observations and the directions passed by the co-ordinate bench at Lucknow Bench are as follows:

"The basic premise of challenge put forth by learned counsel for the petitioners in both the petitions is that the prescription in relation to the eligibility qualification as advertised is not in tune with the judgement and order dated

23.05.2003 passed by this Court in a bunch of writ petitions, leading writ petition being Writ Petition No.7001 (S/S) of 2001 and the same is in derogation of the Government Order issued on 20.12.2003 by the State Government for ensuring compliance of the judgement and order dated 23.05.2003 passed by this Court.

The recruitment to the post of Lab Technicians is governed by Uttar Pradesh Lab Technician (Medical, Health and Family Welfare Department) Service Rules, 1994 as amended from time to time.

Rule 8 of the said Rules provides the eligibility educational qualification for appointment to the post in question, according to which only those candidates will be eligible for appointment by way of direct recruitment who have passed Intermediate examination from the Board of High School and Intermediate Education, U.P. Allahabad or any equivalent examination and who are possessed with diploma in Lab Technician granted by the U.P. State Medical Faculty or any other diploma equivalent thereto from a recognized institution.

In relation to eligibility qualification, as prescribed in Rule 8 of the Service Rules, various writ petitions were filed before this Court by certain individuals which were connected and decided by a common judgement and order dated 23.05.2003, leading writ petition being Writ Petition No.7001 (S/S) of 2001; Atul Kumar Bhardwaj and others vs. State of U.P. and another. The Court quashed the order/letter dated 05.12.2001, which was under challenged in the aforesaid bunch of writ petitions, and directed the State Government to decide the question of equivalence of the Lab Technician diploma held by the petitioners therein and their eligibility to participate in the selection process for the post of Lab Technician by a speaking order.

In compliance of the said order dated 23.05.2003, the State Government took a decision, which is embodied in the Government Order dated 20.12.2003, which has been annexed as annexure no.2 to the Writ Petition No.2350 (S/S) of 2017. According to the said Government Order, U.P. State Medical Faculty was directed to determine the equivalence of the diploma granted by other institutions in accordance with the conditions laid down in the said Government Order. The Government Order dated 20.12.2003 further states that the candidates in possession of diploma in Lab Technician Trade shall be required to be registered with U.P. State Medical Faculty and only those candidates who are registered with U.P. State Medical Faculty shall be eligible for appointment/selection to the post of Lab Technician."

xxxx

xxxx

"It has been stated by learned counsel for the petitioners that the Government Order dated 20.12.2003 became subject matter of challenge before this Court in Writ-A No. 64102 of 2013; Shailesh Kumar vs. State of U.P. and others. This Court while deciding the said petition by means of judgement and order dated 25.11.2013 did not find any justification to interfere with the Government Order dated 20.12.2003. The Government Order dated 20.12.2003, thus, having been affirmed by this Court by means of the aforesaid order, has to be given effect to by the selecting body while making selection/appointment to the post in question. However, in absence of the requisite informations/materials which the State Government and the concerned

department were required to furnish to the Commission, the apparent discrepancy in the advertisement appears to have crept in."

xxxx

xxxx

"Accordingly, the petitions are disposed of with the direction to the Commission to proceed with the selection against the posts in question in accordance with law and also taking into account the provisions contained in Government Order dated 20.12.2003.

It may further be observed that it is common knowledge that the State of U.P. is facing scarcity of Paramedical staff which are urgently needed and hence, the Court expects and hopes that the entire selection process initiated on issuance of the impugned advertisement shall be completed expeditiously and for the said purpose, the merit list prepared earlier on the basis of written examination without taking into consideration the provisions contained in the Government Order dated 20.12.2003 shall be redrawn and accordingly the interview shall be held. The entire process for selection shall be completed expeditiously, say, within a period of three months from today."

(emphasis supplied)

3.10 The above referred judgment and order dated 14.2.2017 was challenged by some of the candidates who were declared selected in the result of written examination, but likely to be eliminated if the above referred directions passed in the said judgment are executed, by way of filing Special Appeal Defective No.145 of 2017, (Pragati and 16 Ors. Vs. Mahendra Veer Vikram Singh & 9 Ors) and Special Appeal Defective No.118 of 2017, (Akil Khan & Anr. Vs. Mahendra Veer Vikram Singh & Ors.)

3.11 The said Special Appeals were disposed of with certain directions vide judgment and order dated 04.4.2017, by Division Bench at Lucknow Bench. The relevant observations and directions are reproduced below:

"2. These two appeals have been filed seeking leave to appeal to question the correctness of the judgment of the learned Single Judge dated 14.02.2017, the fallout whereof is directly affecting the appellants, and it is alleged that they having succeeded in the selection process would now be eliminated from the merit list, which is to be prepared under the impugned judgment, inasmuch as, the appellants are now sought to be non-suited on the ground that they do not possess the equivalent qualifications/eligibility criteria as per the Government Order dated 20.12.2003, which requires the registration of such candidates with the U.P. State Medical Faculty, which is a sine-qua-non as per clause 11 of the aforesaid Government Order."

"5. As a consequence of the aforesaid judgment, the matter was deliberated upon and the State Government issued the Government Order dated 20.12.2003. While prescribing the parameters and ingredients of equivalence, the G.O. also imposed an additional condition of registration with the U.P. State Medical Faculty as contained in Clause 11 thereof, which is extracted herein under:

" उपरोक्त शर्तों के अनुसार समकक्ष अन्य संस्थाओ का निर्धारण उ०प्र० स्टेट मेडिकल फेकल्टी द्वारा किया जायेगा तथा समकक्ष संस्थाओ से लैब टेक्नीशियन का डिप्लोमा प्राप्त अभ्यर्थियो को उ०प्र० स्टेट मेडिकल फेकल्टी मे पंजीकरण कराना आवश्यक होगा तथा पंजीकृत अभ्यर्थी ही लैब टेक्नीशियन के पद पर चयन हेतु अर्ह होगें।"

"7. It appears that advertisements were issued on 08.01.2016 and again on 15.09.2016 for filling up the post of Lab Technicians which is the subject matter of the present appeal. The appellants also applied and claim that they have qualified in the written examination. It is at this stage that a challenge was raised by those persons who had not succeeded and qualified by filing writ petitions that have given rise to these appeals. The writ petitions were entertained without impleading the appellants or any other successful candidates and has been ultimately disposed off by recording a finding that the selection process has proceeded without complying with the terms and conditions as prescribed in the Government Order dated 20.12.2003 and consequently, the entire process has to be revisited and the list of successful candidates rearranged after applying the eligibility conditions prescribed therein.

"8. Learned counsel for the appellants contend that this would amount to changing the rules of the game after the game has been played and consequently the learned Single Judge has committed an error in proceeding to issue such directions without there being any such condition imposed in the advertisements under which the selections are being held. It was the specific case of the appellants that this condition was not contained or even indicated in the advertisement and consequently, the directions of the learned Single Judge would be re-defining the advertisement thereby causing prejudice to the appellants. It is also submitted that there was no notice to the appellants about the inclusion of any such term and condition of eligibility nor any opportunity was given to the appellants to even obtain the registration from the U.P. State Medical Faculty. In such circumstances, this would amount to denial of opportunity thereby violating Article 14 and 16 of the Constitution of India."

"9. Learned counsel for the appellants, therefore, submit that the impugned judgment cannot be permitted to be applied in relation to such selections that are a consequence of the advertisements dated 08.01.2016 and 15.09.2016. It is urged that the terms of eligibility after the selection is over cannot be altered so as to eliminate the appellants from the select list. It is urged that even though a mere selection cannot give a right of appointment but if the selection procedure is sought to be altered then any subsequent change in eligibility cannot be a ground to eliminate the appellants on the strength of a condition, which was never part of the advertisement on the basis whereof, selections are being held."

"12. We have considered the aforesaid submissions and after having heard learned counsel for the parties, we find that a selection, which is being held bereft of the compulsory rules of eligibility cannot be said to be valid selection and consequently, if the selection is sought to be rectified by introducing the said compulsory eligibility criteria, we do not find any error in the direction issued by the learned Single Judge in applying the said eligibility conditions, if it has been deliberately omitted to be mentioned in the advertisement. A mere omission would not alter the terms and conditions of eligibility inasmuch as that by itself would violate Article 16 of the Constitution of India."

"13. We are, therefore, of the opinion that the learned Single Judge was fully justified in proceeding to apply the eligibility conditions, the terms whereof have already been upheld by the judicial pronouncement dated 25.11.2013. Admittedly, the challenge raised to the

terms and conditions having been upheld by this Court, there is no occasion now to accept the argument that the selections should be allowed to be completed without complying with the provisions of the eligibility as prescribed in the Government Order dated 20.12.2013. We, therefore, uphold the judgment of the learned Single Judge to that extent.

14. Having said so, what appears is that the said judgment has been delivered without putting any other qualified candidates including the appellants to notice and without providing any opportunity to such candidates to avail the facility of registration from the U.P. State Medical Faculty. To this, learned counsel for the respondents submits that after the judgment impugned herein was delivered on 14.02.2017, the appellants were very well are of the said terms and conditions that were to be applied. More so, after the issuance of notice on 06.3.2017 to the effect that the appellants would not be further eligible to be considered for selection. The appellants having failed to avail of this intervening period to get themselves registered with the U.P. State Medical Faculty, therefore, cannot be a reason for them to claim that they should be extended any benefit by setting aside the impugned judgment. It is, therefore, submitted that having failed to avail of this opportunity, they cannot now question the correctness of the impugned judgment on this ground."

"15. On this issue, we find ourselves at variance with the submissions raised on behalf of the respondents inasmuch as it is admitted that the advertisement did not mention the aforesaid eligibility condition and which omission was either deliberate or by mistake, may not be a reason to deny the opportunity to the appellants, who have already applied and have qualified in the written examination. This eligibility, in our opinion, can be rectified in the event the appellants succeed in getting themselves registered with the U. P. State Medical Faculty. Consequently, an opportunity to them with a reasonable time to get registered ought to be given keeping in view the aforesaid background of the litigation and the circumstances in which the impugned judgment has brought about this situation.

"16. Consequently, we direct that all the appellants herein and such other similarly situate candidates, who are not before the Court, would be entitled to apply before the U.P. State Medical Faculty and in the event they are successfull in obtaining such registration from the competent authority, it will be open to them to bring it to the notice of the respondent Commission, and the Commission shall proceed to comply with the judgment of the learned Single Judge dated 14.02.2017 including the names of such candidates who succeed and are able to supply the said registration certificate before the Commission within one month from today. In the event the appellants apply before the U.P. State Medical Faculty for such a registration, such applications shall be disposed off within three weeks from the date of presentation of a certified copy of this order in order to ensure that in the event they are extended the benefit of registration, they may be able to avail the benefit during the final selection. The appellants and other similarly situate candidates shall be entitled to be considered provided they have qualified in the written exam and are otherwise qualified and eligible as per the relevant rules and the Government order referred to herein above." (Emphasis supplied)

3.12 In compliance of above referred directions, the UPSSSC issued an

Important Information dated 25.4.2017 to call upon all the candidates who were covered by the said judgment to submit their registration certificate issued by U.P. State Medical Faculty till 24.5.2017. Last date for submission of certificate was extended till 06.11.2018 by subsequent notification dated 31.10.2018 as mentioned by the UPSSSC before this Court by way of short counter affidavit dated 28.7.2019 and further that as per the guidelines, the Commission has to call three times candidates of the post advertised.

3.13 As per the stand taken by UPSSSC, in the present case 477 posts of General Category were advertised, therefore, 1431 candidates were required to be called for interview applying principle of "3x'. Since, only 1148 candidates were available in the said category, therefore, even the last candidate from General Category was called for interview. Such last candidate had obtained 0.5 marks in the written examination. In terms of ratio of judgment passed by this Court in **Lalit Kumar Vs. State of U.P. & Ors, Writ Petition No.68706 of 2015**, decided on 11.1.2016 cut off marks of other categories were also lowered down. On the basis of new cut off marks, the merit list was redrawn and finally the merit list was declared of total number of 6494 candidates who were included within the zone of eligibility for interview and the result of the written examination declared earlier on 29.12.2016 was cancelled and redrawn merit list was declared on 07.1.2019. The candidates were called for interview from 17.1.2019 to 2.2.2019. The UPSSSC issued a new information dated 15.1.2019 for all the candidates who had participated in the written examination to submit their self attested copy of the registration certificate issued by the U.P. State Medical Faculty. In pursuance of the said information 278 candidates, also submitted their certificates and were declared eligible to participate in the interview. Thus, making the total number of candidates to appear in the interview to 3772. The final result was declared on 15.6.2019 against 921 posts of Lab Technician. The final cut of marks after the interview declared by UPSSSC on 15.6.2019, is as follows:

"उत्तर प्रदेश अधीनस्थ सेवा चयन आयोग
पिकप भवन, तृतीय तल, गोमती नगर,
संख्या. 400 /गोपन
अनुभाग/1/30/2016/2019
लखनऊः दिनांक 15 जून,2019

विज्ञापन संख्या-17-परीक्षा/2016 प्रयोगशाला प्राविधिज्ञ (सामान्य चयन)
प्रतियोगितात्मक परीक्षा 2016 के अन्तर्गत
विज्ञापित प्रयोगशाला प्राविधिज्ञ पद का
अंतिम कट.आफ अंक
लम्बवत आरक्षण

श्रेणी	अंतिम कट आफ अंक
अनारक्षित	63.5
अन्य पिछड़ा वर्ग	58.5
अनुसूचित जाति	55
अनुसूचित जनजाति	55.5

क्षैतिज आरक्षण

श्रेणी	अंतिम कट.आफ अंक
महिला	53.5

स्वतंत्रता संग्राम सेनानी के आश्रित	54.5
विकलांग	59.5

टिप्पणी-

1- कार्मिक अनुभाग -2, उत्तर प्रदेश शासन के शासनादेश संख्या - 18/1/99 /का-2/ 2006, दिनांक 09.01.2007 के अनुसार राज्याधीन लोक सेवाओं और पदों पर सीधी भर्ती के प्रक्रम पर महिलाओं को अनुमन्य आरक्षण का लाभ केवल उत्तर प्रदेश की मूल निवासी महिलाओं को ही अनुमन्य है।

2- कार्मिक अनुभाग - 3, उत्तर प्रदेश शासन की अधिसूचना संख्या . 32/2015/857/47 .का-3- 2015-13 /19/2015, दिनांक 11.05.2015 के नियम- 8(2)(चार) के अनुसार . यदि दो या अधिक अभ्यर्थी बराबर.बराबर औसत अंक प्राप्त करें, तो लिखित परीक्षा में उच्चतर अंक प्राप्त करने वाले अभ्यर्थी को उच्चतर स्थान पर रखा जायेगा। यदि दो या अधिक अभ्यर्थी लिखित परीक्षा में भी बराबर.बराबर अंक प्राप्त करें तो सूची में उस अभ्यर्थी को उच्चतर स्थान पर रखा जायेगाए जो आयु मे ज्येष्ठ होगा।

(आशुतोष मोहन अग्निहोत्री)
सचिव "

3.14 In total, 11 Writ Petitions are filed before this Court challenging the impugned final result dated 15.6.2019. None of the writ petitioners have challenged select redrawn list dated 7.1.2019 and declaration of cut off marks dated 15.6.2019. According to the records available, neither the writ petitioners nor the respondents have approached the Division Bench for any clarification of the judgment and order passed by Division Bench nor any review petition is preferred.

3.15 The case set up by the petitioners in the writ petitions is mainly on the ground that under the garb of redrawing of the merit list, large number of candidates who were not able to qualify earlier in the written examination, are now declared to be qualified and made eligible for interview. Even the candidates who did not possess the requisite qualification of Diploma before the cut off date were also declared eligible for interview and finally some meritorious candidates were left out and less meritorious candidates got selected and therefore merit was compromised.

3.16 This Court by order dated 26.8.2019 after taking note of cut off marks on the basis of which final merit list was issued passed an interim order. Operative part of the order is reproduced below:-

"Till the next date of listing, the impugned result dated 15.6.2019 shall be kept in abeyance. The State Government shall not issue any further appointment pursuant to it and the appointments already made shall remain subject to the outcome of the present writ petition."

3.17 This Court by another order dated 08.1.2020 extended the above referred interim order and disposed of all the impleadment applications/intervention applications. Relevant part of the order is mentioned below:

"All these impleadment applications and applications styled as intervention application have been filed by the selected candidates. A representative number of the selected candidates are already on record as respondent Nos.3 to 11. All these impleadment applications are disposed of with a direction that the applicants in each of the impleadment or intervention applications made shall be

heard under Chapter XXII Rule 5A of the Rules of the Court. The names of each of the learned counsel who have filed the above detailed impleadment applications shall be printed in the cause list on 22.01.2020."

3.18 Later on an application was filed by the State of U.P. for modification of the interim order dated 26.8.2019, seeking permission to continue with the process of appointment of the remaining 729 posts of Lab Technicians. After hearing the parties, prayer was allowed and the interim order dated 26.8.2019 was accordingly modified vide order dated 13.5.2020 passed by this Court, which stated that:

" The COVID-19 Pandemic has already spread all over the India including State of U.P,. despite various remedial steps taken by the concerned authorities. The Lab Technicians have important role in testing which is increasing day by day. It is on record that about 186 Lab Technicians have joined their respective post before the interim order dated 26.8.2019 was passed though their appointments are kept subject to the outcome of the present writ petitions.

Considering subsequent developments due to COVID-19 Pandemic and the importance of the Lab Technicians for testing, this Court is of the view that State be permitted to fill up remaining 729 posts of the Lab Technicians. However, their appointments shall also remain subject to the final outcome of the writ petition.

Accordingly, paragraph no.8 of the order dated 26.8.2019 is modified and is to be read as follows "State of U.P. is permitted to expeditiously carry out the process of joining of remaining 729 selected Lab Technicians from the selection list. Appointments made prior to order dated 26.8.2019 as well as subsequent to present order, shall remain subject to the final outcome of the present writ petitions".

4. Learned Advocates appearing on behalf of the petitioners as well as on behalf of the respondents and applicants who have filed applications for impleadment or intervention, are heard through Video Conferencing as well as by physical appearance in detail. Perused various counter affidavits, rejoinder affidavits and written submissions filed by rival parties.

5. **Submissions on behalf of the petitioners.**

Crux of the arguments submitted by the various advocates appearing on behalf of the writ petitioners could be summarised as follows:

5.01 The two directions passed by the Single Bench in the case of **Mahendra Veer Vikram Singh (supra): Firstly** that the Commission shall proceed with the selection in accordance with law and would also take into account the provisions contained in Government Order dated 20.12.2003 and **Secondly** the merit list prepared earlier on the basis of written examination conducted without taking into consideration the provisions contained in the Government Order dated 20.12.2003 shall be redrawn, were challenged before the Division Bench and the Division Bench vide judgment and order dated 04.4.2017 upheld only the first direction, however the second direction for redrawing the merit list was not upheld. In support of their submissions, counsels have relied upon certain paragraphs of the judgment passed by the Division Bench.

5.02 The other arguments are with regard to the directions made by the

Division Bench regarding opportunity for getting registered with the U.P. State Medical Faculty. It is contended that this would only be applicable to the appellants in the special appeal and such other similarly situated candidates, who were not before the Division Bench, therefore, the procedure undertaken by the UPSSSC for redrawing the merit list by lowering down the cut off marks to accommodate all the candidates irrespective whether they were appellants or similar to appellants in special appeals is not correct, being beyond the directions passed by Division Bench.

5.03 The UPSSSC has allowed even such candidates who did not possess requisite eligibility before the cut off date to participate in interview and erroneously declared some of them as selected also. The UPSSSC has compromised with the merit, by lowering down the cut off marks upto 0.5 marks which was earlier quite high up to 13 marks for General Category and similarly for other categories also.

6. Submissions on behalf of the respondents.

Submissions are made on behalf of the respondent UPSSSC, selected candidates and State of U.P. Their arguments are also based on the interpretation of the judgment passed by a co-ordinate bench as well as by the Division Bench to state that both the directions passed by the co-ordinate bench were entirely upheld by the Division Bench. The first direction of compliance of mandate of Government Order dated 20.12.2003 was upheld in specific words in para 13 of the judgment of Division Bench that "We, therefore uphold the judgment of the learned Single Judge to that extent", so far as the direction of redrawing the merit list is concerned, it being only a consequential direction need not be affirmed/upheld in specific words, further said direction was not set-aside by the Division Bench.

6.01 Benefit granted by the Division Bench to apply before the U.P. State Medical Faculty for registration was applicable to all the candidates, who were not selected, due to absence of such registration.

6.02 The cut off marks was lowered down only to accommodate three times of candidates for interview as to the number of posts advertised in each category as per the procedure prescribed.

6.03 No prejudice was caused to any candidate due to lowering of cut off marks as the final select list was prepared on the basis of the combined marks obtained in the written examination, interview, academics and sports.

6.04 The writ petitions are liable to be rejected only on the ground of not joining selected selected candidates as party respondent.

6.05 Writ petitioners who have participated in the selection process, cannot be permitted to challenge the same and further none of the writ petitioners have challenged the result dated 7.1.2019 which was announced after redrawing of the merit list.

6.06 Candidates who have passed the diploma course before the cut off date however their certificates were issued after the cut off date are eligible to participate in the examination.

7. Issues for consideration.

On the basis of pleadings, arguments and written submissions, following issues emerge for consideration before this Court:-

(I). Whether the two directions passed by co-ordinate bench vide judgement and order dated 14.2.2017 namely (i) UPSSSC shall proceed with the

selection process by taking into account the provisions contained in the Government Order dated 20.12.2003 and (ii) merit list prepared earlier on the basis of written examination without considering the provisions of Government Order dated 20.12.2003 shall be redrawn, were upheld by the Division Bench in Special Appeals vide judgment and order dated 4.4.2017 or only direction no.(i) was upheld and not the direction no.(ii)?

(II) Whether the direction passed by the Division Bench regarding applying for registration with the U.P. State Medical Faculty was applicable to all the candidates notwithstanding that they were selected in the result of written examination declared on 29.12.2016 or not?

(III) Whether the UPSSSC is justified in lowering down the cut off marks up to 0.5 in order to call three times the candidates for the post advertised in General Category and consequently cut off marks were rightly lowered down for all other categories to participate in the interview?

(IV) Whether UPSSSC has permitted such candidates who did not possess eligibility on the date of submission of form for selection process?

(V) What is the effect of not challenging result dated 07.1.2019 declared after redrawn of merit list, selected candidates are not made party to the writ petitions as well as challenge to the selection process after participating in the same?

8. <u>Re: Issue No.I.</u>

In order to decide the issue no.1, it is essential to consider the two directions passed by co-ordinate bench vide order dated 14.2.2017 in their correct perspective.

8.01. The co-ordinate bench found that the UPSSSC has not followed the provisions contained in the Government Order dated 20.12.2003 which requires a candidate to possess Diploma in Lab Technician Trade and shall further required to be registered with U.P. State Medical Faculty to become eligible to participate in the selection process to the post of Lab Technician and on this premise the co-ordinate bench directed to proceed with the selection after taking into account the said provisions. In order to comply the said directions, the UPSSSC has to redraw the merit list to disallow those selected candidates who did not register their names with the U.P. State Medical Faculty, therefore, the second direction for redrawing the list was only a consequential direction in case the direction no.1 is complied with by the UPSSSC.

8.02. Now, I have to consider how the Division Bench has dealt with the above mentioned directions in the judgment and order dated 04.4.2017.

8.03. In paragraph 13 of the judgment, the division bench in specific words has upheld the direction no.1 for applying the eligibility conditions prescribed in the Government Order dated 20.12.2003, which was earlier upheld by judicial pronouncement dated 25.11.2013, therefore, by upholding the first direction in specific words in paragraph 13, the Division Bench has also upheld the direction no.2 for redrawing the merit list, being a consequential direction. Though there is no specific finding on the said issue by the division bench however, it is relevant to note that division bench has not set-aside the second direction either.

8.04. The Division Bench further considered that the Single Bench has not granted any opportunity to the candidates to get them enrolled with the U.P. State

Medical Faculty, therefore, the division bench issued direction to the appellants and the other similarly situated candidates to get them enrolled before the U.P.State Medical Faculty and further in very specific words in paragraph 16, the Division Bench has directed the Commission to comply with the order of the Single Bench dated 14.2.2017, for including the names of such candidates who succeed and are able to apply for registration certificate. This direction would be complied only when UPSSSC after including the names of candidates who got themselves registered with U.P. State Medical Faculty, redraw the merit list, therefore, it is essential to read paragraphs 15 and 16 conjointly which are reproduced hereinafter:

"15. On this issue, we find ourselves at variance with the submissions raised on behalf of the respondents inasmuch as it is admitted that the advertisement did not mention the aforesaid eligibility condition and which omission was either deliberate or by mistake, may not be a reason to deny the opportunity to the appellants, who have already applied and have qualified in the written examination.. This eligibility, in our opinion, can be rectified in the event the appellants succeed in getting themselves registered with the U. P. State Medical Faculty. Consequently, an opportunity to them with a reasonable time to get registered ought to be given keeping in view the aforesaid background of the litigation and the circumstances in which the impugned judgment has brought about this situation."

"16. Consequently, we direct that all the appellants herein and such other similarly situate candidates, who are not before the Court, would be entitled to apply before the U.P. State Medical Faculty and in the event they are successfull in obtaining such registration from the competent authority, it will be open to them to bring it to the notice of the respondent Commission, and the Commission shall proceed to comply with the judgment of the learned Single Judge dated 14.02.2017 including the names of such candidates who succeed and are able to supply the said registration certificate before the Commission within one month from today. In the event the appellants apply before the U.P. State Medical Faculty for such a registration, such applications shall be disposed off within three weeks from the date of presentation of a certified copy of this order in order to ensure that in the event they are extended the benefit of registration, they may be able to avail the benefit during the final selection. The appellants and other similarly situate candidates shall be entitled to be considered provided they have qualified in the written exam and are otherwise qualified and eligible as per the relevant rules and the Government order referred to herein above."

8.05. From the above, it is absolutely clear that the Division Bench has also directed the UPSSSC to proceed with the examination after taking into consideration the provisions of the Government Order dated 20.12.2003, with further direction to the candidates by granting opportunity to obtain certificates from the U.P. State Medical Faculty and to present before the Commission for consideration of their names also, therefore, the UPSSSC has not committed any fault by granting opportunity to all the candidates to apply and get them registered with the U.P. State Medical Faculty and submit their registration certificates prior to the prescribed date and in order to include

names of such candidates, the UPSSSC has rightly redrawn the merit list.

8.06. The Division Bench has upheld the direction No.1. The direction No.2 being consequential direction, requires no specific order. The subsequent directions of the Division Bench for permitting candidates to get them registered before U.P. State Medical Faculty could be implemented only when merit list is redrawn. Issue no.1 is decided accordingly.

9. Re: Issue No.II.

The Division Bench has directed the candidates to apply for registration certificates from U.P. State Medical Faculty on the ground that the said eligibility condition was not mentioned in the advertisement, therefore, all the candidates who were selected or not selected in the first select list are entitled to rectify it in the event they got themselves registered with the U.P. State Medical Faculty. The said direction is based on the well recognised principle of Article 14 of the Constitution of India. The Division Bench has not distinguished while issuing the said direction on the basis of candidates who have been selected or not in the first merit list, which was redrawn and not challenged before this Court by any of the writ petitioners, therefore, no error has been committed by the UPSSSC by granting opportunity to all the candidates to get them registered with the U.P. State Medical Faculty. Issue no.2 is decided accordingly.

10. Re:Issue No.III.

The issue of "calling three times of candidates for interview' to the number of post advertised was considered by the Apex Court in **Ashok Kumar Yadav & Ors Vs. State of Haryana & Ors, (1985) 4 SCC 417,** that:-

"19.....The Division Bench pointed out that in order to have a proper balance between the objective assessment of a written examination and the subjective assessment of personality by a viva voce test, the candidates to be called for interview at the viva voce test should not exceed twice or at the highest, thrice the number of available vacancies. This practice of confining the number of candidates to be called for interview to twice or at the highest, thrice the number of vacancies to be filled up, was being followed consistently by the Union Public Service Commission in case of Civil Services Examination, but in the present case, observed the Division Bench, a departure was made by the Haryana Public Service Commission and candidates numbering more than 20 times the available vacancies were called for interview."

10.01 Similar view was taken by co-ordinate bench of this Court in **Nitin Kumar & Ors. Vs. State of U.P. & Ors, 2015 (4) ADJ 701**, wherein direction was issued to Electric Service Commission to apply the 3 time formula uniformally to all the categories reserved as well as unreserved. This direction was upheld by Division Bench in Special Appeal being U.P. Power Corporation Ltd. & Ors Vs. Nitin Kumar & Ors, 2015 (5) ADJ 417 (DB). Therefore, UPSSSC has not committed any error in lowering the cut off marks to call 3 times candidates for interview for all the categories.

10.02 The writ petitioners have also failed to show any prejudice caused to them by including more number of candidates in the zone of consideration for interview by lowering cut off marks. The final list was prepared on the basis of

marks obtained in the written examination, interview, academics and sports and even final cut off marks still remained high to be 63.5 marks for unreserved, 58.5 marks for OBC, 55 marks for SC and 55.5 marks for ST. The issue No.III is decided accordingly.

11. Re: Issue No.IV.

It is categorical stand of the UPSSSC that all the candidates who are selected possessed eligibility qualifications as declared by them before the cut off date. Some of the candidates who though passed Diploma before the cut off date, but their certificates were issued subsequently were also declared eligible to participate in the selection process. The writ petitioners are not able to point out any illegality in this process.

12. The writ petitioners have not come up with any documentary evidence to show that the categorical statement made on behalf of UPSSSC is false, therefore, the submission of the learned counsel for the petitioners in this regard is rejected. The entire selection process cannot be quashed on the basis of general and vague allegations. However, it is made clear that in case declaration made by any candidate in this regard is found to be false or contrary to the record, the UPSSSC/concerned authority is at liberty to take action against such candidate in accordance with law. Issue no IV is decided accordingly.

13. Re: Issue No.V.

The petitioners neither challenged the redrawn merit list dated 07.1.2019, nor arrayed selected candidates as respondents, this aspect also goes against the petitioners. (See paras 13,15 and 30 of **Km. Rashmi Mishra Vs. M.P. Public Service Commission & Ors. (2006) 12 SCC 724)**. It is also well settled that petitioners who have consciously taken part in selection process cannot turn around and question the very selection process. (See para 18 of **Ramesh Chandra Shah & Ors. Vs. Anil Joshi & Ors, (2013) 11 SCC 309** and paras 14,15,16,17 and 18 of **Madras Institute of Development Studies & Anr Vs. K. Sivasubramaniyan & Ors. (2016) 1 SCC 454**. It is also relevant to mention here that petitioners have not alleged any malafide or favourism in the entire selection process. Issue no V is decided accordingly.

Conclusion.

14. Petitioners have failed to make out a case for interference with the selection process of Combined Laboratory Technician General Recruitment Competitive Examination, 2016.

15. Accordingly, the present writ petitions are **dismissed.**

(2020)10ILR A457
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.10.2020

BEFORE
THE HON'BLE MANISH KUMAR, J.

Service Single No. 12438 of 2019

Vijay Kishore Anand & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Gaurav Mehrotra, Abhinav Singh

Counsel for the Respondents:

C.S.C., Apoorva Tewari, Hemant Kr Mishra, Rajeiu Kumar Tripathi, Surya Narayan Mishra, Vinod Kumar Singh

A. Service Law - Uttar Pradesh Transport Taxation (Subordinate), Service Rules, 1980 - Rule 5 - U.P. Transport Taxation (Subordinate) Service (First Amendment) Rules, 2018 - Rule 1(2), 3(hh) - note appended to Rule 4(4) - Indian Constitution - Article 309 - Promotion .

The petitioner had applied for consideration of their candidature to be directly appointed on the post of Passenger Tax, Goods-Tax Officer. The appointment letters were floated only after the interim order was modified by the Court vide order dated 22.02.2017 allowing the petitioners to join on the post. During the pendency of the completion of the selection process, the State Government vide order dated 03.05.2011 abolished and merged the vacant post of Goods/Passenger Tax Superintendents with the Passenger Tax, Goods-Tax Officers. A final seniority list dated 15.04.2019 placing the petitioner below Passenger Tax/Goods Tax Superintendents. The Court observed that such order are in the teeth of the judgment of this Court. **Once the controversy has been finally been adjudicated by this Court and the same has not been challenged before any Competent Court of law then the opposite party cannot sit as an appellate authority and pass order contrary to the directions issued by the judgment of this Court, in the matter the list has finally been adjudicated between the parties.** The opposite party cannot disturb the seniority list dated 17.11.2017 issued in pursuance of the Division Bench judgment dated 13.04.201 in the garb of that the Rules have been amended in the year 2018. (Para 34, 36, 41, 42)

As per the language used in the Rule 3(hh) it was observed that there was no provision for recruitment on the post of Passenger Tax, Goods Tax Officers by adopting the method of merger by executive order issued by the State Government. The Rule 1980 were very much in existence in the year 2011 when the merger order was passed by the Government. As per the existing Rules promotion can be only considered on completion of atleast 5 years of continuous service but the respondents have only completed 3 years of service and are not eligible to be considered for promotion according to the 1980 Rules. It is a gross violation of Rules that the respondents were promoted by inventing an extraneous method of merger of the respondents and other similarly situated persons. (Para 53)

The Court disregarded the preliminary objection raised regarding the maintainability of the writ petition on ground of non-joinder of necessary parties. It was held that there is no individual dispute between the parties, which may require the presence of all the parties at the time of adjudication of the seniority.(Para 49)

Writ Petition Allowed. (E-10)

List of Cases cited:-

1. H.S. Vankani & ors. Vs St. of Guj. & ors. (2010) 4) SCC page 301

2. Madan Mohan Pathak & ors. Vs U.O.I. & ors. (1978) 2 SCC page 50 I*(followed)*

3. Chairman, Railway Board & ors. Vs C.R. Rangadhamaiah (1997) 6 SCC page 623

4. J.S. Yadav Vs St. of U.P. (2011) 6 SCC Page 570

5. Vijay Kumar Kaul Vs U.O.I. (2008) 6 SCC 797 *(distinguished)*

6. St. of Uttaranchal Vs Madan Mohan Joshi (2010) 1 SCC *(distinguished)*

7. Amarjeet Singh Vs Devi Ratan (2010) 1 SCC Page 417

8. Pawan Pratap Singh Vs Reevan Singh (2011) 3 SCC 267

9. T. Thangavelu Vs U.O.I. (2009) 16 SCC 302

10. T. Narasinhulu Vs St. of A.P. (2010) 6 SCC 545

11. Chaman Singh Vs Jai Kaur (1969) 2 SCC

12. Sheshrao Jangluji Bagde Vs Bhaiyya 1991 Suppl. (1) SCC 367

13. A. Janardana Vs U.O.I. 1983 (3) page 601 *(distinguished)*

14. Prabodh Verma & ors. Vs St. of U.P. & ors. (1994) 4 SCC page 251 *(followed)*

15. B. Prabhakar Rao & ors. Vs St. of A.P. & ors. 1985 (Supp) SCC page 432 *(followed)*

16. Pawan Pratap Sigh Vs Reevan Singh (2011) 3 SCC 267

17. Prakash Nath Khanna & ors. Vs Commissioner of Income Tax & anr. (2004) 9 SCC *(followed)*

18. Prabhudas Damodar Kotecha & anr. Vs Smt. Manharbala Jaram Damodar & ors. 2007 (5) Mh. L.J. *(followed)*

19. Union of India & anr. Vs National Federation of the Blind & ors. (2013) 10 SCC page 772*(followed)*

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

1. Heard Sri Gaurav Mehrotra and Sri Abhinav Singh, learned counsel for the petitioners, learned State Counsel for Opposite Parties No. 1 and 2 and Sri Sudeep Seth, learned Senior Advocate, assisted by Sri V.K. Singh for Opposite Party No.3, Sri Suraya Narayan Mishra for Opposite Party No.13, Sri Hemant Mishra for Opposite Party Nos. 14 and 15 and Sri Apurva Tewari, who has moved an impleadment application on behalf of one Sri Mahesh, he has been allowed to make his submissions.

2. The present writ petition has been preferred by the petitioners feeling aggrieved by the final Seniority list issued vide office order no.871E/2019-371E/GPT/85-18 dated 15.04.2019 in so far as it relates to the placement of the petitioners below Passenger Tax / Goods Tax Superintendents, whose services have been merged in the higher cadre of posts of Passenger Tax, Goods-Tax Officer to which petitioners were directly appointed. They have also challenged the order dated 15.04.2019, by which the representation of the petitioners against the tentative seniority list has been rejected.

3. The dispute pertains to the placement of seniority on the post of Passenger Tax, Goods-Tax Officer amongst the direct recruits i.e. the petitioners and the private respondents, who were working on the post of Passenger Tax / Goods Tax Superintendents, the feeding cadre for promotion to the post of Passenger Tax, Goods-Tax Officers, but their services have been merged with Passenger Tax, Goods-Tax Officers vide Government Order dated 3.5.2011 abolishing post of Passenger Tax / Goods Tax Superintendents.

4. The services of the petitioners and the respondents are governed by the Provisions of the Uttar Pradesh Transport Taxation (Subordinate), Service Rules, 1980 (hereinafter referred as "Rules 1980'). The Rule 5, in Part III of the Rules 1980 deals with sources of recruitment to the service and as per Sub-Rule (1) of Rule 5, the post of Passenger Tax/ Goods-Tax Officers is to be filled up by direct recruitment through the Commission and by promotion also through the Commission from amongst the permanent Passenger Tax / Goods Tax Superintendents, who have put in at least 5 years of continuous service as such besides some other sources. According to the Rule 5, the post of Passenger Tax, Goods-Tax Officers were advertised by the U.P. Public Service Commission in the year 2009. The petitioners, since fulfilled the requisite

eligibility criteria, applied for the aforesaid advertised post and were selected for appointment.

5. Thereafter, the State government issued a Government Order dated 3.5.2011, by which the Post of the Passenger / Goods Tax Superintendents was abolished and the persons working on those posts were merged with the post of Passenger Tax Goods Officers. The government order dated 3.5.2011 was challenged by the ministerial employees, who were also eligible to be considered for promotion on the post of Passenger Tax, Goods-Tax Officers alongwith Passenger Tax / Goods Tax Superintendents, by filing a Writ Petition No.2811 (S/S) of 2011 (Ministerial Service Association Transport Lucknow vs. State of U.P.) and in this case, an interim order dated 27.05.2011 was passed by this Court directing for maintaining the status quo till the next date of listing.

6. In the above mentioned writ petition, an application was preferred by the State of U.P. for modification / clarification of the order dated 27.05.2011 to the extent that the 15 selected candidates including the present petitioners be allowed to join on the post of Passenger Tax, Goods-Tax Officers. The application for modification was allowed by this Court vide order dated 22.02.2013 allowing the 15 selected candidates including the present petitioners to join on the post of Passenger Tax, Goods-Tax Officer.

7. The appointment letters were issued on 22.07.2013 as far as the petitioners no.2, 3, 4, 5, 6, 8, 9 and 10 are concerned and on 6. 8. 2013 as far as it relates to Petitioners No.1 and 7.

8. The petitioners also preferred a Writ Petition No.336 (S/B) of 2015 assailing the Government Order dated 3.5.2011, but not pressed the same with liberty to file a fresh writ petition, as permitted by the order of this Court dated 26.03.2015. At the same time, the Writ Petition No.2811 (S/S) of 2011 was also dismissed as withdrawn vide order dated 17.07.2015. After the disposal of above writ petitions, on 13.08.2015 a tentative seniority list was published, wherein the names of the petitioners were tentatively placed below the employees, who were initially appointed as Passenger Tax / Goods Tax Superintendents and subsequently claimed to have been merged on the post of Passenger Tax, Goods-Tax Officers in the light of Government Order dated 3.5.2011. The petitioners preferred detailed objections to the seniority list, but the same was rejected and a final seniority list was published on 11.09.2015 for the post of Passenger Tax, Goods-Tax Officers, maintaining the seniority shown in the tentative seniority list.

9. The petitioners then preferred a writ Petition No.1802 (S/B) of 2015 (Vijay Kishor Anand And Ors. vs. State of U.P. & Ors) challenging the validity of the seniority list dated 11.09.2015 and the Government Order dated 3.5.2011. The Writ Petition was finally allowed by this Court vide judgment and order dated 13.04.2017, quashing the seniority list dated 11.09.2015 with a further direction to prepare a fresh seniority list of Passenger Tax/ Goods Tax Officer within a period of two months from the date of communication of the aforesaid order. Against the final judgment and order dated 13.04.2017, a review petition was preferred by two private respondents, which was

dismissed vide order dated 18.12.2017 and the matter attained finality.

10. The department despite the judgment of this Court kept sitting over the matter instead of issuing a fresh seniority list. The petitioners then filed a contempt petition being Contempt Case No.1544 of 2017 before this Court. During the pendency of the contempt petition, a seniority list dated 6.11.2017 was issued in three parts, wherein more than one person was placed at Serial No.1 including the Passenger Goods Tax Superintendents, but the same was not accepted by the Court, thereafter, another seniority list of Goods/ Passenger Tax Officers was issued on 17.11.2017 of petitioners only excluding the names of respondents and other similarly situated persons.

11. On 5.3.2018, the **U.P. Transport Taxation (Subordinate) Service (First Amendment) Rules, 2018,** were passed giving it immediate effect. The Passenger Tax / Goods Tax Superintendents preferred a Writ Petition No.16657/2018 for inclusion of their names in the Seniority list of Passenger Tax, Goods - Tax Officer in the light of the amendment in the Rules. The Writ Petition was disposed off without expressing any opinion on the merits of the case vide judgment and order dated 27.07.2018, with a direction to the Transport Commissioner to decide their representations.

12. During the pendency of the Writ Petition No.36294 (S/S) of 2018 filed by the present petitioners seeking consideration for promotion on the vacant post of ARTO (Assistant Regional Transport Officer), an order dated 19.12.2018 was issued by the Deputy Secretary providing therein that the private respondents i.e. Passenger Tax / Goods Tax Superintendents, who were merged on the post of Passenger Tax, Goods - Tax Officer may be treated as substantively appointed as such w.e.f. 3.5.2011. This court after hearing the counsels for the respective parties, considering the facts that the service rules have been amended with effect from 5.3.2018, allowed the writ petition vide order / judgement dated 17.01.2019 directing the respondents to consider the petitioners for promotion on the post of ARTO

13. The aforesaid order dated 19.12.2018 passed by Deputy Secretary was challenged by the petitioners by filing a Writ Petition No.3654 (S/S) of 2019 and also the tentative seniority list dated 30.01.2019. The writ petition was finally disposed of by this Court vide judgment and order dated 7.02.2019 directing the Transport Commissioner to pass appropriate order in regard to the controversy involved in the writ petition for placing the private respondents in the seniority list, ignoring the order dated 19.12.2018 passed by the State Government. Further taking into consideration promulgation of Rules dated 5.3.2018 in the light of judgment and order dated 13.04.2017, after affording the opportunity of hearing to the petitioners and the private respondents.

14. Despite the direction of this Court, the impugned order dated 15.04.2019 has been passed by rejecting the objections submitted by the petitioners and issued a final seniority list including the respondents and other similarly situated persons in the seniority list, which is under challenge and the subject matter of the present writ petition.

15. Learned counsel for the petitioner has submitted that the impugned orders dated 15.04.2019 has been passed in the teeth of the judgment of this Court dated 13.04.2017 in Writ Petition No.1802 (S/B) of 2015, wherein, it has been held that the provisions of Government Order dated 3.5.2011 were contrary to the existing Service Rules and the merger of the post of Passenger Tax / Goods Tax Superintendents with the Passenger Tax, Goods-Tax Officers is not provided in the relevant statutory Rules i.e. Rules 1980, as such the private respondents and other similarly situated Passenger Tax / Goods Tax Superintendents are not entitled to be placed in the Seniority list of the Passenger Tax, Goods-Tax Officers alongwith the petitioners. The judgment and order dated 13.04.2017 has attained finality as the Review Petition against the aforesaid judgment had been dismissed by this Court by means of judgment and order dated 18.12.2017 and the same was never assailed by anyone before any Court.

16. In the contempt petition preferred by the petitioners, firstly an attempt was made by placing the seniority list dated 06.11.2017 deliberately including the names of Goods/ Passenger Tax Superintendents, but on 16.11.2017 the contempt court held that the seniority list prepared by the department is not in consonance with the judgment and order dated 13.04.2017, thereafter the Respondent No.2 had issued a fresh seniority list of petitioners dated 17.11.2017 in which the private respondents were not included.

17. The submission is that the impugned orders are also in total defiance of judgment1 and order dated 07.02.2019 passed in Writ Petition No.3654 (S/S) of 2019, whereby this Court while disposing of the writ petition directed to the Transport Commissioner, Uttar Pradesh for passing an appropriate order with regard to the controversy involved in the writ petition, ignoring the order dated 19.12.2018 passed by the Deputy Secretary of the State of U.P. or being influenced by it.

18. The second submission raised by the learned counsel for the petitioner is that the private respondents and other similarly situated persons cannot be included in the seniority list of Passenger Tax, Goods-Tax Officers in pursuance of the Government Order dated 3.5.2011 by which the Passenger Tax / Goods Tax Superintendents were merged with the posts of Passenger Tax, Goods-Tax Officers without there being any amendment in the Rules 1980 as required in the Govt. order itself. The Passenger Tax / Goods Tax Superintendents would become Goods / Passenger Tax Officers only after the amendment in the relevant service Rules.

19. The submission is that the Rules 1980 have been amended by first amendment and promulgated on 5.3.2018 As per Rule 1(2) of Amendment Rules 2018, it has clearly been provided that the said amended rules shall come into force at once and, hence, it is explicit that the amendment in the Service Rules 1980 has been made effective with immediate effect, i.e. 5.3.2018. It is not retrospective. So, at the most, the respondents and other similarly situated Passenger Tax / Goods Tax Superintendents are entitled to be included in the seniority list from the date of promulgation of first amendment Rule 2018 i.e. 5.3.2018 not with effect from 3.5.2011.

20. It has further been contended as per Rule 3 (hh) which defines term substantive appointment, has been inserted in the service rules for the first time with effect from 5.3.2018. The functioning of the private respondents is at the most on officiating basis and not as substantive appointment.

21. It is further contended that the definition clause pertaining to substantive appointment says that the substantive appointment means an appointment, not being an ad-hoc appointment, on the post in the cadre of service, made after selection in accordance with rules and, if there were no rules, in accordance with procedure prescribed for the time being by the executive instructions issued by the State Government. In the present case there were Rules i.e. Rules 1980 and, hence, any executive orders would be in contravention of the same and bad in law.

22. It has further been submitted that the Transport Commissioner has no power to unsettle the final seniority list dated 17.11.2017 finalized in compliance of mandamus issued by this Court without there being any challenge and interference by any competent court of law.

23. In support of his arguments, learned counsel for the petitioner has relied upon the judgment reported in ***2010 (4) SCC page 301 (H. S. Vankani and others vs. State of Gujarat & Ors).*** It is further contended that the promulgation of first amendment Ruled 2018 would not nullify the judgment and orders dated 13.04.2017, 7.2.2019, 17.11.2019 passed by this Court in different writ petitions, as per law laid down in the case of ***Madan Mohan Pathak and other vs. Union of India and other*** reported in ***(1978) 2 SCC page 50 .*** By the judgment and order dated 17.11.2019 passed in Writ Petition no. 36294 (S/S) 2018 a direction has been issued to the State Government that the petitioner be considered for promotion on the post of Assistant Regional Transport Officer on the basis of final seniority list dated 17.11.2017. It has further been contended that it is the settled proposition of law that the right accrued cannot be taken away even by a retrospective amendment and in support thereof the judgment of the Supreme Court in the case of ***Chairman, Railway Board & Ors. vs. C.R. Rangadhamaiah*** reported in ***(1997) 6 SCC, page 623,*** and ***J.S. Yadav vs. State of U.P.*** reported in ***(2011) 6 SCC Page 570*** have been relief upon.

24. On the other hand, learned State Counsel has submitted that the Post of Passenger Tax/ Goods Tax Superintendents has been abolished and the persons who were working on the said post were merged with the post of Passenger Tax, Goods - Tax Officer vide Government Order dated 3.5.2011 which was never set aside by this court. After the promulgation of first amendment in Rule 2018, wherein in the note it has been provided that the Goods/ Passenger Tax Superintendents have been merged with the post of Passenger Tax, Goods-Tax Officer by abolishing the posts of Passenger Tax / Goods Tax Superintendents gives the Government Order dated 3.5.2011 retrospective effect and hence, the private respondent and the similarly situated persons have rightly been place in the seniority list.

25. Sri Sudeep Seth, learned Senior Advocate, assisted by Sri V. K. Singh appearing for one of the private respondents has submitted that the writ petition is liable to be dismissed on the

ground of non-joinder of necessary parties in the memo of writ petition. The petitioners are claiming their seniority over and above the merged Goods Tax Officers and inter se seniority being a civil right, the right of the parties must be determined in their presence and, as such, all the incumbents in the impugned seniority list are necessary parties. In support of the arguments, learned counsel has relied upon the judgment in the Case reported in 2012 (7) SCC 610 ***Vijay Kumar Kaul Vs. Union of India , 2008 (6) SCC 797 State of Uttranchal Vs Madan Mohan Joshi, 2010 (1) SCC Amarjeet Singh Vs. Devi Ratan.***

26. It has further been submitted vide Government order dated 3.5.2011 the post was abolished and the services of Passenger Tax / Goods Tax Superintendents were merged with the next higher post of Passenger Tax, Goods-Tax Officers. The petitioner and other persons preferred a writ petition challenging the Government Order dated 3.5.2011, but the same was either dismissed as not pressed or dismissed as withdrawn with liberty to file afresh petition and in none of the writ petition, the order dated 3.5.2011 has ever been set aside or quashed by this Court, so it still holds good and is in existence. Even in the judgment dated 13.04.2017 the Government Order dated 3.5.2011 was not set aside though the seniority list was quashed with a direction for preparation of the fresh seniority list. Under these circumstances, the private respondents and other similarly situated persons have rightly been placed in the final seniority list of the Passenger Tax, Goods-Tax Officer.

27. It is also contended that the merger / substantive appointment of the private respondents and other similarly situated persons is prior to the appointment of the petitioners on the post of Passenger Tax, Goods-Tax Officer on 22.07.2013 / 06.08.2013 / 05.03.2014. The date of entry of the petitioners in the service was subsequent to the private respondents and as such the petitioners cannot be granted seniority from the date prior to birth in the cadre by placing them over and above the respondents. In support of this argument, learned counsel has relied upon the judgement of the Suprmene Court in the case of ***Amarjeet Singh Vs. Devi Rata*** *reported in* ***2010 (1) SCC Page 417.***

28. It is further submitted that the safest criteria for determination of seniority is date of substantive appointment and in the present case, the private respondents were merged on the post of Passenger Tax, Goods - Tax Officer on 3.5.2011 on abolition of post of Passenger Tax / Goods Tax Superintendents, while the petitioners were subsequently appointed on the supernumerary post of Passenger Tax, Goods-Tax Officer. The seniority list dated 17.11.2017 comprised of only petitioner i.e. direct recruitees and did not include the merged Passenger Tax, Goods Tax Superintendents in compliance of the Courts order and judgment dated 13.04.2017 pursuant to the contempt proceedings drawn by the petitioner and also that as the rules were not amended till then.

29. It is further contended by Sri Sudeep Seth that the petitioners have nowhere disclosed that they were appointed on the supernumerary posts. The Supernumerary post is not cadre post. The Substantive appointment could only be made on the cadre post, so the seniority of the petitioners can be determined as per Seniority Rules 1991 i.e. from the date of order of substantive appointment. In

support of the submissions, learned counsel has relied upon the judgement of Supreme Court in the Case of ***Pawan Pratap Singh Vs. Reevan Singh*** *reported in* ***2011 (3) SCC 267, T. Thangavelu vs. Union of India*** *reported in* ***2009 (16) SCC 302.***

30. It is further submitted the phrase "*.....**if there were no rules, in accordance with the procedure prescribed for the time being by the executive instructions issued by the Government*....." in Rule 3 (hh) defining substantive appointment and to the effect that the note appended to the Rule 4(4) for about merger of post of Passenger Tax / Goods Tax Superintendents in the post of Passenger Tax, Goods - Tax Officer, gives credence to the order dated 3.5.2011 and despite amendment of service rule by the notification dated 5.3.2018 being prospective in nature, the merger of services by Opposite Party No.3 as the post of Passenger Tax, Goods - Tax Officer on 3.5.2011 has retrospective effect.

31. It has further been submitted that the seniority is not vested right and Act or State legislature or Rule made under Article 309 of Constitution of India can have retrospective effect in the matter of seniority of the Government servants. The Seniority is a civil right and could be effected by the amendment of the service Rules. In support thereof, he relied upon the judgment of Supreme Court reported in ***2010 (6) SCC 545 (T. Narasinhulu Vs. State of Andhra Pradesh), 1969 (2) SCC (Chaman Singh Vs. Jai Kaur),*** and ***1991 Suppl. (1) SCC 367 (Sheshrao Jangluji Bagde Vs. Bhaiyya).***

32. It has further been submitted that as far as the judgment and order dated 7.2.2019 is concerned, this Court neither quashed the tentative seniority list nor granted relief for not disturbing the placement of petitioner in the seniority list dated 17.11.2017 and granted liberty to the Transport Commissioner to deal with the controversy about the placement of merged Passenger Tax, Goods-Tax Officers in the seniority list after taking into consideration the amended rules promulgated on 5.2.2018 and the observation made in judgment dated 13.04.2017. The Transport Commissioner heard the petitioners and passed the order dated 15.04.2019 after considering the amended rules as well as observations in order dated 13.04.2017. The merits of the matter were not decided in the judgement dated 7.2.2019 and reliance placed by the petitioners upon the judgement dated 7.2.2019 is misconceived.

33. Since the above case has a checkered history having several rounds of ligation by filing writ petitions and contempt petitions by different parties, which have been decided with certain directions to the authorities to act in particular manner in preparation of the final seniority list. However, the case mainly hinges upon the question as to whether the amended Rules 2018 are partly retrospective in effect so far as it bestowes benefit of seniority to the respondents and other similarly situated persons in the list of seniority of Passenger Tax, Goods - Tax Officer. In this connection as seen in the preceeding paras mainly two contentions have been raised by learned counsel for the respondents. Firstly, about the language used in the newly added provision i.e. Rule 3(hh) and Secondly, on the note appended to Rule (4)(4) of the amended Rules 2018.

34. The case of the petitioners is that they had applied for consideration of their candidature to be directly appointed on the

post of Passenger Tax, Goods-Tax Officers in pursuance of the advertisement published in the year 2009 by the U.P. Public Service Commission but before the appointment letters could be issued, an interim order dated 27.05.2011 was passed in Writ petition No. 2811 (S/S/) of 2011 for maintaining the status quo till the next date of listing. The appointment letters were issued only after the interim order dated 27.05.2011 was modified by this Court vide its order dated 22.02.2017 to the extent that the 15 selected incumbents including the petitioners were allowed to join on the post of Passenger Tax, Goods-Tax Officer.

35. The post of Goods / Passenger Tax Superintendent and Passenger Tax, Goods-Tax Officer are governed by the Uttar Pradesh Transport Tax (Subordinate) Services Rule, 1980 (hereinafter referred as "The Rules 1980). Rule 5 in Part III of the Rules 1980 is quoted hereinbelow :

5. Source of recruitment. *- recruitment to the various categories of posts in the service shall be made from the following sources -*

(1) Passenger Tax, Goods-Tax Officer - (i) By direct recruitment through the commission.

(ii) By promotion through the Commission from amongst -

(a) the permanent Tax Superintendent / Passenger Tax / Goods Tax Superintendents who have put in at least five years of continuous service as such;

(b) the permanent Assistant Public Prosecutors who have put in at least five years of continuous service as such; and

(c) the permanent Head Assistants, Head Clerks of the Transport Commissioner's Office, who have put in at least five years of continuous service as such:

36. During the pendency of the completion of the selection, the State Government issued a Government Order dated 3.5.2011 and took a decision that 93 vacant posts of Goods/ Passenger Tax Superintendents shall be abolished and merged with 133 posts of Passenger Tax, Goods-Tax Officers. It is also provided in the G.O. dated 3.5.2011 that the relevant service rules shall be amended accordingly.

37. The Government order dated 3.5.2011 was challenged by the petitioners by filing Writ Petition No.336 (S/B) of 2015 (Irshad Ali and others Vs. State of U.P.), but subsequently, it was not pressed with liberty to file a fresh petition vide order dated 26.03.2015 and the Writ Petition No.2811 (S/S) of 2011 preferred by the Ministerial Services Association was also dismissed as withdrawn vide order of this Court dated 17.07.2015.

38. The Opposite Parties after the withdrawal of the above mentioned writ petitions issued a tentative seniority list on 13.08.2015 placing the Passenger Tax / Goods Tax Superintendents over and above the petitioners against which the petitioners preferred objections, which were rejected and the final seniority list was issued on 11.09.2015. The seniority list was challenged by the petitioners by filing the writ petition no.1802 (S/B) of 2015 (Vijay Kumar Anand and Ors. Vs. State of U.P. and others). The writ petition was finally allowed by this Court quashing the seniority list dated 11.09.2015 with a direction to the Transport Commissioner to prepare a fresh list of Goods/ Passenger Tax Officer, the relevant paragraphs of the

Division Bench judgment and order dated 13.04.2017 passed in Writ Petition No. 1802 (S/B) of 2015 are extracted and quoted hereinbelow:

2. The petitioners have assailed the order dated 11.9.2015 issued by the Transport Commissioner, Lucknow, whereby the respondents, who were posted as Good/Passenger Tax Superintendents, have been merged into Passenger Tax Officers and consequently, they have been placed in the seniority list of the Passenger Tax/ Goods Tax Officers amongst the petitioners. The petitioners have also assailed Government Order dated 3.5.2011, whereby the Government has taken a decision to merge the Good/ Passenger Tax Superintendents into the post of Passenger Tax Officer.

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11. The Government Order dated 3.5.2011 provides the provisions contrary to the Rules, therefore it cannot be said that by way of Government Order, the State Government has supplemented the Rules.

12. The State Government cannot be permitted to transgress the power of legislature by way of executive order.

13. Therefore, we are of the view that since the decision taken by the State Government for restructuring the post and placing the Passenger Tax Superintendent at per with the Tax Officer has not been inserted in the Rules, the private respondents, who are posted as Passenger Tax Officers, have no right to be placed in the seniority list of Passenger Tax and Goods Tax Officers amongst the petitioners. (Emphasis Supplied by the Court).

14. In the result, the office order dated 11.9.2015 issued by the Transport Commissioner, State of U.P., is hereby quashed and a direction is issued to the State Government to prepare a seniority list of Passenger Tax, Goods Tax Officer afresh within two months from the date of communication of this order.

15. The writ petition stands allowed.

39. When the order and judgment was not complied with, a contempt petition being Contempt No.1544 of 2017 was preferred, in which on 16.11.2017, the contempt Court had directed the Opposite Parties to issue a fresh seniority list, the relevant extract of the order dated 16.11.2017 is quoted hereinbelow :

"A final seniority list of substantive members of service is one which allows one person to be placed at one place. The tentative seniority list issued in three parts seeks to place more than one person at serial no. 1 in the three parts yet it is termed to be a list of one and the same cadre. The list issued does not stand in the spirit of the final judgment dated 13.4.2017 and according to the Rules.

The Officer present in the Court has however explained that the government order dated 3.11.2011 not being struck down has throughout caused a difficulty of understanding the judgment, hence the bonafide mistake.

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The above observations made in the judgment lead to no other conclusion but to a clear picture of the fact that substantive members of service appointed as per Rule-5 of the Service Rules, 1980 on the post of Passenger Tax and Goods Tax Officers have to be included in the final seniority list at their respective places in an ascending order.

The officer who is present in person has prayed that he may be permitted

to carry out the mandate of law understood in the manner stated above within a further period of three days."

40. And only thereafter, a final seniority list was issued on 17.11.2017, in which the only petitioners were included and not the private respondents.

41. In the light of the orders passed by this Court, it is apparent that the orders impugned in the present petition dated 15.04.2019 are in the teeth of the judgment of this Court. Once the controversy has finally been adjudicated by this Court and the same has not been challenged before any Competent Court of law then the Opposite Parties cannot sit as an appellate authority and pass an order contrary to the directions issued by the judgment of this Court, in the matter the lis has finally been adjudicated between the parties.

42. The Rules 1980 has been amended namely the U.P. Transport Taxation (Subordinate) Service (First Amended) Rules 2018, Rule (1) (c) specifically provides that the rules have come into force at once that is w.e.f. since 5.3.2018. It has no retrospective effect. The inclusion of the respondents and similarly situated persons in the impugned seniority list is bad in the eyes of law. The Opposite Party No.2 could not modify or disturb the seniority list dated 17.11.2017 issued in pursuance of the Division Bench judgment dated 13.04.2017 in the garb that the Rules have been amended in the year 2018.

43. Learned counsel for the petitioner has relied upon the case of ***Madan Mohan Pathak Vs. Union of India and others***, the relevant extract from the judgment is quoted below.

"If by reason of retrospective alteration of the factual or legal situation, the judgment is rendered erroneous, the remedy may be by way of appeal or review, but so long as the judgment stands, it cannot be disregrded or ignored and it must be obeyed by the Life Insurance Corporation. We are, therefore, of the view that, in any event, irrespective of whether the impugned Act is constitutionally valid or not, the Life Insurance Corporation is bound to obey the writ of mandamus issued by the Calcutta High court and to pay annual cash bonus for the year April 1, 1975 to March 31, 1976 to Class III and Class IV employees."

44. The other judgment relied upon by the learned counsel for the petitioner is ***Chairman, Railway Board and others vs. C.R. Rangadhamaiah & Ors.*** reported in ***(1997) 6 SCC 623.*** In this case, the Supreme Court has held that the accrued rights in the matter of promotion / seniority cannot be taken away by retrospective amendment in the statute. The Relevant extract of the judgment is quoted hereinbelow;

"24. In many of these decisions the expressions "vested rights" or "accrued rights" have been used while striking down the impugned provisions which had been given retrospective operation so as to have an adverse effect in the matter of promotion, seniority, substantive appointment. etc., of the employees. The said expressions have been used in the context of a right flowing under the relevant rule which was sought to be altered with effect from an anterior date and thereby taking away the benefits available under the rule in force at that time. It has been held that such an amendment having retrospective operation

which has the effect of taking away a benefit already available to the employee under the existing rule is arbitrary, discriminatory and violative of the rights guaranteed under Articles 14 and 16 of the constitution."

45. The attention of this court has been drawn to the judgment dated 7.2.2019, passed in Writ Petition No.3654(S/S.) of 2019 (Vijay Kishor Anand vs. State of U.P. and others) assailing the order dated 19.12.2018 issued by the Deputy Secretary directing therein that the respondents shall be treated as substantively appointed w.e.f. 3.5.2011 and also assailing the tentative seniority list dated 30.01.2019. The said Writ Petition was disposed off finally by this Court vide its judgement / order dated 7.2.2019. The relevant extract of the judgment and order is quoted hereinbelow :

"In view of the submission advanced by learned counsel for the parties and nature of controversy involved in the present writ petition, this Court thinks it appropriate in case direction is issued to the competent authority to pass an appropriate order without being influenced with the impugned order dated 19.12.2018, the controversy shall be resolved.

Accordingly, this writ petition is finally disposed of with the direction to the Transport Commissioner, Uttar Pradesh, Lucknow (respondent No.4) to pass appropriate order in regard to the controversy involved in the present writ petition for the placement of private respondents in the seniority list ***ignoring the order dated 19.12.2018 passed by the State Government, taking into consideration promulgation of Rules on 5.3.2018 in the light of the observation made in the judgment and order dated 13.4.2017 (emphasis supplied by the Court)*** *after affording an opportunity of hearing to the petitioners and to the private respondents within a period of 6 weeks from the date of production of certified copy of this order.*

With the following observation and direction, the writ petition is finally disposed of."

46. Even in the second round of the litigation against the adamant attitude of the State Government for including the respondents and other similarly situated persons in the seniority list of the Passenger Tax, Goods-Tax Officers, this Court was very clear in its judgment and order dated 7.2.2019 that while deciding the controversy, the Competent Authority would pass appropriate order without being influenced by the impugned order dated 19.12.2018, as well the amended Rules dated 5.3.2018 and further in the light of the observation made in the judgment and order dated 13.04.2017. The Court in its judgment dated 13.04.2017 passed in the Writ Petition No.1802 (S/B) of 2015 and judgment and order dated 7.2.2019 passed in Writ Petition No.3654 (S/S) of 2019 (Vijay Kumar Anand Vs. State of U.P.) holding that the respondent and other similarly situated persons could not be included in the seniority list in pursuance of the Government order dated 3.5.2011 and order 11.12.2018 passed by the Deputy Secretary. It is clear that the impugned orders passed on 15.04.2019 are in the teeth of the judgment of this Court dated 13.04.2017 and 7.2.2019 as well as observations of the Contempt Court in its order dated 16.11.2017. As indicated above, it has been held by the Supreme Court that an amendment even if having retrospective effect would not adversely affect the rights accrued to the employees under the Rules as existed.

47. The impugned orders dated 15.04.2019 are also in complete violation of law laid down in the case of ***Madan Mohan Pathak Vs. Union of India (Supra).*** The authorities cannot disregard or ignore the judgment so long as the judgment stands and the authorities are bound to obey the same. The judgment dated 13.04.2017 had already been acted upon and complied with by issuance of the seniority list dated 17.11.2017, which is much prior to the amendment of Service Rules 1980 with effect from 3.5.2018.

48. The learned counsel for the respondents raised a preliminary objection regarding maintainability of the writ petition on the ground of non-joinder of necessary party. As the petitioners have failed to array all the merged Passengers Tax, Goods - Tax Officer from Serial No.1 to 41 and promoted Passenger Tax, Goods-Tax Officer from Serial No.41 to 60 except Respondent Nos. 3 to 15, the petitioners are claiming seniority over and above the merged Passenger Tax, Goods - Tax Officer. The inter se seniority being a civil right (not vested right), the rights of the parties, must be determined in their presence. In support of the submission, the learned counsel for the respondents has relied upon the judgment reported in ***2012 7 SCC 610 (Vijay Kumar Kaul And Others Vs. Union of India),*** and ***(2008) 6 SCC 797 (State of Uttrakhand vs. Madan Mohan Joshi).*** Both these judgment are not applicable in the present case for the reasons that the facts in the case of ***Vijay Kumar Kaul and Ors. vs. Union of India*** and in the case of ***State of Uttrakhand vs. Madan Mohan Joshi*** are totally different from the facts of the present case.

49. The respondents and other similarly situated persons are claiming seniority in pursuance of the Government order dated 3.5.2011. Some persons from the list of the Government order dated 3.5.2011 are sufficient to be arrayed in the array of the opposite parties in the representative capacity. There is no individual dispute between the parties, which may require the presence of all the parties at the time of adjudication of the seniority. The objection raised is frivolous and is liable to be rejected. The Supreme Court in the case of ***A. Janardana v. Union of India*** reported in ***1983 (3) page 601*** has held that in case the person does not claim seniority over anyone particular individual. In the background of any particular fact controverted by that persons against whom the claim is made, then it necessary to have all the persons impleaded as respondent . The relevant para of the judgment is extracted hereinbelow:

"36. ..... However, there is a more cogent reason why we would not countenance this contention. In this case, appellant does not claim seniority over particular individual in the background of any particular fact controverted by that person against whom the claim is made. The contention is that criteria adopted by the Union Government in drawing-up the impugned seniority list are invalid and illegal and the relief is claimed against the Union Government restraining it from upsetting or quashing the already drawn up valid list and for quashing the impugned seniority list. Thus the relief is claimed against the Union Government and not against any particular individual. In this background, we consider it unnecessary to have all direct recruits to be impleaded as respondents. ..... In such proceedings, the necessary parties to be impleaded are these against whom the relief is sought, and in whose absence no effective decision can

be rendered by the Court. Approaching the matter from this angle, it may be noticed that relief is sought only against the Union of India and the concerned Ministry and not against any individual nor any seniority is claimed by anyone individual against another particular individual and therefore, even . if technically the direct recruits were not before the Court, the petition is not likely to fail on that ground. The contention of the respondents for this additional reason must also be negatived."

50. The Supreme Court in another judgment of ***Prabodh Verma and others Vs. State of U.P. and others,*** reported in ***(1994) 4 SCC page 251*** has held that those who were vitally concerned, namely, at least some of them in a representative capacity may be made respondent in the writ petition, if the member is large. The relevant extract of the paras of the judgment is here being quoted below:

"To summarize our conclusions:

(1) A High Court ought not to hear and dispose of a writ petition under Article 226 of the Constitution without the persons who would be vitally affected by its judgment being before it as respondents or at least some of them being before it as respondents in a representative capacity if their number is too large to join them as respondents individually, and, if the petitioners refuse to so join them, the High Court ought to dismiss the petition for non-joinder of necessary parties.

(2) The Allahabad High Court ought not to have proceeded to hear and dispose of Civil Miscellaneous Writ No. 9174 of 1978-Uttar Pradesh Madhyamik Shikshak Sangh and Others v. State of Uttar Pradesh and Others-without insisting upon the reserve pool teachers being made respondents to that writ petition or at least some of them being made respondents thereto in a representative capacity as the number of the reserve pool teachers was too large and, had the petitioners refused to do so, to dismiss that writ petition for non-joinder of necessary parties."

51. The Supreme Court in the case of ***B Prabhakar Rao and Ors. v. State of Andhra Pradesh and Ors.*** reported in ***1985 (Supp) SCC page 432***, has held that even some individual affected parties have not been impleaded and their interest are identical with those and have been sufficiently and well represented, then the writ petition cannot be dismissed on the ground of jon-joinder of parties to the litigation. The relevant extract of this judgment is quoted hereinbelow:

"22. .....So also the second objection which related to the nonjoinder of all affected parties to the litigation. We are quite satisfied that even if some individual affected parties have not been impleaded before us, their interests are identical with those and, have been sufficiently and well represented. Further, the relief claimed in Writ petition Nos. 3420-3426 of 1983 etc. is of a general nature and claimed against the State and no particular relief is claimed against any individual party. We do not think that the more failure to impead all affected parties is a bar to the maintainability of the present petitions in the special circumstances of these cases where the actions are really between two 'warning groups'."

52. The submission of learned counsel for the respondent is that the petitioners were appointed subsequently that too on the supernumerary post which could not be counted as a post of cadre and the services

on the supernumerary post could not be taken into account for the determination of seniority and as per settled law, the seniority is to be determined from the date of substantive appointment and in support of arguments that the seniority list is to be seen from the date of substantive appointment, the judgments of Supreme Court reported in ***2011 (3) SCC 267 (Pawan Pratap Singh vs. Reevan Singh;*** and ***2009 (16) SCC 302 T. Thangavelu vs. Union Of India***, has been relied.

53. As far as argument about the language used in the Rule 3(hh) is concerned, it may be observed that a reading of Rule 3(hh) makes it amply clear that if there were no rules only in that event an order could be passed in accordance with the procedure prescribed for time being by the executive instructions issued by the State Government. In the present case, Rule 5 of Part III deals with sources of recruitment including the recruitment on the post of Passenger Tax / Goods Tax Officer i.e. 50 % posts by direct recruitment through the Commission and 50 % posts by promotion through the Commission from amongst Passenger Tax/ Goods Tax Superintended, who have put in 5 years of continuous services as such. There were no provision for recruitment on the post of Passenger Tax, Goods Tax Officers by adopting the method of merger by executive order issued by the State Government. The Rules 1980 were very much in existence in the year 2011 when the Government Order dated 3.5.2011 was issued for recruitment / merger of the respondents and other similarly situated persons on the post of Passenger Tax, Goods Tax Officers. It is an admitted case of the respondent that they were initially appointed in the year 2008 and as per Rules existing then at least 5 years of continuous service was required to be considered for promotion through the commission on the next higher post of Passenger Tax, Goods Tax officer. Whereas at the time of issuance of the Government order dated 3.5.2011, the respondents had completed only three years of service and they were not even eligible for being considered for promotion according to Rules 1980. It was in gross violation of Rules that the respondents were promoted / recruited by inventing an extraneous method of merger of their services with the cadre of Passenger Tax, Goods Tax Officers for merger of the respondents and other similarly situated persons. It is in complete contravention of the statutory provisions, which cannot be superseded by the executive order.

54. So far as reliance placed on note appended to Rule 4(4) is concerned, that is also of no help to the respondents. The note is only a statement of a fact. It has no effect of an amendment on Rules.

55. As held in the judgment of the Supreme Court reported in ***2004 (9) SCC (Prakash Nath Khanna and other vs. Commissioner of Income Tax and Another),*** that the marginal notes to a Section of an Act cannot be referred for the purpose of construing the meaning of section, particularly when the language of the section is plain and simple. Function of the marginal note is just brief indication of the contents of the sections and cannot construe the meaning of the body of the sections if the language of provision is not clear. It cannot be treated as substantive part of the main provision itself. The relevant extract of the judgment is mentioned hereinbelow:

"17. The heading of the Section or the marginal note may be relied upon to

clear any doubt or ambiguity in the interpretation of the provision and to discern the legislative intent. In C.I.T v. Ahmedbhai Umarbhai and Co. (AIR 1950 SC 135) after referring to the view expressed by Lord Machnaghten in Balraj Kunwar v. Jagatpal Singh (ILR 26 All. 393 (PC), it was held that marginal notes in an Indian Statute, as in an Act of Parliament cannot be referred to for the purpose of construing the statute. Similar view was expressed in Board of Muslim Wakfs, Rajasthan v. Radha Kishan and Ors. (1979 (2) SCC 468), and Kalawatibai v. Soirvabai and ors. (AIR 1991 SC 1981). Marginal note certainly cannot control the meaning of the body of the Section if the language employed there is clear. (See Smt. Nandini Statpathy v. P.L. Dani and Anr. (AIR 1978 SC 1025) In the present case as noted above, the provisions of Section 276-CC are in clear terms. There is no scope for trying to clear any doubt or ambiguity as urged by learned counsel for the appellants. Interpretation sought to be put on Section 276-CC to the effect that if a return is filed under sub-section (4) of section 139 it means that the requirements of sub-section (1) of Section 139 cannot be accepted for more reasons than one."

56. Another case on the point is in ***2007 (5) Mh. L.J., (Prabhudas Damodar Kotecha and another Vs. Smt. Manharbala Jaram Damodar and others),*** the relevant paras are quoted hereinbelow:

"32. It is now well settled that marginal notes to the section of an Act cannot be referred to for the purpose of construing the meaning of section particularly when a language of the section is plain and simple. (See in this connection I.T. Commissioner v. Ahmadabhai Umarbhai and Co. AIR 1950 SC 131; Kalavatibai v. Soiryabai Chela Sundardas v. Shiromani Gurudwara Prabhandhak Committee). Similarly, marginal note cannot certainly control the meaning of the body of the section if the language employed therein is clear. In this connection, we can usefully refer to the judgment of the Supreme Court in Nalinakhya Bysack v. Shamsunder Haider and Ors. . The Supreme Court in this case has observed that marginal note cannot control the meaning of the body of the section if the language employed therein is clear and unambiguous. If the language of the section is clear then it may be there is an accidental slip in the marginal notes rather than it is correct and accidental slip in the body of the section itself. (See Nandini Satpathy v. P.L. Dani and Ors.). The Supreme Court in S.P. Gupta and Ors. v. President of India and Ors. , after considering the law on the use of marginal notes while interpreting the provisions of a statute in paragraph 1096, held thus:

1096. A reading of the passages and decisions referred to above leads to the view that the Court while construing a statute has to read both the marginal notes and the body of its provisions. Whether the marginal notes would be useful to interpret the provisions and if so to what extent depends upon the circumstances of each case. No settled principles applicable to all cases can be laid down in this fluctuating state of the law as to the degree of importance to be attached to a marginal note in a statute. If the relevant provisions in the body of the statute firmly point towards a construction which would conflict with the marginal note the marginal note has to yield. If there is any ambiguity in the meaning of the provisions in the body of the statute, the marginal note may be looked into as an aid to construction.

33. It is thus clear that the function of a marginal note is as a brief indication of the contents of the section. It cannot be referred to for the purpose of construing the meaning of section particularly when the language is plain and simple. In other words, it cannot construe the meaning of the body of the section if the language employed therein is clear. If the relevant provisions in the body of the statute firmly point towards a construction which would conflict with the marginal note the marginal note has to yield. In short, the marginal note is a poor guide to the scope of a section. In any case, the marginal note cannot be legitimately used to restrict the wide words/expressions in the section or plain term of an enactment and it cannot be said to be enacted in the same sense."

57. In the case of Union of India and another vs. National Federation of the Blind and others reported in (2013) 10 SCC page 772, the said proposition is reiterated and the relevant extract of the judgment is quoted hereinbelow:

"(46) The heading of a Section or marginal note may be relied upon to clear any doubt or ambiguity in the interpretation of the provision and to discern the legislative intent. However, when the Section is clear and unambiguous, there is no need to traverse beyond those words, hence, the headings or marginal notes cannot control the meaning of the body of the section. Therefore, the contention of Respondent No. 1 herein that the heading of Section 33 of the Act is "Reservation of posts" will not play a crucial role, when the Section is clear and unambiguous."

58. In the first amendment Rules 2018, there is no ambiguity with regard to the applicability of the Rules by reading Rule 1 (2), it is clear that it would come into effect at once w.e.f. 5th March, 2018. The intention of the legislature was not to make this rule retrospective. And as observed earlier the Note to the Rule 4(4) cannot be treated as amendments of the Rule 1980.

59. So far as such claim for seniority of respondent on the ground that they have been working on the post of Passenger Tax, Goods-Tax Officer prior to the joining of the petitioners, it may be observed that the private respondents and similarly situated persons were merged in the cadre of Passenger Tax, Goods-Tax Officer by means of Government Order dated 3.5.2011 despite the fact that it could not be permissible since Rule 1980 were already in existence which provided for only promotion of Passenger Tax / Goods Tax Superintendents to the post of Passenger Tax, Goods-Tax Officer. This process of selection for promotion was not applied to the respondents, hence, they cannot be said to have been duly promoted to the post of Passenger Tax, Goods-Tax Officer. The Rules did not provide for merger of the feeding cadre to the higher cadre. However, they are not entitled to claim seniority, as per the discussion made hereinabove and in view of the judgment dated 13.04.2017, which was duly complied with by Opposite Party No.2. The petitioners have been duly selected from the Public Service Commission fully complied with the Rules 1980. It may, further be worth noted that the petitioners were selected in pursuance of the advertisement of 2009, but the appointment was delayed due to the order passed in the writ petitioner no.2811 (S/S) of 2011.

60. So far the argument raised about the petitioners being not entitled for

seniority since they have been working on supernumerary posts, it does not arise since the Government placed the respondents above the petitioners solely on the ground of their merger by order dated 3.5.2011. The order dated 3.5.2011 has already been found to be bad in law by Division Bench of this Court vide judgment and order dated 13.04.2017. Since the Rules did not provide for the merger and Government Order could not alter or over-ride the provision of the Statutory Rules.

61. In view of the discussion held above and finding no merit in submissions made on behalf of the respondents, the writ petition is allowed. The two impugned orders dated 15.04.2019 are quashed. The seniority list dated 17.11.2017 issued by Opposite Party No. 2 in compliance with the judgment dated 13.04.2017 shall be maintained and remained operative.

62. No order as to cost.

(2020)10ILR A475
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 15.10.2020

BEFORE
THE HON'BLE MANISH KUMAR, J.

Service Single No. 17321 of 2018

Leeladhar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Avinash Tiwari

Counsel for the Respondents:
C.S.C.

A. Service Law - Uttar Pradesh Police Officers of the Subordinate Rank (Punishment and Appeal) Rules, 1991 - Natural Justice - Disciplinary Proceedings - Evidence recorded during the preliminary enquiry cannot be used in regular departmental enquiry. (11)

The impugned order of dismissal was passed against the petitioner, Head Constable on a frivolous complaint by a woman of bigamy. No other evidence except the statement given by the complainant during the preliminary enquiry were relied in the departmental enquiry to arrive at a conclusion that charges of bigamy is proved against the petitioner. Therefore, the findings holding the petitioner guilty of bigamy is vitiated under law. (Para 10, 13)

Writ Petition Allowed. (E-10)

List of Cases cited:-

1. Narayan Dattatraya Ramteerthakhar Vs St. f Mah. & ors. AIR 1997 SC 2148 *(followed)*

2. Nirmala J. Jhala Vs St. of Guj. & anr. 2013 (31) LCD 762 (SC) *(followed)*

3. Champaklal Chimanlal Shah Vs U.O.I. AIR 1964 SC 1854

4. State of U.P. Vs Jai Singh Dixit 1975 ALR 64

5. Raj Veer Singh Vs St. of U.P. & ors. 2010 (10) ADJ 246

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

1. Heard Shri Avinash Tiwari, learned counsel for the petitioner and learned State Counsel for the respondents.

2. The present writ petition has been preferred for quashing of the impugned dismissal order dated 03.05.2018 passed by the respondent no. 3 i.e. the Superintendent of Police, District Raibareli with all consequential benefits of the services.

3. The learned counsel for the petitioner has submitted that the petitioner

was initially appointed on the post of Constable in the year 1986 and subsequently promoted as Head Constable in the year 2017. On 12.07.2017, one Smt. Archna, wife of late Makhan Kurmi made a frivolous complaint of bigamy against the petitioner. The I.G. (Lokasikayat), Uttar Pradesh vide its order dated 12.07.2017 directed respondent no. 3 i.e. the Superintendent of Police, District Raibareli to conduct a preliminary inquiry. The preliminary enquiry was conducted by Circle Officer, Salon. After culmination of the enquiry, the preliminary enquiry report was submitted on 30.08.2017. In the preliminary enquiry, the complainant, Smt. Archana made a statement that she had in close proximity and having a love affair with the petitioner and they got married, from that wedlock, a son was born.

4. The Charge-Sheet dated 09.10.2017 was issued against the petitioner under Rule 41 of the Uttar Pradesh Police Officers of the Subordinate Rank (Punishment and Appeal) Rules, 1991.

5. The learned counsel for the petitioner has further submitted that in support of the charges levelled against the petitioner only two documents were relied, the first was the testimony given by the complainant during the preliminary enquiry and second one was the preliminary enquiry report, except that no other documents or evidence in support of the charges was enclosed along with the charge sheet. In reply thereto, the petitioner submitted its detailed reply denying the charges of bigamy.

6. The statement of the complainant was also recorded during the regular departmental enquiry, where the complainant has given a categorical statement that she does not reside with the petitioner nor she has married with him. She further made a statement that she lives along with her parents and having no child from the petitioner.

7. The learned counsel for the petitioner has further submitted that the Enquiry Officer only on the basis of the statement given by the complainant during preliminary enquiry drawn a conclusion that the case of bigamy is proved against the petitioner. It has further been submitted that except the statement of the complainant during the preliminary enquiry, no other evidence or material was on the record before the enquiry officer, which could prove the charge of bigamy against the petitioner, thus, the impugned order of dismissal dated 03.05.2018 is only based on statement of the complainant recorded during the preliminary enquiry and the said fact is not disputed rather admitted in para 9 and 10 of the counter affidavit.

8. It has also been submitted that the evidence recorded during the preliminary enquiry cannot be used in regular departmental enquiry and in support of this placed reliance on the following judgments :-

(1) Narayan Dattatraya Ramteerthakhar Vs. State of Maharashtra & others reported in AIR 1997 SC 2148.

(2) Nirmala J. Jhala Vs. State of Gujarat and another reported in 2013 (31) LCD 762 (SC)

(3) Champaklal Chimanlal Shah vs. Union of India reported in AIR1964 SC 1854.

(4) State of U.P. Vs. Jai Singh Dixit reported in 1975 ALR 64

(5) Raj Veer Singh Vs. State of U.P. and others reported in 2010 (10) ADJ 246.

9. On the other hand, learned State Counsel has submitted that the complainant during the preliminary enquiry had made a statement before the Circle Officer, Salon that she had an affair with the petitioner and they married subsequently and from that, a son has born but failed to dispute the statement made on behalf of the petitioner that during the regular departmental enquiry, the complainant had given a statement denying the marriage and residing with the petitioner.

10. After hearing the learned counsel for the parties, the position which emerges out is that there was no evidence or material to prove the charge of bigamy against the petitioner in the regular departmental enquiry but the enquiry officer, on the basis of the statement given by the complaint Smt Archna during the preliminary enquiry arrived at a conclusion that charge of bigamy is proved against the petitioner.

11. Further, the Hon'ble Apex Court in the case of Narayan Dattatraya Ramteerthakhar (supra) has held that the preliminary enquiry has no bearing with the enquiry conducted after issuance of charge sheet. The former action would be to find whether disciplinary enquiry should be initiated against the delinquent. After full-fledged enquiry, a preliminary enquiry looses its importance. Similarly, the Hon'ble Apex Court in the case of Nirmala J Jhala (supra) has held that evidence recorded in preliminary enquiry cannot be used in regular enquiry, as the delinquent is not associated with it, and opportunity to cross examine the persons examined in such enquiry, is not given. Using such evidence would be violative of the principles of natural justice. The preliminary enquiry is useful only to take a prima-facie view, as to whether there can be some material in the allegation made against an employee, which may warrant a regular enquiry.

12. The learned State Counsel has not able to show any other material or record, neither in the enquiry report nor in counter affidavit, which could prove the charge of bigamy against the petitioner except the statement given by the complainant during the preliminary enquiry.

13. Further, the respondents failed to dispute that the order of dismissal of the petitioner was only based on the statement of the complainant made during the preliminary enquiry and as per the law discussed hereinabove, the enquiry officer conducting the regular enquiry erred in relying upon the statement given by complainant during preliminary enquiry, therefore, the finding holding that charge against the petitioner is proved, is vitiated under the law.

14. Taking into consideration the aforesaid discussion, it is found that the dismissal order of the petitioner dated 03.05.2018 passed by the respondent no. 3 is bad in the eyes of law and is hereby quashed.

15. The petitioner shall be reinstated in the service with immediate effect and is entitled for 50% of the back wages from the date of impugned order dated 03.05.2018.

16. The writ petition is ***allowed***.

(2020)10ILR A478
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.10.2020

BEFORE
THE HON'BLE MANISH KUMAR, J.

Service Single No. 21633 of 2019

Sachin Kumar Verma ...Petitioner
Versus
Bank of Baroda & Ors. ...Respondents

Counsel for the Petitioner:
Ajay "Madhavan"

Counsel for the Respondents:
Lalit Shukla

A. Service Law - Appointment - An appointment letter was issued to the petitioner but before joining he was implicated in a criminal case. He voluntarily brought this to the knowledge of the respondent-Bank. The respondent- Bank had granted one year time for joining with a condition that he should come with an order of acquittal. Due to no fault of the petitioner, the proceedings in the court could not conclude within a period of 1 year. As soon he got acquitted in the case, he filed representation for joining. The Court noted that though it is the discretion lies with the employer (bank) to take a decision in the matter to retain the person or not. But it must be reasonably exercised in the background of circumstances of the case which may differ from case to case. (Paras 12, 13)

Writ Petition Allowed. (E-10)

List of Cases cited:-

Avtar Singh Vs U.O.I. & ors. (2016) 8 SCC page 471 *(followed)*

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

1. Heard learned counsel for the petitioner and Sr Lalit Shukla, learned counsel for the respondents.

2. The present writ petition has been preferred for quashing the orders dated 30.03.2019 passed by Opposite Party No.3; dated 26.07.2018 passed by Opposite Party No.1 and order dated 19.06.2018 passed by Opposite Party No.2, rejecting the candidature of the petitioner for appointment as Probationary Officer.

3. The learned counsel for the petitioner has submitted that vide letter dated 2.5.2017 an appointment has been given to the petitioner on the post of Probationary Officer after successfully completing the Diploma Course in Banking & Finance followed by essential training program & Internship at Deva Branch of Bank of Baroda. Petitioner was given time to join by 17.05.2017. After the issuance of the appointment letter and prior to joining, an F.I.R. was lodged on 9.5.2017, in which the petitioner was falsely implicated. He was enlarged on bail on 27.05.2017. On being enlarged on bail, petitioner immediately informed the respondent-Bank on 31.05.2017 about the false implication of the petitioner in the criminal case and lodging of an F.I.R. The Bank has informed the petitioner that the Competent Authority had taken a decision that his candidature may be kept in abeyance till his acquittal, not exceeding more than one year, failing which the candidature of the petitioner would stand cancelled.

4. The petitioner made his earnest effort for expeditious disposal of the criminal case by approaching the High Court. But time that it takes in court proceedings is beyond the control of the petitioner. When one year was to expire, the petitioner made a representation on 7.5.2018 and 19.06.2018 for extension of time for a few months but the petitioner received no reply.

5. The petitioner was acquitted in the criminal case vide order / judgement dated

23.01.2019. The petitioner immediately made a representation dated 28.01.2019 alongwith copy of the judgement passed in the criminal case before the Authority for his joining. But the Competent Authority has rejected the representation of the petitioner by order dated 30.03.2019 solely on the ground that the petitioner has not submitted the order of acquittal within the stipulated time i.e. by 20.07.2018, and then the Bank could not grant unlimited time to the petitioner.

6. On the other hand, learned counsel for the respondent-Bank has submitted that the petitioner has been acquitted after the time granted by the Bank for joining and the Bank cannot wait for unlimitted period. It is further submitted that the petitioner cannot be permitted to joint for the reason that his acquittal is not an honourable acquittal.

7. After hearing learned counsel for the respective parties, the case that emerges is that the appointment letter was issued on 2.5.2017 and thereafter the petitioner was implicated in a criminal case on 9.5.2017. The Bank had granted one year time for joining with a condition that the petitioner comes with an order of acquittal. The petitioner has not left any stone unturned for early adjudication of the case, even by approaching the High Court but the legal process takes its own time, which is beyond the control of the petitioner. The petitioner also requested for extension of time by making representation, but the petitioner received no response thereof. The petitioner was acquitted vide judgment / order dated 23.01.2019 i.e. about 5 months later beyond 20.07.2018, the time provided by the respondent-Bank. The contention of the counsel for the respondent - Bank is that the petitioner was not acquitted honourably, but acquitted by giving benefit of doubt this is however refuted by the counsel for the petitioner. However, this is not the reason given by the Bank. The only reason assigned in the impugned order is that the petitioner had given his joining after the time granted by the Bank and the Bank cannot wait for unlimited time.

8. The Supreme Court in the case of ***Avtar Singh v. Union of India & Ors,*** reported in ***(2016) 8 SCC page 471*** has discussed and decided almost all the eventualities pertaining to disclosure, non-disclosure; disclosure of pendency; conviction or acquittal in criminal case against the candidate and its effect on employment etc. and ultimately it has been held that the discretion lies with the employer to take a decision in the matter to give or retain the person or not.

9. On inquiring that under which provision, the one year period was granted to the petitioner keeping his appointment in abeyance. Both the counsels have submitted that there is no such hard and fast rule for the same. It is the discretion of the Bank. If the Bank has exercised its discretion in favour of the petitioner by granting one year time, then the things which are beyond the control of the petitioner i.e. to get the matter adjudicated within time granted by the Bank for rejecting the candidature of the petitioner does not appear to be reasonable and appropriate.

10. In the present circumstances of the case, it should have been proper for the Bank to consider in totality of facts and circumstances whether grant of further time for 5 months beyond 1 year would amount waiting for indefinite period of time or not.

11. The conduct of the petitioner cannot be ignored. He had himself voluntarily brought this fact to the notice of Bank about false case against him a few days before he was required to join on the post of Probationary Officer. He also approached the High Court. Taking all these facts into consideration, the Bank should have exercised its discretion in a more reasonable manner to allow him to join the post instead of depriving him of the employment on the basis of some delay in decision of the case which was beyond his control.

12. It is true in similar circumstances an employer is to take its decision. It is solely its discretion. Once it is decided to exercise its discretion, it must be reasonably exercised in the background of circumstances of the case which may differ from case to case. It is not meant to be said that any indefinite and unreasonably long time may always be granted. The fact cannot escape notice that the Bank has not shown any development in 5 months which could cause hurdle in the way of the Bank to permit him to join on the post.

13. It is to be noted that the petitioner was found fit for the appointment after completion of his training which the petitioner had undergone as prescribed by the Bank. The petitioner was actually appointed on the post of Probationary Officer but unfortunately before the date of joining a false case was registered against the petitioner and the petitioner had very honestly and voluntarily disclosed this fact to the Authorities. The Bank did not decide to deny the employment to the petitioner on the ground of pendency of criminal case. It all related to the question of time allowable to join.

14. In view of the discussion held above, it is found that the Bank did not consider the question of grant further time to the petitioner to join in a reasonable manner rather arbitrarily in the facts and circumstances of the case. The impugned orders dated 30.03.2019 passed by Respondent No.3, impugned order dated 26.07.2018 passed by Respondent No.1 and impugned order dated 19.06.2018 passed by Respondent No.3 are quashed.

15. The respondent-Bank is directed to permit the petitioner to join in pursuance of letter of appointment dated 2.5.2017 on the post of Probationary Officer within a period of six weeks from the date of downloaded copy of the order from the website of the High Court is served.

16. The writ petition is allowed.

(2020)10ILR A480
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.09.2020

BEFORE
THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.

Service Single No. 24928 of 2019

Shivnandan Prasad Pandey & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Manish Singh

Counsel for the Respondents:
C.S.C.

A. Service Law - U.P. District Offices (Collectorates) Ministerial Service Rules, 1980 - Rule 5 - U.P. District Offices (Collectorates) Ministerial Service (Second Amendment) Rules, 2011- Rule 5(ii)- Recruitment/Appointment.

The question before the Court was to consider whether an employee, initially appointed on the basis of the selection held for the post of Seasonal Assistant Wasil Baqi Nawis (AWBN) and has worked against the said post but has been subsequently assigned the works relating to other posts, will be eligible for being considered for regular appointment in terms of Rule 5(ii) of the amended Service Rules or not. The provision as contained in the amended Rule 5 provides that 50% appointments against all category 'A' posts shall be made by way of direct recruitment and 30% category 'A' posts shall be filled in by way of selection through the Selection Committee amongst Seasonal AWBN, who have worked for at least 4 fasli years on the first day of the year in which the selection is made. On perusal it is found that the amended Service Rules do not confine the regular appointment of Seasonal AWBN only against the posts of AWBN; rather it expands the scope of regular appointment of Seasonal AWBN against various posts which are ministerial in nature other than the post of AWBN. Experience of having worked a Seasonal AWBN for four fasli years does not carry any rationale or nexus with the object of making regular appointment on category 'A' posts other than the post of AWBN and it would defeat the purpose for which the Rule was amended. The petitioners continued to discharge the functions of other posts as assigned to them from time to time though they were initially appointed as Seasonal AWBN on the basis of a selection held for the said purpose are eligible to be considered for regular appointment.(Para 22, 23, 25)

Writ Petition Allowed. (E-10)

List of Cases cited:-

1. Jiv Kumar Tiwari Vs St. of U.P. & ors. Writ A No. 68698 of 2006

2. Grid Corporatio of Orissa Ltd. & ors. Vs, Eastern Metals and Ferro Alloys & ors. (2011) 11 SCC 334 (followed)

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J.)

1. Heard Shri Manish Singh, learned counsel for the petitioners and learned Additional Chief Standing Counsel representing the State-respondents.

2. At the outset, it has been informed by the learned counsel for the petitioners that petitioner No. 3-Ravindra Nath has passed away without leaving any heir or legal representative to pursue this writ petition or in whose favour right to sue can be said to survive. Accordingly, the writ petition in respect of petitioner No. 3-Ravindra Nath is hereby abated.

3. The petitioners, who are said to have been initially appointed on the post of Seasonal Assistant Wasil Baqi Nawis (hereinafter referred to as, "AWBN') district Sultanpur, have invoked the jurisdiction of this Court under Article 226 of the Constitution of India to challenge the decision taken by the respondents whereby their claim for regular appointment on the post of AWBN has been rejected. The petitioners had earlier filed a writ petition bearing No. 8063 (S/S) of 2011 claiming that they should be regularly appointed on the post in question. The said writ petition was finally disposed of by this Court, vide its order dated 08.11.2011 with the direction to the District Magistrate to consider the representation to be preferred by the petitioners in respect of their grievances taking into account the relevant rules and materials as also the judgment dated 26.08.2011 rendered by this Court in **Writ A No. 68698 of 2006 (Jiv Kumar Tiwari Vs. State of U.P. and others).**

4. In compliance of the said order dated 08.11.2011, the claim of the petitioner for regular appointment was considered by the District Magistrate, who vide his order dated 31.12.2011 rejected the

same. The aforesaid order dated 31.12.2011 passed by the District Magistrate Sultanpur came to be challenged by the petitioners in Writ Petition No.749 (S/S) of 2012. The said writ petition was allowed by this Court vide its judgment and order dated 12.09.2014 whereby the order impugned in the said writ petition was quashed and the District Magistrate was directed to examine the case of the petitioners afresh for regular appointment in terms of the order passed by this Court in **Jiv Kumar Tiwari's case (supra).**

5. Since in compliance of the said order dated 12.09.2014, the decision was not being taken by the authority concerned, contempt proceedings were initiated by the petitioners by filing Contempt Petition No.93(C) of 2015. It is only once the contempt petition was filed that the matter was considered by the authorities in compliance of the order dated 12.09.2014 passed by this Court, not once but thrice. The first consideration appears to have been made in a meeting held on 03.11.2018 under the chairmanship of Additional District Magistrate (Finance and Revenue). The said committee considered the claim of the petitioners for regular appointment and rejected the same. The minutes of the said meeting held on 03.11.2018 have been annexed as Annexure No.1 to the writ petition. The authorities again considered the matter relating to claim of the petitioners for regular appointment in a meeting of the officers held on 30.11.2018. The second consideration made for ensuring compliance of the judgment and order dated 12.09.2014, however, also resulted in rejection of the claim of the petitioners. Minutes of the said meeting dated 30.11.2018 are also on record as Annexure No.2 to the writ petition. In the meantime, the Special Appeal preferred by the State Government against the judgment and order dated 12.09.2014 namely, Special Appeal Defective No. 621 of 2018 was dismissed by a Division Bench of this Court, vide its judgment and order dated 27.11.2018. It, thus, appears that matter thereafter was again considered by the Committee headed by the Additional District Magistrate (Finance and Revenue). It is relevant to point out that the said meeting was held on 18.01.2019 after dismissal of the Special Appeal by the Division Bench of this Court on 27.11.2018 whereby the judgment and order dated 12.09.2014 passed by Hon'ble Single Judge in Writ Petition No.749 (S/S) of 2012 was affirmed.

6. Based on the minutes of the meeting comprising of the officers headed by Additional District Magistrate (Finance and Revenue), dated 18.01.2019 the District Magistrate again rejected the claim of the petitioners. The minutes of the said meeting dated 18.01.2019 are on record at page No. 42 as part of the Annexure No. 3 appended to the writ petition. On the basis of the said minutes dated 18.01.2019, an order was passed by the District Magistrate, Sultanpur on 25.05.2019 whereby one of the writ petitioners in the earlier writ petition, namely, Surendra Bahadur Singh was given regular appointment, whereas claim of the other persons, who are the petitioners in the present writ petition, namely, Shiv Nandan Prasad Pandey, Musheer Ahmad and Ravindra Nath has been rejected.

7. Amongst others, the primary ground taken by the learned counsel for the petitioners to assail the decision of the respondents in rejecting the claim of the petitioners for being given regular appointment is that the reasons indicated in

the impugned decision are erroneous and hence not tenable and further that the petitioners have wrongly been held to be ineligible for being given regular appointment in terms of the provisions contained in Rule 5 of the U.P. District Offices (Collectorates) Ministerial Service Rules, 1980, amended vide Notification dated 26.05.2011 by proclaiming U.P. District Offices (Collectorates) Ministerial Service (Second Amendment) Rules, 2011 (hereinafter referred to as, the "amended Rules").

8. Learned counsel for the petitioners has, thus, emphasized that if the reasons indicated by the authority concerned while rejecting the claim of the petitioners are examined in the light of the correct interpretation of the Rule 5 of the amended Rules, the same would be held to be unsustainable. His further submission is that in terms of Rule 5, the petitioners though are eligible for giving substantive/regular appointment, yet they have been denied their rightful claim even after long litigation. He has also submitted that the impugned decision, if examined carefully, is not found in conformity with the judgment dated 26.08.2011 rendered by this Court in the case of **Jiv Kumar Tiwari (supra)**

9. Vehementally opposing the prayer made in this writ petition, the learned Additional Chief Standing Counsel has submitted that if the amended Rule 5 is construed in correct perspective, there does appear to be any illegality in the impugned decision whereby the claim of the petitioners for being given regular appointment has been rejected. He has stated that since all the petitioners do not have requisite experience of having worked in the capacity of Seasonal AWBN for at least 4 Fasli years hence, they have rightly been rejected for being considered for substantive/regular appointment in terms of Rule 5 of the Service Rules. .

10. Learned State Counsel has also raised an objection which may come in the way of the petitioners being granted relief. He stated that the order dated 25.05.2019 passed by the District Magistrate, Sultanpur has not been challenged.

11. I have given my careful consideration to the competing arguments made by learned counsel for the respective parties and have also perused the record available on this writ petition.

12. What I find is that the fate of this writ petition revolves around the correct interpretation of Rule 5(ii) of the Service Rules, which was amended vide Notification dated 26.05.2011. Thus, the construction of said Rule is pivotal for decision in this case. The claim of the petitioner for being given regular appointment depends on consideration of the said issue.

13. The conditions of the service including recruitment/appointment against various ministerial posts in the Collectorates of U.P. including the post of AWBN are governed by U.P. District Offices (Collectorates) Ministerial Service Rules, 1980 as amended, vide its Second Amendment promulgated on 26.05.2011.

14. The position which existed prior to the amendment effected on 26.05.2011 and position which emerged after the said amendment has been elaborately dealt with by this Court in the judgment dated 26.08.2011 rendered by this court in **Jiv Kumar Tiwari's case (supra).**

15. As observed above, the present case concerns itself with the regular appointment on the post of AWBN from amongst Seasonal AWBN. Prior to amendment in Service Rules effected vide notification dated 26.05.2011, there was no provision of making regular appointment from amongst the Seasonal AWBN, however, by the amendment made in the year 2011 a clear provision has been made for making regular/substantive appointment against various ministerial posts in the Collectorates in the State of U.P. from amongst Seasonal AWBN. For convenience Rules 5 of the Service Rules, as amended vide notification dated 26.05.2011 is being quoted herein under:-

COLUMN-2
Rule as hereby substituted
5.Recruitment to the various categories of posts, in the Service shall be made district wise from the following sources :
Category "A'

Junior Assistant which term includes Assistant Bill clerk, Ahalmad, Naib Nazir (Grade II), Library Clerk, Assistant Routine Clerk, Assistant Revenue Clerk, Assistant Revenue Assistant (Grade III), Assistant English Record Keeper, Assistant Judicial Assistant (Grade-III), Arms Forms-Keeper, Appeal Ahalmad, Assistant Record Keeper, Arrangers, Weeders, Copyist, Assistant Local Bodies, Syaha Nawees,, Suits clerk, Judicial Moharrir, Revenue Moharir, Kurk Ameen, Assistant Record Keeper (Indexer), Town Clerk, Typist, Land Acquisition clerk, Assistant Excise Clerk, Stamp Clerk, Assistant Record	*(I) Fifty percent by direct recruitment.* *(ii) Thirty percent by selection through the Selection Committee from amongst Seasonal Assistant Wasil Baqi Navises who have worked satisfactorily for at least four fasli years on the first day of the year in which the selection is made:* *Provided that the upper age limit for such candidates shall be relaxable by such number of years for which they have worked as Seasonal Assistant Wasil Baqi Navis in Fasli years :* *Provided further that if sufficient number of eligible and suitable candidates are not available for selection, the remaining posts shall be filled by direct recruitment.* *(iii) Twenty percent by promotion from amongst substantively appointed Group "D' employees in accordance with the Uttar Pradesh Subordinate Offices Ministerial Group "C' Posts of the Lowest Grade (Recruitment by Promotion) Rules, 2001, as amended for time to time.*

Keeper (Revenue), Assistant Record Keeper (Judicial), Despatcher, Assistant Record Keeper (Lekhpal), Political Pension clerk, Local Bodies Clerk, Assistant Commissioner's clerk, Cell Clerk, Junior clerk, Assistant Session Clerk, Nazul clerk, Assistant Moharrier judicial), Embossing Clerk, Junior Clerk, Freedom fighters Clerk, Complaints Clerk, Assistant General Clerk, Small Saving Clerk, Honarary Court Clerk, Auction Clerk, Suits Clerk (Grade-II), Mutation Clerk, Assistant Record Keeper, Assistant Wasil Baqi Navis, Ceiling Clerk, Assistant Chief Revenue Accountant, Agriculture Income Tax Clerk, government Estate Clerk, Money Lending Clerk, Finance and Revenue Clerk, Mela Clerk, Assistant Suits Clerk, Ziladar government Estate and any other ministerial posts in the scale of pay Rs. 5200-20200 (Pay Band-1) with Grade Pay Rs.1900.	

16. A perusal of the aforequoted amended Rule 5 of the Service Rules shows that in the Collectorates in the State of U.P., there are various posts in the ministerial cadre including the post of AWBN which are described as category "A' posts in the Service Rules. The provision as contained in Rule 5 provides that 50% appointments against all category "A' Posts shall be made by way of direct recruitment and 30% category "A' posts shall be filled in by way of selection through the Selection Committee from amongst Seasonal AWBN, who have worked satisfactorily for at least 4 fasli years on the first day of the year in which the selection is made. It is , thus, clear that Seasonal AWBN are entitled to be considered for their regular appointment not only against the posts of AWBN but also against the various other category "A' posts, which are all ministerial in nature.

(Emphasis by the Court)

17. It is thus explicit that the scope of regular appointment of Seasonal AWBN is not confined to the post of AWBN alone. Seasonal AWBN, thus, are to be considered for their regular appointment against various posts other than the posts of AWBN as well. In a way, the scope of substantive/regular appointment from amongst Seasonal AWBN gets enlarged by making Seasonal AWBN eligible for being given regular appointment in their 30% quota against the vacancies in various posts including the posts of AWBN. As observed above, it, thus, does not need any elaboration that the Seasonal AWBN are entitled to be considered for regular/ substantive appointment against various ministerial posts as given and defined in Rule 5 as category "A' posts.

18. Coming to the reasons indicated by the District Magistrate, Sultanpur in his order dated 25.05.2019 rejecting the claim of the petitioner for regular appointment, it is found that they have been held to be ineligible for the only reason that they had not rendered their services in the capacity of Seasonal AWBN for at least four fasli years as is the requirement under the amended Rules 5. No other reason has been indicated in the said order. The Committee in its meeting held on 18.01.2019 also does not give any reason other than that the petitioners had not worked for at least 4 fasli years in the capacity of Seasonal AWBN hence, they have been held to be ineligible for being considered for regular appointment.

19. It is, thus, apparent that the petitioners in the impugned decision have been found to be ineligible not on account of any other reason including the reason of the petitioners being over age etc. It is to be noticed, as submitted by learned counsel for the petitioner, that the petitioners were initially appointed as Seasonal AWBN pursuant to the selection held for the said purpose, which is clear from the interview letter issued to one of the petitioners namely, Shivnandan Pandey, dated 01.08.1986 which has been annexed as Annexure no. 5 to the writ petition whereby the petitioner No.1 was required to appear in interview on 09.08.1986. By such interview letters, the petitioners were required to undergo interview and after being subjected to selection/interview, the petitioners were appointed as Seasonal AWBN. Annexure no. 6 appended to the writ petition is the select list in which name of the petitioners also figure. Thereafter petitioners were appointed vide order dated 12.08.1986, which has been annexed as Annexure no. 7 to the writ petition. Similarly, the petitioner no. 2 was appointed, vide order dated 22.10.1988, which has been annexed at page 56 of the

writ petition. Pursuant to their selection and appointment orders, the petitioners submitted their joining on the post of Seasonal AWBN.

20. Learned counsel appearing for the petitioners has taken the Court to various orders whereby from time to time additional works have been assigned to the petitioners. These orders are available at page 56, 58 and 60 to the writ petition. Having worked as Seasonal AWBN on their appointment on the basis of selection held, the petitioners, depending on the exigencies which arose in the Collectorate and other related offices under the District Magistrate, Sultanpur, were assigned the work related to various other posts i.e. the posts other than the post of Seasonal AWBN. The work assigned to the petitioners included the work of copyist, bidder, additional copyist and election clerk. These facts are not in dispute. Learned counsel for the petitioners' contention is that having been appointed on the basis of selection held for the post of seasonal AWBN, the petitioners initially worked in the capacity of Seasonal AWBN, however, depending on the exigencies which might have arisen, these petitioners were assigned the work relating to other posts as well. In this view, his submission is that even if the petitioners had not worked for at least 4 fasli years in the capacity of Seasonal AWBN, still they are entitled to be considered for regular / substantive appointment against one or the other category "A' posts in terms of the provisions contained in the amended Rule 5 of the Service Rules. Rule 5 (ii) of the Service Rules as has been quoted in the earlier part of the judgment according to which, 30% category "A' posts are to be filled in by way of selection to be made by the Selection Committee from amongst the Seasonal AWBN.

21. According to the said Rule, those Seasonal AWBN are eligible for being considered for regular appointment who have worked for at least four fasli years.

22. The question which falls for consideration of this Court at this juncture is as to whether an employee, initially appointed on the basis of the selection held for the said purposes on the post of Seasonal AWBN and has worked against the said post but subsequently has been assigned the works relating to other posts, will be eligible for being considered for regular appointment in terms of Rule 5(ii) of the amended Service Rules or not.

23. It is trite in law that court while interpreting any statutory provision cannot either interpolate or intrapolate or substitute or insert any word which is not available in the statutory provisions. However, the Court while giving a correct construction to any statutory provision can always look into the purpose for which such statutory rule is made. It is to be noticed in this case that prior to the amendment in the Service Rules effected on 28.05.2011, there was no provision for making any regular appointment from amongst the Seasonal AWBN, however, after the said amendment came into force, Rule 5 provides that 30% of category "A' posts given in the said Rule are to be filled in by way of selection through the Selection Committee from amongst the Seasonal AWBN. It is observed, at the cost of repetition, that the provisions contained in Rule 5 of the amended Service Rules do not confine the regular appointment of Seasonal AWBN only against the posts of Assistant

Wasil Baqi Nawis; rather it expands the scope of regular appointment of Seasonal Assistant Wasil Baqi Nawis against various posts which are ministerial in nature other than the post of AWBN. Had the Rule confined regular appointment of Seasonal AWBM against the posts of AWBN alone, it could have been said in Rule 5 of the Service Rules that for regular appointment as AWBN, a candidate should have four years service to his credit in the capacity of Seasonal AWBN. The scope in Rule 5 for regular appointment of Seasonal AWBN stands enlarged and in its fold it encompasses various posts for which experience of having worked as Seasonal AWBN may not be relevant. For example, for the purpose of making appointment on regular basis against the posts of Junior Assistant, Assistant Bill Clerk, Ahalmad and various other category "A' posts experience of having worked as Seasonal AWBN will not be relevant. This experience of having worked as Seasonal AWBN can be said to be relevant only for the purpose of making regular appointment against the posts of AWBN. Thus, if the provision contained in Rule 5 (ii) is construed to mean that only those Seasonal AWBN will be eligible for regular appointment against category "A' posts as detailed in Rule 5 itself, who have at least four fasli years experience in the capacity of Seasonal AWBN, the same would not go in tune with the purpose for which amended Rule 5 appears to have been framed. The experience of work in the capacity of Seasonal AWBN can be said to have the nexus with the object of making regular appointment only against the posts of AWBN and not against other posts which have been detailed as category "A' posts in Rule 5 of the Service Rules.

24. Experience of having worked as Seasonal AWBN for four fasli years does not carry any rationale or nexus with the object of making regular appointment on category "A' posts other than the post of AWBN. In the other words, in case any Seasonal AWBN is to be considered for regular appointment within the 30% quota against the posts mentioned as category "A' posts, the services rendered by a person who is initially appointed as Seasonal AWBN but subsequently has been assigned the work relating to other posts, will also be eligible for being considered for regular appointment.

25. So far as the facts of instant case are concerned, there is no denial of the fact that all the petitioners were initially subjected to a selection for the purpose of their appointment as Seasonal AWBN. It is also not in dispute that these petitioners, initially, were assigned the work of the post of Seasonal AWBN, however, depending on the exigencies which arose in the office concerned, they performed their duties relating to other posts such as the post of copyist, additional copyist and election elerk etc. It is also noticeable that before assigning these petitioners the work relating to other posts, no new selection had taken place. The petitioners continued to discharge the functions of other posts as assigned to them from time to time though they were initially appointed as Seasonal AWBN on the basis of a selection held for the said purpose.

26. Accordingly, I have no hesitation to hold that for the purpose of regular appointment against category "A' posts other than the posts of AWBN insistence of the authority concerned for a candidate on having worked for at least four fasli years in the capacity of Seasonal AWBN is legally not tenable. Rule 5(ii) of the Service Rules as amended vide Notification dated 26.05.2011, in my considered opinion, is

thus to be given this interpretation as the purpose of said Rules was to make the Seasonal AWBN eligible for regular appointment not only against the posts of AWBN but against various other ministerial posts as have been given in detail as category "A' posts in Rule 5 itself.

27. It is needless to say that this Court as also Hon'ble Supreme Court in various pronouncements have held that any interpretation of any statutory Rule may depend upon the purpose for which the statutory rule is made. The regard can be had in this respect to the judgment rendered by Hon'ble Supreme Court in the case of **Grid Corporation of Orissa Limited and others Vs. Eastern Metals and Ferro Alloys and others, reported in 2011 (11) SCC, 334.** Para 25 of the judgment in the case of **Grid Corporation of Orissa Limited (supra)** is extracted herein below:

"25. This takes us to the correct interpretation of clause 9.1. The golden rule of interpretation is that the words of a statute have to be read and understood in their natural, ordinary and popular sense. Where however the words used are capable of bearing two or more constructions, it is necessary to adopt purposive construction, to identify the construction to be preferred, by posing the following questions: (i) What is the purpose for which the provision is made?(ii) What was the position before making the provision? (iii) Whether any of the constructions proposed would lead to an absurd result or would render any part of the provision redundant? (iv) Which of the interpretations will advance the object of the provision? The answers to these questions will enable the court to identify the purposive interpretation to be preferred while excluding others. Such an exercise involving ascertainment of the object of the provision and choosing the interpretation that will advance the object of the provision can be undertaken, only where the language of the provision is capable of more than one construction. (See Bengal Immunity Co. Ltd. v. State of Bihar - AIR 1955 SC 661 and Kanailal Sur v. Paramnidhi Sadhukhan AIR 1957 SC 907 and generally Justice G.P.Singh's Principles of Statutory Interpretation, 12th Edition, published by Lexis Nexis - pp 124 to 131, dealing with the rule in Haydon's case (1584) 3 Co Rep 7a: 76 ER 637)".

28. In view of forgoing discussions made herein above and on the basis of doctrine of purposive interpretation, it is held that what flows from Rule 5(ii) of the Service Rules is that an employee initially appointed as Seasonal AWBN having been subjected to a selection for the said purpose will be eligible to be considered for regular appointment against category "A' posts as given in Rule 5 provided he has worked satisfactorily for at least four fasli years. However, his work experience cannot be confined to working only against the post of Seasonal AWBN. If such a person is initially appointed as Seasonal AWBN but is subsequently assigned the work relating to other posts, his work experience on other posts for the purpose of regular appointment under Rule 5 of the Service Rules shall also be counted.

29. As regards the objection raised by the learned counsel for the State that the petitioners have not challenged the order dated 25.05.2019, passed by the District Magistrate, Sultanpur, it may only be observed that said decision is based on the minutes of the meeting of the Selection Committee held on 18.01.2019. The order dated 25.05.2019 by the District Magistrate has been passed on the basis of minutes of

meeting of the said Larger Committee held on 18.01.2019 and these minutes of the meeting held on 18.01.2019 are under challenge in this writ petition. Merely because formal prayer for quashing of the order dated 25.05.2019, passed by the District Magistrate has not been made, will not come in the way of the petitioners being granted relief to which they are otherwise entitled to. Moreover the court in exercise of its jurisdiction under Article 226 of the Constitution of India can always mold the relief in the interest of justice. Thus, the said objection is overruled.

30. Resultantly, the writ petition is **allowed**. The order dated 25.05.2019, passed by the District Magistrate, minutes of the meeting dated 18.01.2019, minutes of the meeting dated 30.11.2018 and the minutes of the meeting dated 03.11.2011 are hereby quashed.

31. The Selection Committee/District Magistrate, Sultanpur is directed to consider the case of the petitioner Nos. 1 and 2 for their regular appointment in terms of Rule 5 of the Service Rules as amended, vide Notification dated 26.05.2011 taking into consideration the observations made and the principles laid down hereinabove. The consideration for regular appointment of the petitioners shall be made within a period of two months from the date of production of a copy of this order. The District Magistrate/Members of the Selection Committee is/are also directed to be mindful of the fact that it is the third round of litigation which has arisen out of denial of rightful claim of the petitioners and dispute is now to be given quietus.

32. The Court expects and hopes that District Magistrate/Members of the Selection Committee shall abide by the observations made in this judgment and take a lawful decision within the time which has been stipulated herein above.

33. In the facts of the case, there will be no orders as to costs.

(2020)10ILR A490
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.05.2020

BEFORE
THE HON'BLE PRAKASH PADIA, J.

WRIT - B No. 70097 of 2011

Mahipal Singh ...Petitioner
Versus
Board of Revenue, U.P. at Allahabad & Ors. ...Respondents

Counsel for the Petitioner:
Sri S.S. Shukla, Sri Santosh Kumar Tiwari, Sri Rajendra Kumar Pandey

Counsel for the Respondents:
C.S.C., Dr. M. Tandon

Civil Law - Limitation Act (36 of 1963) – Section 5 - Condonation of delay - "sufficient cause" - should receive liberal construction so as to advance substantial justice - in the absence of formal written application for condonation of delay - court should give an opportunity to remove the defect & to file an explanation for delay - moreover an application for condonation of delay may be oral also - If the explanation does not smack of mala fides or it is not put-forth as part of a dilatory strategy the court, delay may be condoned - filing of the application for condonation of delay is in the realm of procedure - cannot be interpreted in such a way so as to take away the right of the parties (Para 23, 22)

Revision dismissed in default - Restoration application filed after 10 months - recall

application rejected on the ground that no separate application u/s 5 of Limitation Act filed for condonation of delay - *Held* - If the restoration application was defective - authority should have given an opportunity to the petitioner to remove the defect and to file an explanation for delay. (Para 28)

Partly allowed. (E-5)

List of Cases cited:-

1. Meghraj Vs Jesraj Kasturjee AIR 1975 Mad 137

2. Firm Kaura Mal Bishan Dass Vs Firm Mathra Dass Atma Ram AIR 1959 PUN 646

3. M/s Markland Pvt. Ltd. & ors. Vs St. of Guj AIR 1989 GUJ 44

4. Indrasani Devi Vs D.D.C., Varanasi 1981 ALJ 637

5. Muneshwari Devi Vs Jitan Singh 1993 AWC 792

6. Smt. Shakuntala Devi Vs Banwari Lal & ors. 1997 AWC 622

7. N. Balakrishnan Vs M. Krishnamurthy JT (1998) 6 SC 242

8. Shakuntala Devi Vs Kuntal Kumari AIR 1969 SC 575

9. St. of WB Vs The Administrator, Howrah Municipality AIR 1972 SC 749

10. Collector, Land Acquisition, Anantnag & anr. Vs Mst. Katiji & ors. AIR 1987, S.C. 1353

11. Sukhdeo Singh & anr. Vs Customs, Excise & Service Tax & ors. Central Excise Appeal No.76 of 2010

(Delivered by Hon'ble Prakash Padia, J.)

1. Heard Sri S.S. Shukla and Sri Santosh Kumar Tiwari, learned counsel for the petitioner and Smt. Praveen Shukla, learned Standing Counsel for the respondent-State.

2. The petitioner has preferred the present writ petition inter-alia with the following prayers :-

"I. Issue a writ, order or direction in the nature of certiorari by quashing the dated 21.12.2009 contained in (Annexure - No.6) passed by Collector Finance and Revenue, Ghaziabad in Case No.8 of 2008-09 under Section 157-AA State Versus Mahipal Singh, order dated 26.5.2010, 4.5.2011 passed by Additional Commissioner Meerut in Revision No.39 of 2009-10 contained in (Annexure-No.7 and 9), and order dated 10.8.2011 signed on 30.8.11 passed by Member Board of Revenue Circuit Court Meerut in Revision No.68 of 2010-11 Mahipal Singh Versus State of U.P. contained in (Annexure- No.11) to this writ petition.

II. Issue a writ, order or direction in the nature of mandamus commanding the respondent No.3 to pass a reasoned and speaking order in mutation proceeding of mutation case No.421 of 2008-09 Mahipal Singh Versus Tara Chand in regard to sale-deed dated 5.3.2009 in accordance with law."

3. The facts in brief as contained in the writ petition are that the petitioner belongs to the caste of Jatav, which is a scheduled caste. One Tara Chand son of Jaggan Singh also belongs to caste of Jatav. One Jaichand son of Ram Dhan was tenure holder of the Arazi Khata No.568 Khasra No.1136 area 2 bigha situated in village Bhanaida Pargana Loni Tehsil and District Ghaziabad, executed a sale deed dated 1.1.2002 in favour of the Tara Chand. The aforesaid sale deed was duly registered in favour of Tara Chand.

4. Tara Chand applied for mutation under Section 34 of U.P. Land Revenue Act on the basis of sale deed in question. The Revenue Officers passed mutation order in favour of Tara Chand and the name of Tara Chand was duly recorded in the revenue records as well as in the Khatauni as bhumidar with transferable rights. The petitioner purchased the aforesaid arazi from Tara Chand by way of registered sale deed dated 5.3.2009 on consideration of Rs.8,75,000/-. The aforesaid sale deed was duly registered in the office of Sub Registrar, Ghaziabad. Subsequently, petitioner moved an application for mutation of the land in question in his name. On the said application report was submitted by the Tehsildar, Ghaziabad, on 09.06.2009 before the Sub Divisional Magistrate. On the basis of the said report the Sub Divisional Magistrate, Ghaziabad, submitted a report on 15.6.2009 before the Collector to initiate proceedings as provided under Section 161/167 of the The U.P. Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred as U.P.Z.A. & L.R. Act). Subsequent to the aforesaid a notice was issued to the petitioner stating therein that the vendor belongs to schedule caste but the land in question was obtained by way of patta and he has not taken permission from the Collector prior to execution of the sale deed as per the provisions contained in Section 157-AA of the U.P.Z.A. & L.R. Act. A detailed reply was submitted by the petitioner in response to the aforesaid show cause notice. It is stated in the reply that there was no need to get the permission from the Collector prior to execution of the sale deed thus there is no violation of the provisions of Section 157-AA of the provisions and none of the provisions contained in the act were violated. Ultimately an order dated 21.12.2009 was passed by the Additional Collector (Finance and Revenue), Ghaziabad against the petitioner.

5. Aggrieved against the aforesaid order petitioner preferred a revision being Revision No.39/10 in the court of Commissioner, Meerut Division, Meerut. The aforesaid revision was dismissed in default by the Additional Commissioner, Meerut Division, Meerut vide its order dated 26.5.2010. An application was filed by the petitioner to recall the order dated 26.5.2010 on 29.3.2011. The aforesaid recall application was rejected by the Additional Commissioner, Meerut Division, Meerut vide its order dated 4.5.2011. The recall application was rejected on the ground that no separate application was filed by the petitioner for condonation of delay.

6. Against the aforesaid order dated 4.5.2011 passed by the Additional Commissioner petitioner preferred a revision being Revision No.68/10-11 before Board of Revenue, Circuit Bench, Meerut. The aforesaid revision was also rejected by the Board of Revenue vide its order dated 10.8.2011. Challenging the aforesaid orders, the petitioner has preferred the present writ petition.

7. It is argued by the learned counsel for the petitioner that the order passed by the Additional Collector (Finance and Revenue), Ghaziabad dated 21.12.2009 is absolutely illegal. It is further argued that the provisions of Section 157-AA (5) of the Act was introduced w.e.f. 26.6.2002 and would not be applicable to sale deed executed on 1.1.2002 and as such sale deed could not have been declared void under Section 167 of the Act.

8. It is further argued by the learned counsel for the petitioner that though statutory revision was preferred by him before the Commissioner, Meerut Division, Meerut, which was dismissed in default vide its order dated 26.5.2010. In order to recall the aforesaid order, a recall application was filed by the petitioner before the Additional Commissioner on 29.3.2011. The said application was rejected by him vide its order dated 4.5. 2011 on the ground that (i) the restoration application is highly time barred (ii) no separate application for condonation of delay has been filed.

9. The order passed by the Additional Commissioner, Meerut Division, Meerut dated 4.5.2011 was challenged by the petitioner by filing a revision before the Board of Revenue as provided under Section 333 of the U.P.Z.A. & L.R. Act, the same was also dismissed by the Board of Revenue, Circuit Bench, Meerut vide its order dated 30.8.2011.

10. It is further argued that even in the absence of a written application for condonation of delay, the oral application was also liable to be entertained. It is further argued that there were no inordinate delay in filing the restoration application since the same was filed only after 10 months. It is further argued that cogent reasons were given in the restoration application to condone the delay but the same was not taken into consideration while rejecting the same. The cogent reasons were given in the restoration application for delay in filing the same.

11. On the other hand it is argued by the learned Standing Counsel that since the sale deed, which was executed in favour of the petitioner was void in law and hit by the provisions of Section 157-A and 157-AA of the U.P.Z.A. & L.R. Act. The orders passed by the Additional Collector (Finance and Revenue), Ghaziabad are absolutely perfect and valid orders. It is further argued that the revision filed by the petitioner before the Board of Revenue was also rightly dismissed. In view of the same, it is argued that the petitioner is not entitled for any relief as claimed by him in the present writ petition.

12. Counter and rejoinder affidavits have been exchanged between the parties.

13. With the consent of learned counsel for the parties, present writ petition is being disposed of.

14. From perusal of the record, it is clear that the revision preferred by the petitioner before the Commissioner was dismissed in default on 26.5.2010. A restoration application was filed to recall the aforesaid order. The said application was rejected by him on 4.5.2011 on the ground that the recall application was filed after 10 months but no application for condonation of delay was filed as provided under Section 5 of the Indian Limitation Act.

15. In this view of the matter, the recall application was rejected being highly time barred though a revision was preferred by the petitioner against the aforesaid order dated 4.5.2011 before the Board of Revenue but the Board of Revenue also rejected the same without application of mind and by a non speaking order on 30.8.2011. From perusal of the aforesaid order, it is absolutely clear that there is no application of mind whatsoever while passing the aforesaid orders. The basic grounds taken while rejecting the

application for restoration was that no separate application was filed by the petitioner for condonation of delay.

16. In the case of ***Meghraj Vs. Jesraj Kasturjee*** reported in ***AIR 1975 Mad 137*** it was observed that in the absence of formal written application for condonation of delay, the court should circumvent technicality and afford a reasonable opportunity to the aggrieved party to mend matters. Otherwise it would lead to miscarriage of justice. Paragraph 4 of the aforesaid judgement reads as follows :-

"The consensus, therefore, appears to be this. If under explainable circumstances an appeal or an application is filed in Court, but without a formal application or a written application for excusing the delay in the presentation of the same, then the Court should circumvent technicality and afford a reasonable opportunity to the aggrieved party to mend matters. Otherwise, it would lead to miscarriage of justice."

17. A bare perusal of the order of the revisional authority would show that the restoration application was dismissed as barred by time as it did not accompany with an application for condonation of delay when it was filed. It does not appear from the said order that any opportunity was given by the revisional authority to the petitioner to move an application for condonation of delay. If the restoration application was defective the revisional authority should have given an opportunity to the petitioner to remove the defect, moreover an application for condonation of delay may be oral also.

18. In the case of ***Firm Kaura Mal Bishan Dass vs. Firm Mathra Dass Atma Ram*** reported in ***AIR 1959 PUNJAB 646*** it was held that merely because there was no written application filed by the appellant is hardly a sufficient ground for refusing him the relief, if he is otherwise entitled to it.

19. A similar observations were made by the Gujarat High Court in the case of ***M/s Markland Pvt. Ltd. and others vs State of Gujarat***, reported in ***AIR 1989 GUJARAT 44***. It has been held that in the absence of written application for condonation of delay, the delay in filing the appeal can be condoned.

20. Identical view was taken by this Court in ***Indrasani Devi vs. D.D.C., Varanasi*** reported in ***1981 ALJ 637***, which was followed by another Single Judge of this Court in the case of ***Muneshwari Devi vs. Jitan Singh*** reported in ***1993 AWC 792.***

21. More or less, the same view has been taken in the case of ***Smt. Shakuntala Devi vs. Banwari Lal and others***, reported in ***1997 AWC 622***.

22. The filing of the application for condonation of delay is in the realm of procedure. The procedure as far as possible cannot and should be interpreted in such a way so as to take away the right of the parties.

23. The Apex Court with a reference to Section 5 of the Limitation Act in ***N. Balakrishnan vs. M. Krishnamurthy*** reported in ***JT 1998 (6) SC 242*** has laid down that the primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice. Time limit fixed for approaching the court in different situations is not because on the expiry of such time a bad cause would transform into a good cause. In the

judgement, it has been held that rules of limitation are not meant to destroy the right of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. Law of limitation fixes a life-span for such legal remedy for the redress of the legal injury so suffered. Ultimately, in para 14, it has been stated that it must be remembered that in every case of delay there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put-forth as part of a dilatory strategy the court must show utmost consideration to the suitor. It has been laid down that in such matters, approach of the court should be justice oriented. The paragraph 14 of the aforesaid judgement is reproduced hereinbelow :-

"14. It must be remembered that in every case of delay there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time then the court should lean against acceptance of the explanation. While condoning delay the Could should not forget the opposite party altogether. It must be borne in mind that he is a looser and he too would have incurred quiet a large litigation expenses. It would be a salutary guideline that when courts condone the delay due to laches on the part of the applicant the court shall compensate the opposite party for his loss."

24. The words "sufficient cause" should receive a liberal construction so as to advance substantial justice. The Supreme Court in the case of ***Shakuntala Devi vs. Kuntal Kumari*** reported in ***AIR 1969 SC 575*** held that the word "sufficient cause" receiving a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bona fides is imputable to the appellant. If the appellant makes out sufficient cause for the delay, the Court may in its discretion condone the delay in filing an appeal. The relevant paragraph 7 in this regard is reproduced hereinbelow :-

"7. The next question is whether the delay in filing the certified copy or, to put it differently, the delay in re-filing the appeal with the certified copy should be condoned under Section 5 of the Limitation Act, If the appellant makes out sufficient cause for the delay, the Court may in its discretion condone the delay. As laid down in Krishna v. Chathappan (4) "Section 5 gives the Courts a discretion which in respect of jurisdiction is to be exercised in the way in which judicial power and discretion ought to be exercised upon principles which are well understood; the words "sufficient cause" receiving a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bonafides is importable to the appellant."

25. Similar view was again taken by the Supreme Court in the case of ***State of West Bengal vs. The Administrator, Howrah Municipality*** reported in ***AIR 1972 SC 749.*** It was held in the aforesaid case by the Supreme Court that the words "sufficient cause" should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fide is imputable to a party.

The relevant paragraph 30 is reproduced hereinbelow :-

"From the above observations it is clear that the words "sufficient cause" should receive a liberal construction so, as to advance substantial justice when no negligence nor inaction nor is, imputable to a party."

26. In the case of ***Collector, Land Acquisition, Anantnag and another vs. Mst. Katiji and others*** reported in ***AIR 1987, S.C. 1353***, it was held by the Supreme Court that the Court should adopt liberal approach for condonation of delay. Certain observations were made by the Sureme Court in paragraph 3 of the aforesaid judgement, which is reproduced hereinbelow :-

"The legislature has conferred the power to condone delay by enacting Section 51 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on 'merits'. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice--that being the life-purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that:-

"Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908. may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period."

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is con- doned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."

27. In so far as the reliefs claimed in the present writ petition are concerned, the petitioner has challenged the order dated 21.12.2019 passed by the Additional Collector (Finance and Revenue),

Ghaziabad by which the mutation application filed by him was rejected. The said order was passed by the Additional Commissioner is on merit. Against the aforesaid order statutory remedies were available to the petitioner and the same were duly availed by him by filing a revision before the Commissioner, Meerut Division, Meerut. Though initially the revision was dismissed in default by the Additional Commissioner, Meerut Division, Meerut vide its order dated 26.5.2010, a recall application was filed in order to recall the aforesaid order but since the same was not supported by a separate application for condonation of delay, the same was rejected by him on 04.05.2011. Against the order dated 04.05.2011 though a statutory revision was preferred by the petitioner as provided under Section 333 of the Act, 1950, the same was also rejected by the Board of Revenue, Circuit Court, Meerut without providing opportunity to the petitioner to file an application for condonation of delay.

28. Taking into consideration what has been stated hereinabove, in my opinion the order passed by the Commissioner dated 4.5.2011 (annexure 9 to the writ petition) rejecting the restoration application as well as the order dated 30.8.2011 passed by the Board of Revenue, Circuit Bench, Meerut, (annexure 11 to the writ petition), were passed without giving an opportunity to the petitioner to file an explanation for condonation of delay hence not sustainable and are liable to be quashed.

29. Learned counsel for the petitioner also relied upon a Division Bench judgement of this Court in ***Central Excise Appeal No.76 of 2010 (Sukhdeo Singh & another Vs. Customs, Excise & Service Tax & Others)*** decided on 15.4.2011. The relevant paragraph of the aforesaid judgement is reproduced hereinbelow :-

"Taking into consideration what has been stated above, in our considered view, the Commissioner (Appeals) was not justified in rejecting the appeal as barred by time without giving an opportunity to the appellant to file an application explaining the delay.

In normal circumstances, we would have referred the matter back to the authority concerned for consideration of the application for condonation of delay. But looking to the fact that the sufficient time has elapsed, it is not desirable to restore the matter back for consideration of delay condonation application.

.....

Considering that the grounds disclosed by the appellants are sufficient cause, we, therefore, condone the delay in filing the appeal before the Commissioner (Appeals), Customs & Central Excise, Allahabad."

30. Taking into consideration the law laid down by a Division Bench of this Court in the aforesaid case, since the sufficient time has lapsed it is not desirable to restore the matter back for consideration of delay condonation application considering that the grounds disclosed by the petitioner are sufficient cause. In view of the above I hold that the Commissioner, Meerut Division, Meerut should have condoned the delay as he was not justified in rejecting the restoration application as barred by time.

31. The petitioner has already availed a statutory remedy by filing a revision against the order passed by the Additional Collector (Finance and Revenue),

Ghaziabad. In this view of the matter, without interfering in the order dated 21.12.2009 passed by the Additional Collector (Finance and Revenue), Ghaziabad, a mandamus is issued to the revisional authorities to decide the revision on merits.

32. The matter is restored back to the Commissioner, Meerut Division, Meerut to hear and decide the Revision No.39/10 on merits.

33. In the facts and circumstances of the case, the Court is of the view that the orders 26.5.2010 and 04.05.2011 passed by Additional Commissioner Meerut and the order dated 10.8.2011 passed by Member Board of Revenue Circuit Court Meerut are liable to be set aside and they are hereby set aside. The Commissioner Meerut Division Meerut is directed to decide the revision preferred by the petitioner being Revision *No.39 of 2009-10 (Mahipal Vs. State of U.P. and others) on merits.*

34. In the result the writ petition succeeds and is partly allowed.

35. No order as to costs.

(2020)10ILR A498
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.04.2020

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Application U/S 482 No. 5939 of 2006

Prof. Ramesh Chandra ...Applicant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicant:
Sri Rakesh Kumar, Sri W.H. Khan, Sri R.P. Tiwari

Counsel for the Respondents:
A.G.A., Sri P.K. Rao, Sri V.B. Rao

Criminal Law – Code of Criminal Procedure,1973 - Section 482 Cr.P.C. has been filed for quashing the charge sheet (under section 295, 298, 203, 504 IPC) - Section 197 (2) Cr.P.C. – Sanction provision – Applicable for taking cognizance – For conducting investigation and submission of charge sheet – No sanction required under section 195, 196, 197 Cr.P.C. (Para – 20)

Since applicant / accused is no more **"public servant"** issue of section 197 is redundant and could not vitiate proceedings since in such matters sanction not required. (Para – 22)
There is no merit in the application. (Para – 27)

Application dismissed. (E-2)

List of Cases cited:-

1. Priyanka Srivastava & anr. Vs St. of U.P. & ors. (2015) 6 SCC 287.

2. Manharibhai Muljibhai Kakadia Vs Shaileshbhai Mohanbhai Patel, (2012) 10 SCC 517.

3. P.Sundarrajan Vs R. Vidhya Sekar, (2004) 13 SCC 472.

4. Raghu Raj Singh Rousha Vs Shivam Sundaram Promoters (P) Ltd., (2009) 2 SCC 363.

5. A.N. Santhanam Vs E. Elangovan, (2012) 12 SCC 321.

6. Devarapalli Lakshminarayana Reddy Vs Narayana Reddy, (1976) 3 SCC 252.

7. Anil Kumar Vs M.K. Aiyappa, (2013) 10 SCC 705.

8. Dilawar Singh Vs St.of Delhi, (2007) 12 SCC 641.

9. Maksud Saiyed Vs St. of Guj., (2008) 5 SCC 668.

10. CREF Finance Ltd. Vs Shree Shanthi Homes (P) Ltd., (2005) 7 SCC 467.

11. Madhao Vs St. of Mah., (2013) 5 SCC 615.

12. Ramdev Food Products (P) Ltd. Vs St. of Guj., (2015) 6 SCC 439.

13. Lalita Kumari Vs St. of U.P. ,(2014) 2 SCC 1.

14. Station House Officer, CBI/ACB/ Bangalore Vs B.A. Srinivasan & ors., 2019(16) SCALE 803.

15. Shambhoo Nath Misra Vs St. of U.P., (1997) 5 SCC 326 (Para 5).

16. Parkash Singh Badal Vs St. of Punj., (2007) 1 SCC 1 (Paras 20 and 38).

17. Rajib Ranjan Vs R. Vijay Kumar, (2015) 1 SCC 513 (Para 18).

18. P.K. Pradhan Vs St. of Sikkim represented by the Central Bureau of Investigation, (2001) 6 SCC 704.

19. N.K. Ganguly Vs CBI, New Delhi, (2016) 2 SCC 143.

20. U. P. Pollution Control Board Vs Mohan Meaking Limited and others, (2000) 3 SCC 745.

21. Kanti Bhadra Shah Vs St. of W.B, 2001 SCC 722.

22. Nupur Talwar Vs C.B.I. & ors. , (2012) 11 SCC 465.

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

1. Heard Sri W.H.Khan, Senior Advocate, assisted by Sri R.P.Tiwari, learned counsel for applicant, learned A.G.A. for opposite party 1 and Sri P.K.Rao, Advocate, for opposite party 2.

2. This is an application under Section 482 of Code of Criminal Procedure, 1973 *(hereinafter referred to as "Cr.P.C.")* filed by Prof. Ramesh Chandra with the prayer that charge sheet dated 11.8.2005 submitted in Case Crime No.C-26 of 2004 under Sections 295, 298, 203, 504 IPC, arising from Case No.8791 of 2005 registered at Police Post Bundelkhand Vishwavidyalaya, Police Station *(hereinafter referred to as "P.S.")* Nawabad, District Jhansi be quashed.

3. Facts in brief giving rise to present application are that opposite party 2 *(hereinafter referred to as "O.P.-2")* Arvind Kumar Soni, *(hereinafter referred to as "Complainant/Informant")* filed an application under Section 156(3) Cr.P.C. before Chief Judicial Magistrate, Jhansi *(hereinafter referred to as "C.J.M.")* to direct Police to register report against applicant Ramesh Chandra, Smt. Kalpana Mathur, V.K.Sinha, R.K.Saxena, Ms. Aparnaraj, Priyanka and three others under Sections 295, 298, 120B, 504 IPC. O.P.-2 i.e. Complainant/Informant claimed himself to be District Coordinator of Bundelkhand Insaaf Sena. Allegations in complaint read as under :

1. यह कि दिनांक 13.10.04 की रात्रि में इन्स्टीट्यूट आफ मैनेजमेन्ट के तत्वाधान में मैगा फेस्ट 2004 का एक कार्यक्रम का आयोजन बुन्देलखण्ड विश्वविद्यालय में आयोजित किया गया था।

2. यह कि उक्त कार्यक्रम की अध्यक्षता अभियुक्त नं0 2 निर्देशन अभियुक्त नं0 1, 3 एवं 4 ने कार्यक्रम का नेतृत्व किया एवं कार्यक्रम का संचालन अभियुक्त नं0 5 ,6, 7 ने किया था।

3. यह कि कार्यक्रम के दौरान एक लघु नाटक के नाम से यूनिवर्सल मार्केटिंग उक्त कार्यक्रम मंच से प्रस्तुत किया गया इस नाटक में रूद्रावतार महाबली भगवान श्री हनुमान जो दुनिया के करोड़ों–करोड हिन्दुओं के पूज्य एवं आराध्य हैं जिन पर हिन्दू जन बेहद आस्था रखते हैं जिन्हें बाल ब्रह्मचारी, संकट मोचन और महाबली के रूप

एवं अनेक नामों से हम हिन्दु वर्ग के लोग पूजते हैं एवं उन पर अटूट आस्था, श्रद्धा रखते हैं यहां तक कि भगवान श्री हनुमान जी के प्रचलित दिन मंगलवार व शनिवार के दिन पूर्ण सात्विक व्रत रखकर श्रद्धापूर्वक पूजन करते हैं।

4. यह कि हमारे महान आराध्य देव को उक्त नाटक मंचन में अभियुक्तगणों ने एक युवक को श्री बजरंग बली का वाना (रूप रखवाकर) एक फिल्मी गाना ''ओ राजा आ जा बंगले के पीछे कांटा लगा हाय रब्बा . . . '' बजवाया गया एवं श्री बजरंग बली के रूप धारण करने वाले उक्त युवक को रैम्प पर इस अश्लील गाने पर नचवाया गया।

5. यह कि उक्त नाटक मंचन हिन्दुओं के आराध्य देव जिन्हें महाबली के रूप में जाना जाता है को पहले उक्त नाटक मंचन में एक दुबला पतला एवं कमजोर व्यक्ति के रूप में प्रस्तुत किया गया एवं माखौल उडाने वाले अंदाज में उक्त नाटक मंचन में एक बुन्देलखण्ड विश्वविद्यालय से जुगाडमेन्ट नाम की डिग्री उत्तीर्ण छात्र द्वारा स्वास्थ्य वर्धक श्री हनुमान जी को कैप्सूल खिलाते दिखाया गया। जिसके उपरान्त एक दूसरे युवक को कैप्सूल खाने के उपरान्त उक्त कैप्सूल के प्रभाव से एक बलशाली युवक के रूप में दिखाया गया, इतना ही नहीं भगवान श्री हनुमान को उक्त नाटक मंचन में अभियुक्तगणों द्वारा जलती सिगरेट पीते दिखाया गया। अश्लील गाने पर अन्य दूसरे लड़कों के साथ भगवान श्री हनुमान को जमकर नाचते दिखाया गया जिस पर उक्त अभियुक्तगण तालियां बजाकर जोर–जोर से हंसते रहे। देवर्षि विश्वामित्र भगवान श्री राम के गुरू को टिप्स देकर तपस्या भंग कराते दिखा कर यह दर्शाया गया कि हमारे ऋषि मुनि बिकाऊ है।

6. यह कि ***कार्यक्रम के आयोजक/अभियुक्तगण जो पढ़े लिखे एवं बुद्धिजीवी वर्ग के व्यक्ति जाने जाते हैं और भली भांति जानते हैं भारत के धर्म निरपेक्ष राज्य में सभी धर्मो का सम्मान देने और सम्मान करने की व्यवस्था है कानून ने किसी भी व्यक्ति एवं समूहो को यह अधिकार नहीं दिया है कि वह ऐसा कृत्य करें जिससे*** *आमजन की धार्मिक भावनाओं को ठेंस पहुॅचे लोक शान्ति प्रकोपित हो, देश में वर्ग विशेष, धर्म विशेष के लोक उद्धलित होकर लोकशांन्ति भंग करने पर आमादा हो जाये जिससे देश में विद्वेष की स्थिति पैदा हो शान्ति व्यवस्था के लिए पुलिस द्वारा पब्लिक शासन द्वारा ऐसे उद्धलित जन को शांति करने के लिए शक्ति का इस्तेमाल किया जाय जिससे अकारण राजद्रोह की स्थिति पैदा हो इस प्रकार वर्गों के बीच धार्मिक शत्रुता का भाव पैदा करना और संकेतों व दृश्ययस्पों द्वारा धार्मिक भावनाओं को ठेस पहुॅचाने और धार्मिक भावनाओं को आहत करने के आशय से राजद्रोहात्मक कृत्य जानबूझकर आपराधिक षडयंत्र के तहत बुन्देलखण्ड विश्वविद्यालय के कुलपति रमेश चन्द्रा, कुलसचिव वी0के0 सिन्हा, एवं अन्य अभियुक्तगण 1 लगायत 7 ने कार्यस्थ में प्रायोजित किया जिसे मीडिया ने अपने अखबारों में विभन्न तरीकों से प्रकाशित किया जिसे पढ़कर आमजन की धार्मिक भावनाओं को बेहद ठेस पहुंची है।*

7. यह कि उक्त सम्बन्ध में प्रार्थी ने एक प्रार्थना पत्र थाना नवाबाद को प्रथम सूचना रिपोर्ट दर्ज करने के लिये दिया लेकिन प्रार्थी की रिपोर्ट दर्ज नहीं की गयी तब प्रार्थी ने दिनांक 15.10.04 को एक प्रार्थना पत्र श्रीमान वरिष्ठ पुलिस अधीक्षक झांसी को जरिये डाक दिया लेकिन कोई कार्यवाही नहीं की गयी उक्त प्रार्थना पत्र व रसीद की प्रति श्रीमान जी के अवलोकनार्थ संलग्न है।

8. यह कि प्रार्थना पत्र के साथ उक्त कार्यक्रम के सम्बन्ध में दैनिक समाचार पत्रों में प्रकाशित समाचार दिनांक 14, 15, 16, 17 18 अक्टूबर 04 के प्रमुख समाचार पत्रों की छाया प्रति संलग्न है।''

4. Chief Judicial Magistrate, Jhansi passed an order on 05.11.2004 directing Police to register First Information Report *(hereinafter referred to as "FIR")* and after investigation submit report under Section 173 Cr.P.C. Police of P.S. Nawaband, Jhansi consequently registered FIR under Sections 295, 298, 120B, 504 IPC as Case Crime No.C4 of 2004 dated 07.11.2004 wherein applicant and five others were named and three were unnamed accused persons.

5. Applicant and other five named accused filed Criminal Revision No. 208 of 2004 against C.J.M.'s order dated 05.11.2004 before District and Sessions Judge, Jhansi. The revision was registered

on 01.12.2004 and ultimately dismissed vide judgment dated 09.02.2005 passed by Sri Upendra Kumar, Additional Sessions Judge/Fast Track Court No.3, Jhansi *(hereinafter referred to as "Revisional Court").*

6. Applicant and other named accused filed Criminal Misc. Writ Petition No.2941 of 2005 challenging C.J.M.'s order dated 05.11.2004 and Revisional Court's order dated 09.02.2005 but this Court vide judgment dated 21.3.2005 declined to interfere with aforesaid orders holding that prima facie cognizable offence is made out and therefore, there is no illegality in the said orders. However, this Court granted indulgence only to the extent that petitioners during investigation may not be arrested.

7. After investigation, Police has submitted charge sheet No.322/05 dated 11.8.2005 against applicant. It is this charge sheet which has been challenged in the present application.

8. Sri W.H.Khan, Senior Counsel appearing for applicant submitted that charge sheet has been submitted before Magistrate without any application of mind; applicant is a "public servant' and no sanction under Section 197 Cr.P.C. has been obtained; and no specific allegation has been made and proceedings under Section 156(3) Cr.P.C. were wholly illegal.

9. In my view, none of the arguments have any force.

10. Order passed by C.J.M. under Section 156(3) Cr.P.C. was already challenged by applicant in Revision by District Judge and then in Criminal Misc. Writ Petition No.2941 of 2005. He lost in both Courts. This Court, having not found any illegality therein, declined to interfere. Hence order of C.J.M. directing Police to register FIR cannot be allowed to be reagitated in this application.

11. Learned counsel for applicant submitted that application under Section 156(3) Cr.P.C. must have been supported by an affidavit and relied on Supreme Court's judgment in **Priyanka Srivastava and Another vs. State of Uttar Pradesh and others (2015) 6 SCC 287**, but, as already said, this issue is not open to be raised in this application since order passed by C.J.M. on 05.11.2004 on the application filed under Section 156(3) Cr.P.C. was already agitated by applicant in Criminal Revision before District Judge and then in Criminal Misc. Writ Petition No.2941 of 2005 and he failed therein. This Court has already upheld order of C.J.M. And Revisional Court vide judgment dated 21.3.2005, hence this issue cannot be allowed to be reagitated in this application. Therefore, aforesaid judgment would not help applicant in any manner.

12. Even otherwise, I do not find that for the purpose of present case, applicant can have any benefit of aforesaid authority as it has not application to this case. Therein one Prakash Kumar Bajaj availed a housing loan from Punjab National Bank Housing Finance Limited *(hereinafter referred to as "PNBHFL")* on 21.01.2001. Loan was in the name of Prakash Kumar Bajaj and his wife Jyotsana Bajaj. They committed default in payment of instalment. PNBHFL treated housing loan as a non-performing asset *(hereinafter referred to as "NPA")* in accordance with guidelines framed by Reserve Bank of India. PNBHFL issued notice to borrowers Prakash Kumar Bajaj and Jyotsana Bajaj

under Section 13(2) of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 *(hereinafter referred to as "SARFAESI Act").* PNBHFL on 05.06.2007 submitted application before District Magistrate, Varanasi for taking action under Section 13(4) of SARFAESI Act. At this stage, Sri Bajaj preferred Writ Petition No.44482 of 2007 before this Court, which was dismissed on 14.09.2007 with the observation that Sri Bajaj may file requisite objection and take appropriate action under Section 17 of SARFAESI Act. Sri Bajaj however preferred Criminal Complaint Case No.1058 of 2008 against V.N.Sahay, the then Vice President; Sandesh Tiwari, Assistant President and V.K.Khanna, Managing Director of PNBHFL for offences punishable under Sections 163, 193, 506 IPC, alleging that said accused persons had intentially taking steps to cause injury to him. Vide order dated 04.10.2008, Magistrate dismissed criminal complaint and declined to take cognizance after recording statements of complainant Sri Bajaj under Section 200 Cr.P.C. and witnesses under Section 202 Cr.P.C. Undeterred, Sri Prakash Kumar Bajaj preferred Criminal Revision No.460 of 2008 whereupon Additional Sessions Judge, Varanasi allowed revision, set aside Magistrate's order dated 04.10.2008 and remanded the matter to Magistrate with direction that he shall hear again and pass order on cognizance according to law on the basis of merits in the light of directions given by Revisional Court. Revisional Court while allowing revision had not issued any notice to accused persons. Supreme Court deprecated this approach of Revisional Court in **Priyanka Srivastava (Supra)** by observing in para 5 as under :

"Be it noted, the learned Additional Sessions Judge heard the counsel for the Respondent No. 3 and the learned Counsel for the State but ***no notice was issued to the accused persons therein.*** *Ordinarily, we would not have adverted to the same because that lis is the subject matter in the appeal, but it has become imperative to do only to highlight how these kind of litigations are being dealt with and also to show the Respondents had the unwarranted enthusiasm to move the courts.* ***The order passed against the said accused persons at that time was an adverse order inasmuch as the matter was remitted. It was incumbent to hear the Respondents though they had not become accused persons."***

(Emphasis added)

13. For making above observation, Supreme Court relied on its authority in **Manharibhai Muljibhai Kakadia vs. Shaileshbhai Mohanbhai Patel (2012) 10 SCC 517; P.Sundarrajan vs. R. Vidhya Sekar (2004) 13 SCC 472; Raghu Raj Singh Rousha vs. Shivam Sundaram Promoters (P) Ltd. (2009) 2 SCC 363;** and **A.N. Santhanam vs. E. Elangovan (2012) 12 SCC 321.**

14. In **Prinyanka Srivastava (supra)** following Revisional Court's direction, Magistrate vide order dated 13.7.2009 took cognizance and issued summons to all the three accused officials of PNBHFL. Accused persons then came to this Court in application under Section 482 Cr.P.C., which was allowed and proceedings in Criminal Complaint Case No.1058 of 2009 were quashed. In the meantime Prakash Kumar Bajaj and his wife i.e. borrowers, filed objection under Section 13 of SARFAESI Act. The objections having not been dealt with, Prakash Kumar Bajaj filed Writ Petition No.22254 of 2009, which was decided by this Court vide order dated 05.05.2009 directing disposal of objection.

The objection was rejected by Competent Authority vide order dated 01.6.2009 whereagainst Securitisation Appeal No. 5 of 2010 was filed by Prakash Kumar Bajaj before Debt Recovery Tribunal, Allahabad *(hereinafter referred to as "D.R.T.")*. The appeal was rejected vide order dated 23.11.2012. Sri Bajaj preferred further appeal before Debt Recovery Appellate Tribunal, Allahabad *(hereinafter referred to as "D.R.A.T.")*. Sri Bajaj then filed another application under Section 156(3) Cr.P.C. against V.N.Sahay, Sandesh Tripathi and V.K.Khanna, officials of PNBHFL alleging criminal conspiracy and forging of documents referring to three post-dated cheques. It was numbered as Complaint Case No.344 of 2011 giving rise to FIR No.262 of 2011 under Sections 465, 467, 468, 471, 386, 506, 34, 120-B IPC. Sri Bajaj filed third application dated 30.10.2011 under Section 156(3) Cr.P.C. alleging that there was undervaluation of his property. This complaint was registered as Complaint Case No.396 of 2011 causing registration of FIR No.298 of 2011. Continuous filing of criminal cases compelled officials of PNBHFL to enter into one-time settlement on the stipulation that Sri Bajaj shall withdraw all the cases on acceptance of one-time settlement. It was acted upon and Sri Bajaj deposited Rs.15 lakhs. Sri V.N.Sahay and two others, in the meantime, preferred Writ Petition No.17611 of 2013 which was heard by a Single Judge along with Criminal Misc. Application No.13628 of 2010 filed under Section 482 Cr.P.C. Writ Petition was disposed of alongwith application under Section 482 Cr.P.C. observing that since final report has been submitted, therefore, writ petition has become infructuous. Appeal preferred by Sri Bajaj at D.R.A.T. was decided in terms of one-time settlement. Sri Bajaj still proceeded further by filing one more application under Section 156(3) Cr.P.C. on 30.10.2011 against Vice-President and Valuer of PNBHFL. Magistrate directed Police to register FIR, which resulted in FIR No.298 of 2011 for offences under Sections 465, 467, 471 IPC as Case Crime No.415 of 2011. It was challenged by officials of PNBHFL in Criminal Misc. Application No.24561 of 2011, which was rejected by this Court vide order dated 23.12.2011 and thereafter matter came to Supreme Court. It is in this backdrop and peculiar facts, Supreme Court in para 19 observed that narration of facts exemplifies in enormous magnitude recourse to Section 156(3) Cr.P.C., as if it is a routine procedure. Court deprecated this approach and observed, if a borrower is allowed to take recourse to criminal law in the manner it has been taken, it has inherent potentiality to affect marrows of economic health of the nation. Statutory remedy were cleverly bypassed and prosecution route was undertaken for instilling fear amongst individual authorities compelling them to concede to the request for one-time settlement which the financial institution may not have acceded. Court observed that there was a contest with a perverse sadistic attitude. Court also deprecated Magistrate who ordered registration of FIR, observing that he exercised power under Section 156(3) Cr.P.C. without any application of mind and passed order for registration of FIR in a routine manner. Court said :

*"The **duty cast on the learned Magistrate**, while exercising power under Section 156(3) CrPC, cannot be marginalized."* (Emphasis added)

15. Referring to earlier decision in **Devarapalli Lakshminarayana Reddy vs. V. Narayana Reddy (1976) 3 SCC 252**,

Court, in **Priyanka Srivastava and Another (supra)**, said, that an order made under sub-section (3) of Section 156, is in the nature of a peremptory reminder or intimation to the police to exercise their plenary powers of investigation under Section 156(1). Such an investigation embraces the entire continuous process which begins with collection of evidence under Section 156 and ends with a report or charge-sheet under Section 173. With regard to Section 156(3) Cr.P.C., observations regarding caution noticed in **Anil Kumar vs. M.K. Aiyappa (2013) 10 SCC 705; Dilawar Singh vs. State of Delhi (2007) 12 SCC 641; Maksud Saiyed vs. State of Gujarat (2008) 5 SCC 668; CREF Finance Ltd. vs. Shree Shanthi Homes (P) Ltd. (2005) 7 SCC 467; Madhao vs. State of Maharashtra (2013) 5 SCC 615;** and **Ramdev Food Products (P) Ltd. vs. State of Gujarat (2015) 6 SCC 439** were also referred. Supreme Court also referred to and relied on its Constitution Bench judgment in **Lalita Kumari vs. State of U.P. (2014) 2 SCC 1.**

16. Having referred to above authorities, in para 27 of judgment, Court in **Priyanka Srivastava and Another (supra)**, said :

"Regard being had to the aforesaid enunciation of law, it needs to be reiterated that the learned ***Magistrate has to remain vigilant with regard to the allegations made and the nature of allegations and not to issue directions without proper application of mind.*** *He has also to bear in mind that sending the matter would be conducive to justice and then he may pass the requisite order. The present is a case where the accused persons are serving in high positions in the bank. We are absolutely conscious that the position does not matter, for nobody is above law. But, the learned* ***Magistrate should take note of the allegations in entirety, the date of incident and whether any cognizable case is remotely made out.*** *It is also to be noted that* ***when a borrower of the financial institution covered under the SARFAESI Act, invokes the jurisdiction under Section 156(3) Code of Criminal Procedure and also there is a separate procedure under the Recovery of Debts due to Banks and Financial Institutions Act, 1993, an attitude of more care, caution and circumspection has to be adhered to. "*** (Emphasis added)

17. Further, in paras 29 and 30 of judgment, Court **Priyanka Srivastava and Another (supra)** said :

29. At this stage it is seemly to state that ***power Under Section 156(3) warrants application of judicial mind.*** *A court of law is involved. It is not the police taking steps at the stage of Section 154 of the code.* ***A litigant at his own whim cannot invoke the authority of the Magistrate. A principled and really grieved citizen with clean hands must have free access to invoke the said power. It protects the citizens but when pervert litigations takes this route to harass their fellows citizens, efforts are to be made to scuttle and curb the same.***

30. In our considered opinion, a ***stage has come in this country where Section 156(3) Code of Criminal Procedure applications are to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate.*** *That apart, in an appropriate case, the learned* ***Magistrate would be well advised to verify the truth and also can verify the veracity***

of the allegations. *This affidavit can make the applicant more responsible.* ***We are compelled to say so as such kind of applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain persons.*** *That apart, it* ***becomes more disturbing and alarming when one tries to pick up people who are passing orders under a statutory provision which can be challenged under the framework of said Act or Under Article 226*** *of the Constitution of India. But* ***it cannot be done to take undue advantage in a criminal court as if somebody is determined to settle the scores."*** (Emphasis added)

18. To avoid mischief, which was noticed by Court in above authority i.e. **Priyanka Srivastava and Another (supra)**, it was, thus observed that now time has come that application under Section 156(3) must be supported by an affidavit. The above judgment nowhere shows that in the earlier matters where applications have already been decided, they shall be bad if no affidavit was filed.

19. Reverting to basic contention, in any case, argument of lack of affidavit along with application under Section 156(3) Cr.P.C. disappeared when petitioner challenged correctness of order dated 05.11.2004 passed by Magistrate directing Police to register FIR as also upheld in revision but the said orders were upheld by this Court in Writ Petition No.2941 of 2005 filed by petitioner wherein Court declined to interfere vide judgment dated 21.03.2005. The said order has attained finality. What relief petitioner could not get in earlier writ petition, cannot be allowed to be reagitated in the present writ petition also and to this extent issue having already attained finality, has to be rejected.

20. Now coming to second aspect that sanction under Section 197(2) Cr.P.C. has not been obtained and therefore entire proceedings are bad in law, here, I find that aforesaid provision is applicable for the purpose of taking cognizance but applicant has preferred this application challenging charge sheet only and for making investigation and submission of charge sheet, no sanction is required as provisions as contained in Sections 195, 196 and 197 Cr.P.C. have no application at that stage.

21. Very recently, a three Judges Bench of Supreme Court has considered a similar issue in **Station House Officer, CBI/ACB/ Bangalore vs. B.A. Srinivasan and Ors. 2019(16) SCALE 803** where cognizance order passed on charge sheet was challenged on the ground of lack of sanction and prayer for discharge was made but Trial Court rejected the same and in the criminal revision, High Court interfered. Supreme Court did not approve order of High Court and said that whether protection under Section 197 is available or not has to be examined not only on the consideration that incumbent is a 'public servant' but also whether offence alleged to have been committed relates to his act or purporting to act in discharge of official duties which would require investigation into facts. Relying on earlier judgments in **Shambhoo Nath Misra vs. State of U.P. (1997) 5 SCC 326** (Para 5)**; Parkash Singh Badal vs. State of Punjab (2007) 1 SCC 1 (Paras 20 and 38); Rajib Ranjan vs. R. Vijay Kumar (2015) 1 SCC 513 (Para 18); P.K. Pradhan vs. State of Sikkim represented by the Central Bureau of Investigation (2001) 6 SCC 704** and **N.K. Ganguly vs. CBI, New Delhi (2016) 2 SCC 143**, Supreme Court said that whether alleged act is intricately connected with discharge of official

functions and whether matter would come within the expression 'while acting or purporting to act in discharge of their official duty', would get crystallized only after evidence is led and issue of sanction can be agitated at a later stage as well. Court said that without there being evidence and issue having been considered by Trial Court, at the stage of summoning such an issue cannot be examined by superior Court on a Criminal Revision or on an application under Section 482 Cr.P.C. This judgment, in my view, rather goes against applicant instead of helping him.

22. In this case, applicant has long back ceased to be an official of University. Learned A.G.A. has informed that he has already been terminated. Once accused-applicant is no more a 'public servant', issue of Section 197 will become redundant and would not vitiate proceedings since in such matters sanction is not required.

23. Learned Senior Counsel submitted that though order of cognizance could not be appended to the application but he has got a copy of said order dated 21.09.2005 and it shows that it is a totally non speaking, unreasoned order and therefore bad in law. Copy of order placed before court passed by C.J.M. on 21.09.2005 reads as under ;

*"आज आरोप पत्र न्यायालय में प्राप्त हुआ। **बाद अवलोकन** आदेश हुआ कि दर्ज रजिस्टर्ड हो अभियुक्त के लिए **प्रसंज्ञान लिया गया नकले तैयार करायी जावे।** दिनांक 30.11.05 को वास्ते हाजिरी एवं देने नकले पेश हों।"* (Emphasis added)

24. Having gone through the said order it cannot be said that Magistrate had not applied its mind to the documents placed before registering the case and taken cognizance by summoning accused-applicant. A similar issue was considered in **U. P. Pollution Control Board vs. Mohan Meaking Limited and others, 2000 (3) SCC 745,** and after referring to an earlier decision in **Kanti Bhadra Shah Vs State of West Bengal 2001 SCC 722**, Court said :

*"Legislature has stressed the need to record reasons in certain situations such as dismissal of complaint without issuing process. There is **no such requirement imposed on a Magistrate for passed detailed order while issuing summons. Process issued to accused cannot be quashed merely on the ground that Magistrate had not passed a speaking order."*** (Emphasis added)

25. Same proposition was reiterated in **Nupur Talwar Vs Central Bureau of Investigation and others, 2012 (11) SCC 465.** Thus even this argument fails.

26. No other point has been argued.

27. I, therefore, find no merit in the application.

28. Dismissed. Interim order, if any, stands vacated.

(2020)10ILR A506
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.04.2020

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Application U/S 482 No. 5469 of 2003
&
Application U/S 482 No. 2444 of 2005

Kuldeep Narayan & Anr. ...Applicants
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Applicants:

Sri I.K. Chaturvedi, Sri G.S. Chaturvedi

Counsel for the Respondents:
A.G.A., Sri D.B. Mishra, Sri H.C. Mishra, Sri V.P. Srivastava

Criminal Law – Code of Criminal Procedure,1973 - Section 482 Cr.P.C. has been filed for quashing the reinvestigation order on the ground that Magistrate has no power for directing reinvestigation are fresh investigation. - Section 173 (8) Cr.P.C. further investigation - Police possesses power of further investigation.

The use of word "पुनः विवेचना" will not be guiding factor to determine where to order re-investigation or further investigation. (Para-19)

It is the substance which is to be looked into or reading the application and the order of the Magistrate – it is clear that permission with direction was for further investigation and not a new investigation. Hence there is no any irregularity impugned order.

CrMA-1 dismissed and CrMA-2 allowed.
(E-2)

List of Cases cited:-

1. Ram Lal Narang Vs State (Delhi Administration) ,(1979) 2 SCC 322.

2. Randhir Singh Rana Vs State (Delhi Administration), (1997) 1 SCC 361.

3. Dinesh Dalmia Vs C.B.I. ,(2007) 8 SCC 770.

4. Rama Chaudhary Vs St. of Bihar, (2009)6 SCC 346.

5. Vinay Tyagi Vs Irshad Ali @ Deepak & ors., (2013) 5 SCC 762.

6. Dharam Pal Vs St. of Har., (2014) 2 SCC (Cri) 159.

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

1. Heard Sri H.C. Mishra, learned counsel for applicants, learned AGA for State-respondent and Sri I. K. Chaturvedi, Senior Advocate assisted by Sri G. S. Srivastava, learned counsel for respondent-2.

2. Criminal Misc. Application u/s 482 No.5469 of 2003 (hereinafter referred to as "CrMA-1") has been filed under Section 482 of Code of Criminal Procedure, 1973 (hereinafter referred to as "Cr.P.C.") by two applicants namely, Kuldeep Narayan and Harendra Vikram with a prayer that order dated 26.06.2003 passed by First Additional Chief Judicial magistrate, Meerut in Case Crime No.90 of 2000 under Sections 392 and 411 IPC, Police Station-Kharkhauda, District-Meerut for reinvestigation be quashed, on the ground that Magistrate has no power for directing reinvestigation or fresh investigation.

3. Criminal Misc. Application u/s 482 No.2444 of 2005 (hereinafter referred to as "CrMA-2") has been filed under Section 482 of Code of Criminal Procedure, 1973 (hereinafter referred to as "Cr.P.C.") by three applicants namely, Lokesh Kumar Singhal, Sunil Kumar Maheshwari and Rakesh alias Rajesh alias Bhurey with a prayer that Case No.3187 of 2004 registered before Chief Judicial Magistrate, Faizabad be clubbed with Case No.158/11 of 2003 pending before Court of 1st Additional Chief Judicial Magistrate, Meerut and should be tried together.

4. Facts giving rise to CrMA-1 in brief are that a First Information Report (hereinafter referred to as "FIR") being Case Crime No.90 of 2000 under Section 392 IPC, Police Station-Kharkhauda, District-Meerut was registered on 05.04.2000 by Informant Lokesh Kumar Singhal and it was against unknown accused persons. Allegations in FIR dated

05.04.2000 stated that Informant Lokesh Kumar is engaged in the business of manufacturing of wires in his factory, "U.P. Insulator Cable Company". In the night of 04/05.04.2000 at 1.30 AM, some persons entered his factory through a ladder crossing rear wall, tied the gunman Santram and other working labours and confined them in a room. Thereafter they took away 442 rolls of cable wires and three bundles copper in a vehicle. The information was given to Informant by his employee Anil Kumar in the morning of 05.04.2000 and thereafter he lodged report.

5. Police during investigation recorded statements of Santram (gunman), Kalp Nath Rai (Chowkidar) and Anil (another employee of Informant's firm). Investigating Officer (hereinafter referred to as 'I.O.'), however, submitted final report on 31.12.2000 which was registered as Misc. Case No.110 of 2001 vide Magistrate's order dated 02.06.2001. Notice was issued to Complainant/Informant giving opportunity to file objection but no objection by opposite party was filed. Ultimately, by order dated 08.11.2002, Additional Chief Judicial Magistrate, Court No.6, Meerut, accepted final report. After a long time, on oral request of Complainant, Sub Inspector Sri Manik Chand Nigam without obtaining permission from concerned Magistrate or higher authority proceeded to Faizabad and raided applicants' shop and godown and seized some material alleging the same to be stolen items and also arrested applicants. Applicants, thereafter were produced before 1st Additional Chief Judicial Magistrate, Meerut on 20.01.2003 and remand was sought. Magistrate taking note of the fact that final report was already accepted and no permission of Magistrate was obtained, rejected application seeking remand of accused-applicants Kuldeep Narayan and Harendra Vikram by order dated 20.01.2003. Against order dated 20.01.2003, Criminal Revision No.38 of 2002 was filed wherein I.O. Sri Mahesh Singh Chauhan submitted report that it could not be found proved that goods were either stolen or belongs to Complainant and no prima facie case was found against applicants. Revisional Court by order dated 05.05.2003 allowed revision observing that police is free to proceed for further investigation as per law. Operative part of revisional order reads as under :

"Revision is allowed. The impugned order dated 20.1.2003 passed by ACJ VI Meerut is set aside. However, in view of the application, moved by the Investigating officer 16 Kha dated 28.4.2003 the Investigating officer is free to proceed with the investigation, as per rules/law."

6. Applicants then made complaint of Sri Manik Chand Nigam, S.I. Before higher authority i.e. Senior Superintendent of Police, Meerut, (hereinafter referred to as 'SSP'). Thereupon by order dated 15.02.2003 further investigation was handed over to another officer Sri Mahesh Singh Chauhan. After making further investigation Sri Mahesh Singh Chauhan submitted report on 08.05.2003 finding no case against applicants. Applicants then submitted an application before Magistrate for release of goods seized from their shop and godown. Therein I.O. Sri M. S. Chauhan submitted report dated 14.05.2003 stating that he has no objection for release. When matter was pending, Inspector General of Police, Meerut Zone, Meerut (hereinafter referred to as 'I.G.') passed order dated 05.06.2003 transferring investigation of Case Crime No.90 of 2000

to District-Ghaziabad. I.G. failed to consider that no investigation was pending, since, final report was submitted by I.O. on 08.05.2003 before Magistrate. Pursuant to order of Inspector General of Police, SSP, Ghaziabad entrusted investigation to Sub Inspector, Sri B. S. Verma, SIS. Sri B. S. Verma, S.I. moved an application dated 26.06.2003 before Additional Chief Judicial Magistrate 1st, Meerut requesting for permission for investigation whereupon order dated 26.06.2003 has been passed by Magistrate permitting re-investigation. This order is challenged on the ground that there is no provision for re-investigation and, therefore, order dated 26.06.2003 is wholly without jurisdiction.

7. In the meantime, applicants also submitted an application before SSP, Meerut on 10.06.2003 requesting to register FIR against Lokesh Kumar Singhal, Sunil Kumar Maheshwari, Rajesh, Manik Chand Nigam (S.I.) and Head Constable Girwar Singh, Rajkumar. Order was passed by SSP directing Station House Officer, Civil Lines, Meerut to register case whereupon Case Crime No.1371 of 2003 under Sections-166, 167, 182, 342, 406, 420, 467, 468, 471, 120 B IPC was registered against Lokesh Kumar Singhal, Sunil Kumar Maheshwari, Rajesh, Manik Chand Nigam (S.I.) and Girwar Singh (Head Constable), Rajkumar (Constable).

8. In CrMA-2 facts are broadly similar but to put things straight the manner in which applicants have stated, I may state the same hereinbelow.

9. Alleging theft of 400 rolls of copper wires and three bundle of copper, FIR being Case Crime No.90 of 2000 was registered under Section 392 IPC against unknown persons at Police Station-Kharkhauda , District-Meerit by applicant Lokesh Kumar Singhal as Informant. Police after investigation submitted final report which was accepted by Magistrate vide order dated 08.11.2000. Thereafter, on some information received by Sub Inspector, Sri Manik Chand Nigam, he went to Faizabad and raided shop of Kuldeep Narayan (O.P.no.2) and Harendra wherefrom 172 rolls insulated copper wire were recovered, allegedly stolen/looted in the incident dated 04./05.04.2000. Looted property was identified by applicant-1 Lokesh Kumar and recovery memo was prepared. Two accused Kuldeep Narayan and Harendra were arrested and produced before Chief Judicial Magistrate, Faizabad for transit remand. They were brought to Meerut and produced before VIth Additional Chief Judicial Magistrate seeking remand which was declined, since, final report was already accepted and police had not obtained any prior permission. Aggrieved by order dated 20.01.2003 passed by Magistrate declining to accord remand, State Government filed Criminal Revision No.38 of 2003 which was allowed vide order dated 05.05.2003 and Revisonal Court at Meerut observed that further investigation may be made. Investigation was handed over to Sub Inspector, Sri Mahesh Singh Chauhan. Applicants, however, moved an application before District Inspector General(hereinafter referred to as 'DIG')/IG, Meerut for entrusting investigation to another officer since Sri Mahesh Singh Chauhan was in connivance with O.P.2 and his accomplices. By order dated 06.06.2003, DIG, Meerut directed that investigation shall be conducted by SIS at Ghaziabad and Sri B. S. Verma, Sub Inspector of SIS was appointed as I.O. After obtaining permission from Additional Chief Judicial Magistrate 1st Meerut, he

completed investigation and submitted charge sheet against Kuldeep Narayan and Harendra Vikram and one Shyam Behari on 16.07.2003.

10 However, Magistrate at Meerut was informed that order dated 26.06.2003 passed in Case Crime No.90 of 2000 under Section 392 and 411 IPC was stayed on 14.07.2003 by this Court in CrMA-1. Further both parties moved application before Additional Chief Judicial Magistrate 1st Meerut for release of goods. Thereafter applicants of CrMA-1 got a report lodged against applicants of CrMA-2 i.e. Case Crime No. 1371 of 2003 under Sections-166, 167, 182, 342, 406, 420, 467, 468, 471, 120 B IPC on 10.06.2003. This FIR was challenged by applicant-1 of CrMA-2 in Writ Petition No.4634 of 2003. Vide order dated 08.09.2003, while issuing notice to Kuldeep Narayan and Mahesh Singh Chauhan, who were impleaded as respondent-5 and 6 in aforesaid writ petition, time was granted to file counter affidavit to State and this Court stayed arrest of applicant-1 in Case Crime No.1371 of 2003 till submission of charge sheet or credible evidence is collected during investigation. Investigation was conducted in Case Crime No.1371 of 2003 and ultimately charge sheet has been filed. Magistrate has taken cognizance, summoned applicants and case has been registered as Case No.3187 of 2004 in the Court of Chief Judical Magistrate, Faizabad. Submission of applicants in CrMA-2 is that one case is at Faizabad and another at Meerut, though both cases have arisen from same incident and, therefore, both cases should be tried together.

11. I proceed to consider first CrMA-1, wherein order dated 26.06.2003 passed by Magistrate has been challenged wherein direction has been given for "पुनः विवेचना" which according to applicants is re-investigation, and is not permissible, while according to opposite parties, it is further investigation and permissible. Hence, this Court is required to consider whether aforesaid order is valid or not.

12. It is no doubt true that for Hindi words "पुनः विवेचना" used in impugned order dated 26.06.2003, dictionary meaning is re-investigation. Under Section 173 (8) CrPC, Police possesses power to proceed for further investigation, but there is no provision empowering police for re-investigation. Word "re-investigation" has to be understood in the context of fresh investigation, new investigation and not in continuation with investigation already made. Before coming to the specific case in hand, it will be appropriate to have a bird eye view of law on the subject.

13. In **Ram Lal Narang vs. State (Delhi Administration) (1979) 2 SCC 322**, Court considered the scope and purport of Section 173 Cr.P.C. and said that on the Magistrate taking cognizance on police report, right of Police to further investigate is not exhausted and it could exercise such right even if, as often as necessary, when fresh information comes to light. Further, it also observed that it is desirable that Police ordinarily should inform Court and seek its formal permission to make further investigation, if fresh facts come to light so as to maintain independence of judiciary, in the interests of purity of administration of criminal justice and in interests of comity of various agencies and institutions entrusted with different stages of such administration.

14. In **Randhir Singh Rana vs. State (Delhi Administration) (1997) 1 SCC 361**

Court observed that power of further investigation is available to Police after submission of charge-sheet by virtue of Section 173(8) Cr.P.C.

15. In **Dinesh Dalmia vs. CBI (2007) 8 SCC 770**, again Court held that Investigating Officer has power to make a prayer for conducting further investigation in terms of Section 173(8) Cr.P.C. and this power is not taken away only because a charge-sheet has been filed under Section 173(2) and cognizance has been taken by Magistrate.

16. In **Rama Chaudhary vs. State of Bihar, 2009(6) SCC 346** Court examined power of Magistrate under sub Section (2) and (8) of Section 173 Cr.P.C. and said:

"From a plain reading of sub-section (2) and sub-section (8) of Section 173, it is evident that even after submission of police report under sub-section (2) on completion of investigation, the police has a right to "further" investigation under sub-section (8) of Section 173 but not "fresh investigation" or "reinvestigation". The meaning of "Further" is additional; more; or supplemental. "Further" investigation, therefore, is the continuation of the earlier investigation and not a fresh investigation or reinvestigation to be started ab initio wiping out the earlier investigation altogether."

17. In **Vinay Tyagi vs. Irshad Ali @ Deepak and Ors. (2013) 5 SCC 762** Court recognizaed power of further investigation of Police suo motu with reference to Section 173 (8) Cr.P.C. and held that Investigating Agency was competent to file a report supplementary to its primary report and that the former was to be treated by Court in continuation of the latter.

18. The decision in **Vinay Tyagi vs. Irshad Ali (supra)** has been reiterated and followed in **Dharam Pal vs. State of Haryana, 2014(2) SCC (Cri) 159** observing that superior Courts have jurisdiction under Section 482 Cr.P.C. or under Article 226 of Constitution of India to direct further investigation, afresh or denovo, and even re-investigation. Fresh, de novo or reinvestigation are synonym expressions and result whereof in law, would be same. Superior Courts are even vested with power of investigation transferred from one agency to another, provided ends of justice so demands. This power has to be exercised by Superior Courts very sparingly and with great circumspection. Court reiterated the following observation with regard to the power of Magistrate:

"Where the Magistrate can only direct further investigation, the courts of higher jurisdiction can direct further, reinvestigation or even investigation de novo depending on the facts of a given case. It would be specific order of the Court that would determine the nature of investigation."

19. The exposition of law laid down in above authorities is well established but it has to be examined in the facts of particular case whether there is any order of fresh or re-investigation or it is an order of further investigation and for this purpose mere use of words "पुनः विवेचना", as such will not be a guiding factor, since, it is substance which is to be looked into.

20. Now considering above expositions of law, I have to examine order dated 26.06.2003 in the context, whether Magistrate intended to direct fresh investigation or new investigation as re-

investigation or it is further investigation i.e. in continuation to investigation already made.

21. To examine this aspect, I may reproduce order dated 26.06.2003 which reads as under :

"अ सं 90/2000 धारा 392 भा द सं के विवेचक पी एस वर्मा द्वारा प्रार्थना पत्र में पुनः तफ्तीश से धारा 173 सीआरपीसी के प्रकरण के सन्दर्भ में सी डी पुनः विवेचना किये जाने के सन्दर्भ में दिया गया है। कहा गया है कि उपरोक्त सन्दर्भ में पुनः तफ्तीश ***चूँकि तार का नमूना बरामद मिलान में विधि विज्ञान प्रयोगशाला में तस्दीक़ नहीं कराया गया है तथा महत्वपूर्ण साक्षी हैं तथा बयान अंकित नहीं किये गए हैं ৯आदेश के तहत पुनः विवेचना৯ कागजात वापस किये जावे।***

अतः पुनः ***विवेचना कि अनुमति व कागजात विधिक वापस किये जाते हैं।"***

*In an application for re-investigation in respect of case under Section 173 CrPC moved by P.S. Verma, Investigating Officer of the Crime No.90/2000 under Section 392 IPC, it is stated that under the order: "**Since recovered sample of wire has not been verified in the Forensic Laboratory and statements of important witnesses have not been recorded**" in the **aforesaid reference, re-investigation documents be returned.***

*Hence, with the **permission for re-investigation, legal documents are returned."***

(emphasis added)(English translation by Court)

22. Magistrate has allowed application submitted by police with permission to make "पुनः विवेचना". Magistrate had not observed that earlier investigation shall be a nullity and police will make a new investigation. Entire order when read as such makes intention clear that Magistrate has directed police to make further investigation i.e. investigation in continuance to investigation already made and not altogether a new investigation ignoring earlier investigation. The mere terminology used by Magistrate i.e. "पुनः विवेचना", in my view, will not control the order when intention of order from its very perusal is quite clear. It is different thing that what is being conveyed by the party challenging said order on the ground that it is a permission for new investigation or fresh investigation and not further investigation but in fact, in Hindi, I do not find a single word for 'further investigation' and Hindi to English dictionary shows its meaning to be "आगे कि जांच पड़ताल". It appears that the terminology used in this aspect by Magistrate is a little bit defective but intention of Magistrate as well as Police authorities is very clear when we read application and order that it is permission with direction for further investigation and not a new investigation. Hence, I do not find any reason to hold impugned order dated 26.06.2003, illegal and reject submissions advanced otherwise by applicants in CrMA-1.

23. Now coming to CrMA-2, apparently cases pending in two Courts are different to the extent that offences under different provisions against different persons are involved, but it cannot be

doubted that on certain aspects the facts in both cases are overlapping and some aspects are common. If one aspect is true in one matter then second cannot continue and second case will stand belied. But the question is whether a case from one Court to another can be transferred on an application filed under Section 482 Cr.P.C. or such a request should be made by filing application under Section 407 CrPC. There was one option, whereby this Court would have permitted applicants of CrMA-2 to move an application under Section 407 CrPC requesting for transfer of case to another district where one case is already pending and thereafter request could have been made to concerned District Judge to direct that both cases should be heard by same Court. This option would take further time and only result in multiplying litigation. These matters are pending for almost 15-17 years. Power under Section 482 CrPC is wide enough and mere mention or non mention of a provision cannot deprive a Court to exercise powers which is otherwise vested in it, even if it is not mentioned by applicants. In given facts and circumstances, Court can exercise a power if it is vested with it.

24. In these facts and circumstances, exercising powers under Section 482 CrPC read with Section 407 CrPC, I allow CrMA-2 i.e. Application under Section 482 CrPC No.2444 of 2005 and transfer Case No.3187 of 2004 (State of U.P. vs. Lokesh Kumar Singhal and others) pending in Court of Chief Judicial Magistrate, Faizabad to Court of 1st Additional Chief Judicial Magistrate, Meerut with a further direction that Case No.158/11 of 2003 pending in the Court of 1st Additional Chief Judicial Magistrate, Meerut shall be heard together with transferred case.

25. In the result, CrMA-1 is hereby **dismissed** and CrMA-2 is **allowed** in the manner as aforesaid.

(2020)10ILR A513
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.04.2020

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Application U/S 482 No. 5396 of 2006

Umesh Chandra Saxena ...Applicant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicant:
Sri Raj Kumar Khanna

Counsel for the Respondents:
A.G.A.

Criminal Law – Code of Criminal Procedure,1973 - Section 482 Cr.P.C. has been filed for quashing the case under section 420, 218, 471 IPC- Condition for exercise of power to prevent an abuse of process of court or to secure the ends of justice – only in case basic ingredients of offences alleged are at together absent – Power shall not be exercised to stifle legitimate prosecution.

State of framing of charge :- Defence of accused cannot be considered at this stage. Various documents placed before the court in defence by the accused cannot be examined the same.

Application lacks merit and dismissed. (E-2)

List of Cases cited:-

1. St. of Orissa Vs Debendra Nath Padhi, (2005) 1 SCC 568.

2. Mohammed Ibrahim Vs St.of Bihar, (2009) 8 SCC.

3. Md. Allauddin Khan Vs The St. of Bihar & ors., (2019) 6 SCC 107.

4. Criminal Appeal No.175 of 2020 (St. of M.P. Vs Yogendra Singh Jadaun & anr.)

5. St. of Har. Vs Bhajan Lal & ors., 1992 Supp (1) SCC 335.

6. Google India Pvt. Ltd. Vs Visakha Industries & ors., AIR 2020 SC 350.

7. Jeffrey J. Diermeier & ors. Vs St. of W.B. & ors. , (2010) 6 SCC 243.

8. Som Mittal Vs St. of Kar., (2008) 3 SCC 753.

9. Lakshman Vs St. of Kar. & ors., (2019) 9 SCC 677.

10. Chilakamarthi Venkateswarlu & ors. Vs St. of A.P. & ors., AIR 2019 SC 3913.

11. Zandu Pharmaceuticals Works Ltd. & ors. Vs Mohd. Sharaful Haque & ors., (2005) 1 SCC 122.

12. M.A.A. Annamalai Vs St. of Karn. & ors., (2010) 8 SCC 524,

13. Sharda Prasad Sinha Vs St.of Bihar, AIR 1977 SC 1754.

14. Nagawwa Vs Veeranna Shivalingappa Konjalgi & ors., 1976 AIR 1976 SC 1947.

15. Rakhi Mishra Vs St. of Bihar & ors., (2017) 16 SCC 772.

16. Sonu Gupta Vs Deepak Gupta & ors., (2015) 3 SC 424.

17. Roshni Chopra and others Vs St. of U.P. & ors., (2019) 7 Scale 152.

18. Dy. Chief Controller of Imports & Exports Vs Roshanlal Agarwal & ors., (2003) 4 SCC 139.

19. U.P. Pollution Control Board Vs Mohan Meaking Ltd. & ors., (2000) 3 SCC 745.

20. Kanti Bhadra Shah Vs St. of W.B. (2001) SCC 722.

21. Nupur Talwar Vs C.B.I. & ors., (2012) 11 SCC 465.

22. Parbatbhai Aahir & ors. Vs St. of Guj. & ors., (2017) 9 SCC 641.

23. Arun Singh & ors. Vs St. of U.P. passed in Criminal Appeal no.250 of 2020 (arising out of Special Leave Petition (Crl.) No. 5224 of 2017).

24. Satish Mehra Vs Delhi Administration & anr. (1996) 9 SCC 766.

25. Superintendent & Remembrancer of Legal Affairs, West Bengal Vs Anil Kumar Bhunja & ors. (1979) 4 SCC 274.

26. St. of Bihar Vs Ramesh Singh (1977) 4 SCC 39.

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

1. This is an application under Section 482 of Code of Criminal Procedure, 1973 *(hereinafter referred to as "Cr.P.C.")* filed by sole applicant Umesh Chandra Saxena with a prayer to quash Case No.101 of 2006 (Crime No.726 of 2004), under Sections 420, 218, 471 IPC, Police Station Bhagatpur, District Moradabad, pending in the Court of Judicial Magistrate Ist Class, Thakurdwara, Moradabad.

2. Facts in brief, as disclosed in the application, are that accused-applicant was appointed as Assistant Teacher in Prathmik Vidyalaya Bhadgawan, District Moradabad on 29.10.1988. Applicant was transferred from time to time. Vide order dated 27.01.2004 passed by Assistant Basic Education Officer *(hereinafter referred to as "ABEO")* Bhagatpur Tanda, District Moradabad, applicant while working at Primary School Chatarpur Nayak was directed to join Primary School Bhagatpur Tanda on 28.01.2004. On 13.02.2004, ABEO wrote a letter to applicant seeking details of distribution of mid-day meals and

scholarship to the students of Primary School Bhagatpur Tanda. Said enquiry was made probably on some complaint made by parents of students to the District Magistrate, Moradabad against Gram Pradhan of Village Bhagatpur Tanda alleging about the irregularities in distribution of scholarship and mid day meal to the students in the year 2003-04. A fact finding enquiry was conducted by Sri A.K. Singh, District Social Welfare Officer, Moradabad *(hereinafter referred to as "DSWO")* and Sri M.K. Kandpal, District Backward Class Welfare Officer, Moradabad *(hereinafter referred to as "DBCWO")*. They submitted report dated 29.07.2004 holding Sri Babban Ali, Gram Pradhan, Shiv Autar, Gram Panchayat Vikas Adhikari and Sri Mahesh Kumar Saxena, Headmaster of School, guilty of embezzlement of government revenue and recommended recovery of Rs.1800/- and also departmental enquiry against Gram Pradhan, Gram Panchayat Vikas Adhikari and Headmaster of School.

3. Thereafter, a First Information Report *(hereinafter referred to as "FIR")* was registered as Case Crime No.726 of 2004 dated 20.10.2004, under Sections 420, 409 IPC on a written report of Sri A.K. Singh, DSWO and Sri M.K. Kandpal, DBCWO dated 29.07.2004. The FIR stated that complaint was related to distribution of scholarship meant for students of minority class. On the demand raised by Primary School, Bhagatpur Tanda, a sum of Rs.1,15,500/- as scholarship was credited to the account of Gram Panchayat meant for 385 students in the financial year 2003-04. Aforesaid information was received from the department of Minority Welfare. Said figure does not match with figure given in the complaint, inasmuch as, 381 students were said to have been given scholarship as mentioned at point no.3 of the complaint. On comparison, it was found that though date of birth of children of one parent was different but he was placed in one class. Point No.4 of the complaint stated that Uzama baby, daughter of Zille Hasan, was shown studying in Class-IV for several years but in the year of enquiry, her name was shown in Class-V. Her father told that she used to go to school, off and on. When girl was interrogated, she also admitted about the factum of going to school sometimes but could not tell even name of Teachers or the fellow students. Names of students in Point No.5 of complaint were shown in Primary School, Bhagatpur Tanda and scholarship was alleged to be given there. Their names were not found enrolled in Ramawati Inter College. Similarly with regard to Point No.6, when enquiry was made about Nafees Ahmed, it was told that he was studying in Class-IV and since he was poor in studies, his guardians sent him back to lower class. This is illegal and scholarship of Rs.300/- given to this student is liable to be recovered. At Point No.7, there is a student Gulam Mohammad aged about 15-16 years who has been shown studying in Class-V and scholarship was given to him. In fact, he was not studying and engaged in some profession and only for the purposes of scholarship, his name was entered as a student. Likewise, other students like Yunus Imammuddin and Sukhlal, mentioned at serial nos.8 to 10 of the complaint were shown to be admitted only for the purposes of scholarship. Similar complaints were mentioned at serial nos.12 and 13. Point No.14 concerned with the irregularities regarding mid-day meal. In a nutshell, it was found by Enquiry Officer that at the time of disbursement of scholarship, fake admissions in two schools were made in connivance with Gram

Pradhan Babban Ali, Gram Panchayat Vikas Adhikari Shiv Autar Verma and Principal Mahesh Kumar Saxena who had misused their authority and in connivance with each other have embezzled public government money which is required to be recovered.

4. District Magistrate, Moradabad issued a notice dated 08.10.2004 requiring Gram Pradhan Sri Babban Ali, Gram Panchayat Adhikari, Bhagatpur Tanda to show cause why his financial and administrative powers be not withdrawn since he has committed serious irregularities in distribution of scholarship to the students. District Panchayat Raj Officer, Moradabad *(hereinafter referred to as "DPRO")* also issued order for recovery of Rs.1800/- from parents of the students failing which it shall be recovered from the concerned Gram Pradhan or Gram Panchayat Vikas Adhikari or Teacher.

5. Gram Development Officer, Bhagatpur Tanda, vide letter dated 17.11.2004, informed District Minority Welfare Officer *(hereinafter referred to as "DMWO")* that DPRO has sent a Bank Draft of Rs.1800/- being amount of scholarship recovered, for transmitting the same. Thereafter, vide order dated 01.10.2014, District Basic Education Officer, Moradabad *(hereinafter referred to as "DBEO")* placed Sri Mahesh Kumar Saxena, Headmaster, Primary School, Bhagatpur Block, Bhagatpur Tanda under suspension. However, Investigating Officer *(hereinafter referred to as "I.O.")* colluded with actual accused persons and in order to exonerate them, in an illegal manner, implicate applicant and also tried to arrest applicant illegally by raiding his house at midnight on 03.01.2005 which was reported by applicant's wife to Senior Superintendent of Police, Moradabad *(hereinafter referred to as "SSP")* vide letter dated 04.01.2005. Later, I.O. submitted charge-sheet No.26 of 2005 dated 18.03.2005 arising from Case Crime No.726 of 2004 dated 20.10.2004, under Sections 420, 218, 471 IPC implicating only the applicant for the alleged fictitious and fraudulent distribution of scholarship of Rs.1800/- to the students.

6. Magistrate has taken cognizance to the charge-sheet and issued process, hence, entire proceedings are challenged on the ground that applicant has been falsely implicated; there is no evidence against him; everything was done earlier to the joining of applicant; and, in the fact finding enquiry conducted by department itself, fault was found on the part of Gram Pradhan, Gram Panchayat Vikas Adhikari and Headmaster of School while I.O. after taking money has falsely implicated applicant, hence, entire proceedings against applicant are malicious and liable to be set aside.

7. Sri Raj Kumar Khanna, learned counsel appearing for applicant has placed reliance on a Supreme Court's decision in **State of Orissa Vs. Debendra Nath Padhi 2005 (1) SCC 568** and **Mohammed Ibrahim Vs. State of Bihar 2009 (8) SCC** and urged that in order to implicate applicant, forged and manufactured evidence has been adduced against him and, therefore, entire proceedings are malicious and are liable to be quashed.

8. Basically, contention of learned counsel for applicant is that investigation has been held wrongly and only to implicate applicant; evidence has been manufactured and, therefore, all these factual aspects should be tried and

examined by this Court in an application under Section 482 Cr.P.C. and the criminal proceedings initiated against applicant should be quashed.

9. "Whether there is any such scope of enquiry/ investigation at this stage under Section 482 Cr.P.C." is the moot question which needs be considered.

10. Scope of judicial review at this stage to interfere under Section 482 Cr.P.C. is very limited. If allegations contained in FIR taken to be true, and evidence collected by police is looked into, it can be said that offences under aforesaid Sections in respect whereof cognizance has been taken and process has been issued, is not made out, only then interference is justified. Scope of judicial review in such matters has been laid down by Supreme Court time and again and it would be fruitful to have a retrospect of some authorities on the subject.

11. At the stage of charge sheet factual query and assessment of defence evidence is beyond purview of scrutiny under Section 482 Cr.P.C. The allegations being factual in nature can be decided only subject to evidence. In view of settled legal proposition, no findings can be recorded about veracity of allegations at this juncture in absence of evidence. Supreme Court has highlighted that jurisdiction under Section 482 Cr.P.C. be sparingly/rarely invoked with complete circumspection and caution. In **Md. Allauddin Khan Vs. The State of Bihar & Others 2019 (6) SCC 107**, Supreme Court observed as to what should be examined by High Court in an application under Section 482 Cr.P.C. and in paras 15, 16 and 17 said as under :

"15. The High Court should have seen that when a specific grievance of the appellant in his complaint was that respondent Nos. 2 and 3 have committed the offences punishable under Sections 323, 379 read with Section 34 IPC, ***then the question to be examined is as to***

whether there are allegations of commission of these two offences in the complaint or not. *In other words,* ***in order to see whether any prima facie case against the accused for taking its cognizable is made out or not, the Court is only required to see the allegations made in the complaint.*** *In the absence of any finding recorded by the High Court on this material question, the impugned order is legally unsustainable.*

16. The second error is that the High Court in para 6 held that there are contradictions in the statements of the witnesses on the point of occurrence.

17. In our view, the ***High Court had no jurisdiction to appreciate the evidence of the proceedings under Section 482*** *of the Code Of Criminal Procedure, 1973 (for short "Cr.P.C.")* ***because whether there are contradictions or/and inconsistencies in the statements of the witnesses is essentially an issue relating to appreciation of evidence and the same can be gone into by the Judicial Magistrate during trial when the entire evidence is adduced by the parties.*** *That stage is yet to come in this case." (emphasis added)*

12. Recently, above view has been reiterated in **Criminal Appeal No.175 of 2020 (State of Madhya Pradesh Vs. Yogendra Singh Jadaun and another)** by Supreme Court vide judgment dated 31.01.2020.

13. The principles which justify interference under Section 482 Cr.P.C. by Court have been laid down in various authorities in which Supreme Court's

judgment in **State of Haryana vs. Bhajan Lal and others, 1992 Supp (1) SCC 335** was leading precedent and thereafter matter has also been examined by even Larger Benches.

14. In **State of Haryana vs. Bhajan Lal and others (supra)** issue of jurisdiction of this Court under Section 482 Cr.P.C. has been considered and what is laid down therein in paragraph 102, has been repeatedly followed and reiterated consistently. In a very recent judgment in **Google India Private Limited Vs. Visakha Industries and Ors., AIR 2020 SC 350**, guidelines laid down in paragraph 102 in **Bhajal Lal's case (supra)** have been reproduced as under :

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power Under Article 226 or the inherent powers Under Section 482 of the Code which we have extracted and reproduced above, we give the ***following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice,*** *though it may* ***not be possible to lay down any precise, clearly defined and sufficiently*** *channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.*

(1) Where the ***allegations made in the first information report*** *or the complaint,* ***even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the Accused.***

(2) Where the ***allegations*** *in the first information report and other materials, if any, accompanying the FIR* ***do not disclose a cognizable offence****, justifying an investigation by police officers Under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.*

(3) Where the ***uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence*** *and make out a case against the Accused.*

(4) Where, the ***allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence****, no investigation is permitted by a police officer without an order of a Magistrate as contemplated Under Section 155(2) of the Code.*

(5) Where the ***allegations made in the FIR or complaint are so absurd and inherently improbable*** *on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the Accused.*

(6) Where there is ***an express legal bar engrafted in any of the*** *provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.*

(7) Where a criminal proceeding is ***manifestly attended with mala fide*** *and/or where the proceeding* ***is maliciously instituted with an ulterior motive for wreaking vengeance*** *on the Accused and* ***with a view to spite him due to private and personal grudge.****" (emphasis added)*

15. Court has also reproduced note of caution given in paragraph 103 in **Bhajan Lal's case (supra)** which reads as under :

*"103. We also give a note of caution to the effect that the **power of quashing a criminal proceeding should be exercised very sparingly and with circumspection** and that **too in the rarest of rare cases**; that the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice." (emphasis added)*

16. What would be the scope of expression "rarest of rare cases" referred to in para 103 in **State of Haryana vs. Bhajan Lal (supra)** has been considered in **Jeffrey J. Diermeier and Ors. Vs. State of West Bengal and Ors. , 2010 (6) SCC 243,** Court has said that words "rarest of rare cases" are used after the words 'sparingly and with circumspection' while describing scope of Section 482 CrPC. Those words merely emphasize and reiterate what is intended to be conveyed by the words 'sparingly and with circumspection'. They mean that the power under Section 482 to quash proceedings should not be used mechanically or routinely, but with care and caution, only when a clear case for quashing is made out and failure to interfere would lead to a miscarriage of justice. The expression "rarest of rare cases" is not used in the sense in which it is used with reference to punishment for offences under Section 302 IPC, but to emphasize that the power under Section 482 Cr.P.C. to quash FIR or criminal proceedings should be used sparingly and with circumspection.

17. Supreme Court in **Jeffrey J. Diermeier (supra)** infact referred to an earlier Three Judges' Bench judgment in **Som Mittal Vs. State of Karnataka, 2008 (3) SCC 753**, to explain phrase "rarest of rare cases". In **Som Mittal (supra)**, Court also said that exercise of inherent power under Section 482 CrPC is not a rule but exception. Exception is applied only when it is brought to notice of Court that grave miscarriage of justice would be added if trial is allowed to proceed where accused would be harassed unnecessarily or if trial is allowed to linger when prima facie it appears to Court that trial would likely to be ended in acquittal. Whenever question of fact is raised which requires evidence, Courts always said that at pre trial stage i.e. at the stage of cognizance taken by Magistrate power under Section 482 CrPC would not be appropriate to be utilized, since, question of fact has to be decided in the light of evidence which are yet to be adduced by parties.

18. In **Lakshman vs. State of Karnataka and others, 2019 (9) SCC 677** Court said that it is not permissible for High Court in application under Section 482 CrPC to record any finding wherever there are factual disputes. Court also held that even in dispute of civil nature where there is allegation of breach of contract, if there is any element of breach of trust with mens rea, it gives rise to criminal prosecution as well and merely on the ground that there was civil dispute, criminality involved in the matter cannot be ignored. Further whether there is any mens rea on part of accused or not, is a matter required to be considered having regard to facts and circumstances and contents of complaint and evidence etc, therefore, it cannot be said pre judged in a petition under Section 482 CrPC.

19. In **Chilakamarthi Venkateswarlu and Ors. Vs. State of Andhra Pradesh and Ors., AIR 2019 SC 3913**, Court reiterated that inherent jurisdiction though wide and expansive has to be exercised sparingly, carefully and with caution and only when such exercise would justify by tests specifically laid down in Section itself. In paragraph 14 of judgment, Court said :

"14. For interference Under Section 482, three conditions are to be fulfilled. The ***injustice which comes to light should be of a grave, and not of a trivial character; it should be palpable and clear and not doubtful and there should exist no other provision of law by which the party aggrieved could have sought relief."***

(emphasis added)

20. Court also said that in exercise of jurisdiction under Section 482 CrPC it is not permissible for the Court to act as if it were Trial Court. Court has only to be prima facie satisfied about existence of sufficient ground for proceeding against accused. For that limited purpose, Court can evaluate material and documents on record but it cannot appreciate evidence to conclude whether materials produced are sufficient or not for convicting accused. High Court should not exercise jurisdiction under Section 482 CrPC embarking upon an enquiry into whether evidence is reliable or not or whether on reasonable apprehension of evidence, allegations are not sustainable, or decide function of Trial Judge. For the above proposition, Court relied on its earlier authority in **Zandu Pharmaceuticals Works Limited and others vs Mohd. Sharaful Haque and others, 2005 (1) SCC 122.**

21. Power under section 482 CrPC should not be exercised to stifle legitimate prosecution. At the same time, if basic ingredients of offfences alleged are altogether absent, criminal proceedings can be quashed under Section 482 CrPC. Relying on **M.A.A. Annamalai Vs. State of Karnataka and Ors. , 2010 (8) SCC 524, Sharda Prasad Sinha Vs. State of Bihar, AIR 1977 SC 1754** and **Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Ors., 1976 AIR 1976 SC 1947, Court in Chilakamarthi Venkateswarlu and Ors. (supra)** said that where allegations set out in complaint or charge sheet do not constitute any offence, it is open to High Court exercising its inherent jurisdiction under Section 482 CrPC to quash order passed by Magistrate taking cognizance of offence. Inherent power under Section 482 CrPC is intended to prevent abuse of process of Court and to clear ends of justice. Such power cannot be exercised to do something which is expressly barred under CrPC. Magistrate also has to take cognizance applying judicial mind only to see whether prima facie case is made out for summoning accused persons or not. At this stage, Magistrate is neither required to consider FIR version nor he is required to evaluate value of materials or evidence of complainant find out at this stage whether evidence would lead to conviction or not.

22. It has also been so observed in **Rakhi Mishra Vs. State of Bihar and Ors., 2017 (16) SCC 772** and **Sonu Gupta Vs. Deepak Gupta and Ors. , 2015 (3) SC 424** and followed recently in **Roshni Chopra and others vs. State of U.P. and others, 2019 (7) Scale 152.** Here Court also referred to judgment in **Dy. Chief Controller of Imports & Exports v. Roshanlal Agarwal and Ors., (2003) 4 SCC 139**, wherein paragraph 9, Court said that in determining the question whether any process has to be issued or not,

Magistrate has to be satisfied whether there is sufficient ground for proceeding or not and whether there is sufficient ground for conviction; whether the evidence is adequate for supporting conviction, can be determined only at the trial and not at the stage of inquiry.

23. However, it is also true that at the stage of issuing process to the accused, Magistrate is not required to record detailed reasons. In **U.P. Pollution Control Board vs. Mohan Meaking Limited and others, 2000 (3) SCC 745,** after referring to a decision in **Kanti Bhadra Shah Vs State of West Bengal 2001 SCC 722**, Court said :

"Legislature has stressed the need to record reasons in certain situations such as dismissal of complaint without issuing process. There is ***no such requirement imposed on a Magistrate for passed detailed order while issuing summons. Process issued to accused cannot be quashed merely on the ground that Magistrate had not passed a speaking order."*** *(emphasis added)*

24. Same proposition was reiterated in **Nupur Talwar Vs Central Bureau of Investigation and others, 2012 (11) SCC 465.**

25. In a Three Judges' Bench in **Parbatbhai Aahir and Ors. Vs State of Gujarat and Ors, 2017 (9) SCC 641**, Court has observed that Section 482 CrPC is prefaced with an overriding provision. It saves inherent power of High Court, as a superior court, to make such orders as are necessary (i) to prevent an abuse of the process of any court; or
(ii) otherwise to secure the ends of justice. In Paragraph 15 of the judgment Court summarized as under :

"(i) 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;***

(ii) 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.***

(iii) 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;***

(iv) 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;

(v) 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;*

(vi) 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;*

(vii) 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;***

(viii) ***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;***

(ix) 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*

(x) There is ***yet an exception*** *to the* ***principle set out in propositions (viii) and (ix) 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." (emphasis added)*

26. Above observations have been reiterated in **Arun Singh and other Vs State of U.P.** passed in **Criminal Appeal no.250 of 2020 (arising out of Special Leave Petition (Crl.) No. 5224 of 2017),** decided by Supreme Court on 10.02.2020.

27. The authority relied on by learned counsel for applicant in **State of Orissa Vs. Debendra Nath Padhi (supra)** is a judgement delivered by a Three Judges' Bench of Supreme Court on a 'Reference' made to larger Bench expressing doubt on the law laid down by a Two Judges' Bench in **Satish Mehra Vs. Delhi Administration and Another 1996 (9) SCC 766** in view of an earlier Three Judges' decision in **Superintendent and Remembrancer of Legal Affairs, West Bengal Vs. Anil Kumar Bhunja and Others 1979 (4) SCC 274** and **State of Bihar Vs. Ramesh Singh 1977 (4) SCC 39.**

28. Following point was considered by larger Bench:

"Can the Trial Court at the time of framing of charge considering the material filed by accused."

29. Supreme Court answered the aforesaid question in para-23 and holding that decision in **Satish Mehra (supra)** is not correct, said as under:-

"23. As a result of aforesaid discussion, in our view, ***clearly the law is that at the time of framing charge or taking cognizance the accused has no right to produce any material. Satish Mehra's case holding that the trial court has powers to consider even materials which accused may produce at the stage of Section 227 of the Code has not been correctly decided."*** (Emphasis Added)

30. In recording of its conclusion as above, Court categorically said that at the stage of framing of charge roving and fishing inquiry is impermissible. It is well settled that at the stage of framing of charge, defence of accused cannot be put forth. If the contention of accused is accepted, it would mean that accused can be permitted to adduce his defence at the stage of framing of charge for examination thereof at that stage which is against basic principle of criminal jurisprudence. Court further said that criminal law has never accepted any circumstance, when during trial, an accused can be given opportunity to lead evidence in defence before charge is proved by prosecution by leading evidence.

31. The decision in **Mohammed Ibrahim Vs. State of Bihar (supra)** is also founded on totally different facts and has no application. Therein, a complaint was filed against Mohammed Ibrahim and others *(hereinafter referred to as "accused-appellants")* in the Court of Chief Judicial Magistrate, Madhubani alleging that he was owner of Katha No.715 Khasra No.1971 and 1973 ad measuring 1 bigha, 5 Katha and 18 Dhurs though Md. Ibrahim, the first accused had no connection with the said land and no title thereto. Yet, he executed two registered sale deeds dated 2.6.2003 in favour of second accused in respect of a portion of the said land measuring - 8 Khatas and 13 Dhurs. Accused-appellants-3, 4 and 5 were witness, scribe and stamp vendor to said sale deeds and conspired with accused-1 and 2 to forge said documents and when confronted with said forgery, they abused Complainant/Informant and hit him with fists and told him that he can do what he wanted, but they would get possession of the land on the basis of said documents. Aforesaid complaint, filed under Section 156(3) Cr.P.C., resulted in order dated 19.07.2003 passed by Magistrate observing that prima facie offences under Sections 323, 341, 420, 467, 471, 504 IPC are made out, hence, police was directed to register a report and proceed for investigation. Accordingly, FIR was registered on 10.10.2003 at Police Station Pandaul. After investigation, a charge sheet was filed on 4.9.2004. Accused applied for discharge. According to first accused, Complainant and first accused is a cousin and owners of Plot Nos.1973 and 1971 jointly. Plots were inherited by Sri Badri Mian's son (father of complainant) and by Muthu Mian's son. As per family arrangement, a portion of said plots came to the share of Girja (mother of first accused) and that portion was in possession of her husband who got it mutated in his name and paying land revenue. After his death, land came into the possession of her son i.e. the first accused. His name was entered/ mutated in record and he was paying land revenue. He bonafide sold a portion of land measuring 8 Khatas and 13 Dhurs to the second accused. Sale deeds were valid and complainant filed a false complaint. Other accused denied any collusion or complicity in any offence. It was also contended that in any case, allegations constitute only a civil dispute having no criminality and no offence is made out which is an offence punishable under any law. Application was contested by prosecution on the ground that during investigation, it was found that plot sold was part of land allotted to Badri, grandfather of Complainant and first accused could not produce any documents in support of his title, hence, I.O. submitted charge-sheet against accused relating to preparation of false sale deeds. Magistrate vide order dated 14.12.2005 rejected application for discharge observing that there was sufficient material for framing

charges. Accused thereafter filed an application under Section 482 Cr.PC for quashing order dated 14.12.2005 passed by Magistrate rejecting discharge application. In the meantime, charge-sheet was also filed against other accused. High Court rejected application under Section 482 Cr.P.C. on the ground that Magistrate had found sufficient material showing complicity of accused and this order was challenged before Supreme Court. It formulated a question as under:-

"Whether the material on record prima facie constitutes any offence against accused ?"

32. Supreme Court in **Mohammed Ibrahim Vs. State of Bihar (supra),** considered the submission of learned counsel of accused-appellants that if allegation made in the complaint and FIR, even if accepted in its entirety did not disclose the ingredients of offence of forgery or cheating or insult or wrongful restraint or causing hurt or there was no other material and, therefore, their application ought to have been accepted. Court examined Sections 464, 420, 504 IPC separately. From a perusal of aforesaid provisions and also the allegations contained in FIR and other material, Court found that no offences under Sections 420, 467, 471, 504, 341, 323 IPC were made out. It is thus evident that aforesaid judgement is based on different facts and has no application to the facts of this case.

33. Here during investigation, I.O. has found that name of Umesh Chand Saxena was mentioned in documents prepared for distribution of scholarship falsely and fraudulently. In fact, documents were prepared subsequently by accused-applicant and that is why, I.O. found that Gram Pradhan and Secretary have no role in the offence and they were left. Various documents which have been placed before this Court by learned counsel for applicant are still unproved documents and yet to led as evidence in Trial Court. Hence, this Court cannot examine the same and it cannot be said that no offence against applicant is made out.

34. Application lacks merit and is accordingly dismissed.

(2020)10ILR A524
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.02.2020

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 No. 5029 of 2020

Rahul Singh & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri J.B. Singh

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

Criminal Law – Code of Criminal Procedure,1973 - Section 482 Cr.P.C. has been filed for quashing the charge sheet under section 498-A, 323, 34, 120-B IPC read with 3/4 D.P. Act.

Section 482 of Cr.P.C. – Condition for exercise of power to prevent an abuse of process of court or to secure the ends of justice - The report of the Forensic Science Laboratory is to this fact that there was poisonous substances in the body of the lady, hence, it cannot be said that there is no evidence or abuse of process of law in filing of chargesheet.

There is no any merit in this application – dismissed. (E-2)

List of Cases cited:-

1. St. of And. 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, Represented by Inspector of Police, (2006) 7 SCC 296.

5. Dhanlakshmi Vs R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494.

6. State of Bihar 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 Applicants, Rahul Singh and Ravi @ Ravish, with a prayer for setting aside Chargesheet No.435/2019, dated 17.9.2019, as well as entire proceeding of Case Crime No.167/2017, under Sectioins-498A/323/34/120B of IPC, read with Section 3/4 of Dowry Prohibition Act, Police Station, Surajpur, District Gautam Buddh Nagar, and impugned cognizance and summoning order, dated 18.9.2019, passed by II Additional Chief Judicial Magistrate, Gautam Buddh Nagar.

2. Learned counsel for applicants firstly argued that the matter may be referred to the Mediation and Conciliation Centre of this Court as there is likelihood of compromise in between the parties and, secondly, accused persons had appeared before the Trial court and they are on bail in above case. It is under abuse of process of law. Hence, for avoiding abuse of process of law and to secure ends of justice, 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. Relief prayed for quashing of entire proceeding in Criminal Case No.4242 of 2019 (State vs. Hem Singh and others), arising out of Case Crime No. 167 of 2017, under Sections 498A, 323, 328/34 and 120B of IPC, read with Section 3/4 of Dowry Prohibition Act of Police Station-Surjapur, District-Gautam Buddh Nagar, but the Application has been filed only by two accused persons, i.e., present applicants, Rahul Singh and Ravi @ Ravish. This case crime number, proceeding of which is being prayed to be quashed, is with other co-accused persons too. Hence, same is not possible to be quashed, upon an application, moved by two accused persons only.

5. Accusation, as is apparent from the statement of victim, Smt. Madhu, is of heinous offence, punishable, under various Sections of IPC, as above. There seems to be no element or likelihood of compromise, if any, in view of law laid down by the Apex Court, with regard to referral of the proceeding by the Courts for mediation to the Mediation and Conciliation Centre. Hence, this prayer is also not with any susbtance.

6. First information report was reiteration of statements of victim and other witnesses, recorded, under Section 161 of Cr.P.C. The report of the Forensic Science Laboratory is to this fact that there was poisonous substances in the body of the lady, hence, it cannot be said that there is

no evidence or abuse of process of law in filing of chargesheet in the case.

7. This Court, in exercise of inherent power, under Section 482 of Cr.P.C., is not expected to embark upon factual matrix of the case.

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".*

10. Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above.

11. In view of what has been discussed above, this Application, under Section 482 of Cr.P.C., merits dismissal and it stands **dismissed** accordingly. However, he facts being raised before this Court may be raised before the Trial court at appropriate stage, by moving an

appropriate Application, at the time of framing of charge or subsequently, as the law permits, which, if moved, shall be decided by the Trial court, in accordance with the provisions of law.

(2020)10ILR A527
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 20.10.2020

BEFORE

THE HON'BLE CHANDRA DHARI SINGH, J.

U/S 482/378/407 No. 1954 of 2020

M/S Daurala Sugar Works ...Applicant
Versus
State of U.P. & Anr. ...Opposite Party

Counsel for the Applicant:
Sudeep Kumar, Avdhesh Kumar Pandey

Counsel for the Opposite Party:

Criminal Law – Code of Criminal Procedure,1973 -Section 245 - This petition filed against the discharge application U/S 245 of Cr.P.C. by the Uttar Pradesh Pollution Control Board under Section 44 and consequential confirming the order by the revisional court (Additional Sessions Judge).

Criminal Law – Code of Criminal Procedure,1973 -Section 203/204 – At this stage, the court considers the material before it to decide whether there is sufficient ground to proceed against the accused. (Para 33)

Criminal Law – Code of Criminal Procedure,1973 -Section 245 of Cr.P.C. (Discharge of accused) - After enquiry U/S 244 of Cr.P.C., the court of consider whether the evidence before it if unrebutted would warrant a conviction. (Para 33)

Quality of consideration of evidence U/S 203/204 Cr.P.C. and 245/246 Cr.P.C. different. (Para 34)

In present case, prima facie evidence available against accused / applicant to warrant conviction. No ground made out for interference.

Criminal Law – Code of Criminal Procedure,1973 -Section 397 - Criminal Revision – Interference by revisional court – only if order is perverse. No illegality/perversity found in the order passed by the court below.

Criminal Revision dismissed.(E-2)

List of Cases cited :-

1. Amrey Pharmaceuticals & ors. Vs St. of Raj, (2001) 4 7 SCC 382.

2. St. of Har. Vs Unique Formed (P) Ltd., (1999) 8 SCC 190.

3. Dr. Z. Kotasek Vs The St. of Bihar, 1984 Cri LJ 683.

4. U.P. Pollution Control Board Vs Dr. Bhupendra Kumar Modi & anr., (2009) 1 SCC (Cri) 679.

5. C.B.I. Vs A. Ravishankar Prasad, (2009) 6 SCC 351.

6. Inder Mohan Goswami Vs St. of Uttar., 2007 (5) CTC 614 (SC) (2007) 12 SCC 1 (2008) 1 SCC (Cri) 259.

7. Dinesh Dutt Vs St. of Rajas., (2001) 8 SCC 570.

8. M.C. Mehta Vs Kamal Nath & ors, (1997) 1 SCC 388.

(Delivered by Hon'ble Chandra Dhari Singh, J.)

1. The instant petition under Section 482/483 of the Cr.P.C. has been filed against order dated 11.11.2019 passed by

Special Judicial Magistrate (Pollution)/CBI, Lucknow in Complaint Case No.774 of 1989 (Uttar Pradesh Pollution Control Board, Lucknow v. M/S Daurala Sugar Works (Distillery Division) and Ors.) rejecting the application of the petitioners for their discharge under Section 245 of the Cr.P.C. from the prosecution lodged by the Uttar Pradesh Pollution Control Board, Lucknow under Section 44 of the Water (Prevention and Control of Pollution) Act, 1974 (hereinafter referred as 'Act of 1974') and the consequential confirming order passed by the Additional Sessions Judge, Court No.1, Lucknow dated 17.07.2020 in Criminal Revision No.688 of 2019 (M/S Daurala Sugar Works (Distillery Division) and Ors. v. State of U.P. & Anr.) dismissing the criminal revision preferred by the petitioners under Section 397 of the Cr.P.C.

2. Brief facts as borne out from the petition are as under:-

(i) M/s Daurala Sugar Works (Distillery Division) is owned by M/s DCM Limited, Delhi having its registered Office at Kanchenjunga Building, 18, Barakhamba Road, New Delhi. The Distillery was installed in the year 1943. There is rearrangement of Company 'DCM Limited' along with three other Companies, i.e., DCM Industries Limited, DCM Shriram Industries Limited and Shriram Industrial Enterprises Limited, approved by Delhi High Court vide order dated 16.04.1990 under Section 391-394 of Companies Act, 1956 (hereinafter referred to as "Act, 1956"). Daurala Sugar Works, Daurala is now a unit of M/s DCM Shriram Industries Limited, New Delhi with effect from 01.04.1990.

(ii) Since installation of Distillery, the Trade Effluent discharged by it, is used to be consumed by nearby growers to irrigate their fields and for that purpose petitioner/company constructed a channel running in about five kilometers. This channel joins a drain (sewer) known as kali Nadi which is neither a river nor watercourse nor stream.

(iii) The Parliament enacted Act, 1974 and State of U.P. framed Rules, namely U.P. Water (Consent for Discharge of Sewage and Trade Effluent) Rules, 1981 (hereinafter referred to as "Rules of 1981"). It constituted 'Board' for the purpose of giving effect to provisions of Act of 1974 and Rules framed by State Government. Sections 25 and 26 of Act of 1974 required a running Industry to obtain consent from Board for discharging 'Trade Effluent' in a stream or well or sewer or on land. State Government issued Notification dated 21.09.1981 specifying 31.12.1981 as the date on or before which consent application should be filed by existing industries. Board vide Notification dated 06.04.1983 laid down effluent standards for discharge in stream and on land fixing BOD level at 100 MG per liter for existing Distilleries.

(iv) For the purpose of setting up "Effluent Treatment Plant", the petitioners made an application to Collector on 13.07.1981 requesting for allotment of 31.38 acres land in Village Daurala and Machri, adjacent to petitioner-Distillery which was taken by State Government under U.P. Imposition of Ceiling on Land Holdings Act, 1960 (hereinafter referred to as "Act of 1960"). Correspondence continued but petitioners could not get land as desired for setting up "Effluent Treatment Plant" whereupon the petitioners made its own efforts with individual farmers and could get land in June 1984 and June 1985 measuring 18.43 acres. The Board passed an order rejecting the application of petitioners for consent vide

order dated 07.05.1983 and 16.08.1984. The petitioners again moved an application on 09.03.1985 to the Board requesting for grant of consent in which it also mentioned a time bound programme for setting up "Effluent Treatment Plant". The Board again declined consent vide order dated 25.06.1985/10.07.1985. The petitioner, however was permitted to continue on the plant of setting up "Effluent Treatment Plan".

(v) Board issued a notice to the petitioners under Sections 25 and 26 read with 44 of Act, 1974 with further advise to complete installation of "Effluent Treatment Plant". Since petitioners' unit continuously was running without consent of the Board under Section 25/26, Board filed application in March 1986 under Section 33 of Act, 1974 before Chief Judicial Magistrate for a direction to petitioner-distillery to stop discharge of effluent. An order was passed by Magistrate on 29.03.1986 restraining Distillery from discharging effluent in sewer. The petitioners filed objection and thereafter learned Magistrate passed order on 17.05.1986 suspending interim order dated 29.03.1986 and directing petitioners to submit progress report of "Effluent Treatment Plant" to Board. The petitioner/D.C.M. Ltd. was also directed to ensure that it does not discharge polluted effluent without treatment.

(vi) The Magistrate passed an order on 31.08.1987 directing petitioner-factory to bring down pollution level in 'Trade Effluent' upto prescribed standard by 15.10.1987. On 09.09.1987, sample was taken and BOD content in the sample were found as 775 MG/Liter and 725 MG/Liter. The petitioners made all efforts to bring down BOD level but could not reduce BOD level as required, though it could be reduced by over 97 per cent. The petitioners sought further time from Magistrate to bring down BOD level as required. The Magistrate did not extend time and passed stop order on 17.10.1987.

(vii) A Writ - C No.9513 of 1989 was filed before this Hon'ble Court assailing orders passed by Uttar Pradesh Pollution Control Board rejecting the consent application filed by the petitioner and also for quashing the consequential proceedings under Section 33 and Section 44 of the Act of 1974. The said writ petition was dismissed vide order dated 21.07.2016. The said order was challenged in Petition for Special Leave to Appeal (C) bearing No.1944 of 2014 and the same was disposed of vide order dated 05.07.2018.

(viii) The Pollution Board filed a complaint under Section 44 of the Act of 1974 before the Chief Judicial Magistrate, Meerut in the year 1989 by alleging inter alia that M/s Daurala Sugar Works (Distillery Division), Daurala is a unit of M/s DCM Ltd., which is a company within the meaning of Section 47 of the Act of 1974 and has been discharging the polluting material (effluent) ultimately into stream Kali River. According to the allegations made in the complaint, initially the consent application of the Industry under Section 25/26 of the Act of 1974 was rejected on June 25, 1985 and thereafter, the industry was inspected on April 3, 1986 and the representatives of the Pollution Board collected sample of the effluent discharged by the Industry. It was contended in the complaint that the trade effluent was found not meeting the norms laid down by the Pollution Board and therefore, the consent given by the industry dated January 4, 1986 was rejected by the Pollution Board through order dated May 6, 1986. It is further contended that since the industry was running without consent of the Pollution Board as is required under

Section 25/26 of the Act of 1974, therefore, the complaint under Section 44 of the Act of 1974 was filed against the petitioners-company. The complaint was filed against the then Chairman, Senior Managing Director and Directors. In support of the complaint, the Pollution Board has relied upon letter dated June 25, 1985 by which the consent application was initially rejected, inspection report, notice of inspection, notice dated December 11, 1985 under Section 25/26 of the Act of 1974, order dated May 6, 1986 and the Board resolution dated June 8, 1987.

(ix) The said complaint filed by the Pollution Board under Section 44 of the Act of 1974 in the Court of Chief Judicial Magistrate, Meerut was transferred to the Special Judicial Magistrate (Pollution)/CBI, Lucknow and after transfer of the complainant, a Complaint Case No.774 of 1989 was registered before the Special Judicial Magistrate (Pollution)/CBI, Lucknow.

(x) During the pendency of the said Complaint Case No.774 of 1989 before the Court of Special Judicial Magistrate (Pollution)/CBI, Lucknow, the Law Officer namely Shri Chandra Bhal Singh, who was authorized by the Pollution Board to file the complaint under Section 44 of the Act of 1974, expired some time in the year 1998.

(xi) On behalf of the Pollution Board, statements of Shri J.S. Yadav and Shri Prakhar Kumar were recorded as P.W.-1 and P.W.-2 under Section 244 of the Cr.P.C.. Both the witnesses produced by the Pollution Board were duly cross examined by the petitioners.

(xii) After completion of evidence under Section 244 of Cr.P.C., a discharge application under Section 245 of Cr.P.C. was filed by the petitioners on September 26, 2019 on the grounds that the prosecution had made an attempt to establish their case on the basis of photocopies of documents, which is wholly impermissible in view of the provisions of Section 64/65 of the Indian Evidence Act, 1872. The U.P. Pollution Control Board filed an objection on October 4, 2019.

(xiii) The Court of Special Judicial Magistrate (Pollution)/CBI, Lucknow rejected the discharge application filed by the petitioner under Section 245 of Cr.P.C. on November 11, 2019. Being aggrieved by the said order passed by the Court below, the petitioners have preferred Criminal Revision No.688 of 2019. The said revision was also rejected by revisional Court vide order dated 17.07.2020. Hence, the instant petition has been filed challenging both orders dated 11.11.2019 and 17.07.2020 passed by the Courts below.

3. Shri Prashant Chandra, learned Senior Counsel assisted by Shri Sudeep Kumar, learned counsel appearing for the petitioners has submitted that while rejecting consent application preferred by the petitioners, the statutory procedure for conducting an inquiry for disposing of discharge application as provided under U.P. Water (Consent of Discharge of Sewage and Trade Effluents) Rules, 1981 was not followed. It is submitted that their valuable right of re-testing of the sample allegedly collected by the Pollution Board in view of the procedure given in Sub-Sections 3, 4 & 5 was contravened.

4. Learned Senior Counsel by relying upon ***Amrey Pharmaceuticals and Ors. v. State of Rajasthan - (2001) 4 SCC 382*** and ***State of Haryana v. Unique Formed (P) Ltd. - (1999) 8 SCC 190*** has submitted that no criminal prosecution can continue against the petitioners once it is established

that their valuable right of re-testing of sample has been denied. Learned Senior Counsel has submitted that the aforesaid ratio has been discarded by both the Courts below on the ground that the aforesaid judgments are related with the provisions of Drug and Cosmetic Act, 1990, Insecticide Act, 1968 and Prevention of Food Adulteration Act, 1954 without appreciating that the provisions of re-testing in the Act of 1974 are almost *pari materia* to the Drug and Cosmetic Act, 1990, Insecticide Act, 1968 and Prevention of Food Adulteration Act, 1954.

5. Learned Senior Counsel has further submitted that the revisional Court has specifically observed that though all the issues raised by the petitioners while pressing the discharge application under Section 245 of Cr.P.C. have not been addressed by learned Magistrate while dismissing the discharge application, even then no jurisdictional error was found by the learned Revisional Court on the ground that there is no alleged illegality or impropriety in the final outcome of the discharge application, and while doing so, the learned Revisional Court has failed to appreciate that unless all the points raised by the petitioners would have been considered and discussed by the learned Magistrate, rejection of discharge application on some of the grounds by ignoring the material grounds cannot be said to be justified as it is the duty of the Courts to consider and decide all the points pleaded.

6. It has further been submitted that no finding has been recorded by the Courts below on the specific submission/contention of the petitioners regarding admissibility of evidence in view of Section 21(3) of the Act of 1974 as well as filing the Complaint against wrong persons.

7. Learned Senior Counsel has further submitted that no finding has been given by both the Courts below on the aspect as to whether authorization/sanction given to Shri Chandra Bhal Singh (now dead) for filing complaint under Section 44 of the Act of 1974 against M/s Daurala Sugar Works, Meerut can hold good or competent against the present petitioners.

8. It has been submitted that perusal of the impugned orders passed by learned Magistrate as well as learned Revisional Court, would reveal that both the Courts below while rejecting the discharge application as also the criminal revision, have misread the provisions of Act of 1974 because no case of framing of charge is made out after taking into consideration the entire evidence.

9. Learned Senior Counsel has submitted that petitioners no.3 to 8 are aged persons and are residing at different part of India and it is not practicably possible for them to come to Lucknow for facing trial.

10. The specific argument of learned Senior Counsel appearing for the petitioners is that there is substantial difference at the stage of issuing process under Section 204 of Cr.P.C. and at the stage of framing of charge under Section 245 of Cr.P.C., The scope of Section 245 of Cr.P.C. is more enlarge to the state of inquiry conducted by the trial Court under Sections 200/202 of Cr.P.C.. It is submitted that under Section 245 of Cr.P.C., a statutory duty is casted upon the trial Court to consider the discharge of the accused if after taking of the evidences referred to in Section 244 of Cr.P.C., the Magistrate

considers, for reasons to be recorded, that no case against the accused has been made out.

11. Learned Senior Counsel has submitted that while deciding the application under Section 245 of Cr.P.C., the Magistrate concerned has not considered the aforesaid legal position and the revisional Court has also erred to not take into consideration the aforesaid legal position while rejecting the criminal revision filed by the petitioners/applicants.

12. It has further been submitted that an application for discharge was filed by the petitioners on the ground that no case under Section 44 of the Act of 1974 is made out against the petitioners. The cause of action for filing the complaint under Section 44 of the Act of 1974 pertains to the year 1985-1986 and therefore, in view of the provisions of Section 49 of the Act of 1974, the authorization/consent for initiating prosecution has been given by the Board against M/s Daurala Sugar Works and whereas the complaint has been filed against M/s Daurala Sugar Works (Distillery Division), Meerut and against M/s DCM and also against its directors and officers.

13. It is submitted that from perusal of the authorization annexed with the complaint reveal that relying on some resolution of the year 1981, the Board has authorized Shri Chandra Bhal Singh, Law Officer to file prosecution against M/s Daurala Sugar Works, Meerut. It is submitted that P.W.-2 Shri Prakhar Kumar, Assistant Environmental Engineer in his cross examination has deposed that Daurala Sugar Works, Meerut and Daurala Sugar Works (Distillery Division), Meerut are two different entities and their consent applications are decided separately. On the basis of the note sheet by which authorization has been given, it is evident that the said authorization relates to the Daurala Sugar Works and not Daurala Sugar Works (Distillery Division). Learned Senior Counsel has submitted that this point has also not been considered by both the Courts below.

14. Learned Senior Counsel has also submitted that the Courts below have also not considered that the statute categorically prohibits for consideration of result of any analysis of a sample of any sewage or to a different to be admissible in evidence unless the provisions of sub-sections 3, 4 and 5 of the Act of 1974 have been complied with. It has been submitted that the statutory rules farmed for disposal of the consent application namely U.P. Water (Consent for Discharge of Sewage and Trade Effluents) Rules, 1981 do not provide for collection of sample of the trade effluent, even then the sample was collected in utter violation to provisions of sub-section 3, 4 and 5 of Section 21 of the Act of 1974.

15. It is further submitted that both the Courts below have considered the evidence of the prosecution witness namely Shri Jai Singh Yadav, and though the said witness has categorically admitted that there is no analysis report, no notice for collecting sample to the representative of the unit, second part of the sample to the representative of the unit and therefore, the consent application was wrongly rejected, even then the learned trial Court as well as the revisional Court have not considered the aforesaid evidence in true spirit for the purpose of consideration of discharge application.

16. Learned Senior Counsel appearing for the petitioner has submitted that for proving any document, there is a requirement of original to be produced before the trial Court and perusal of the complaint as well as the evidences under Section 244 of Cr.P.C., would reveal that only photocopies have been filed by the complainant/Pollution Board, even then the learned trial Court as well as the revisional Court has considered the evidences filed by the complainant/Pollution Board in disregard to the provisions of Section 64/65 of the Indian Evidence Act.

17. Learned counsel for the respondents has vehemently opposed the submissions made by learned counsel for the petitioners and submitted that the instant petition is nothing but a gross misuse of process of law. He has submitted that the petitioners are knowingly avoiding the trial in Complaint Case No.774 of 1989 before the Court of Special Judicial Magistrate (Pollution)/CBI, Lucknow.

18. It has been submitted that on earlier occasion Writ C No.9513 of 1989 was filed before this Court and the same was dismissed with cost vide judgment and order dated 21.07.2016 passed by Division Bench. Thereafter, the petitioner preferred Special Leave to Appeal (C) No(s).1944 of 2017 before the Hon'ble Supreme Court. The said SLP was also disposed of vide order dated 05.07.2018 dispensing with presence of petitioners no.3 to 8 herein before the trial Court. It was also directed that the trial be expedited and concluded as early as possible, preferably within a period of 1 and 1/2 years.

19. Learned counsel for the respondents has submitted that since presence of petitioners no.3 to 8 herein has already been dispensed with by the Hon'ble Supreme Court itself, therefore, the ground taken by the petitioners in the instant petition under Section 482/483 Cr.P.C., that the petitioners are old aged persons and therefore, the entire proceedings against them may be quashed, has no force. It has been submitted that there are no illegalities in the impugned orders dated 11.11.2019 passed by Special Judicial Magistrate (Pollution)/CBI, Lucknow and 17.07.2020 passed by Additional Sessions Judge, Court No.1, Lucknow. Both the Courts below have passed impugned orders after considering the entirety of the matter and after coming at the conclusion that *prima-facie* a case is made out against the petitioners and sufficient material is available to initiate the trial and their conviction.

20. It is further submitted that at the stage of Section 245 Cr.P.C., the Court below is to take into consideration whether the material is sufficient to initiate the trial against the accused. The trial Court while rejecting the application considered each and every points categorically and found that there is no merit in the contentions made in the said application and therefore, the same was rejected. It is also submitted that the revisional Court has also not found any error in order dated 11.11.2019 passed by the Magistrate concerned.

21. Learned counsel for the respondent has submitted that all points which are raised by the petitioners herein maybe dealt with by the Special Judicial Magistrate (Pollution)/CBI, Lucknow at the appropriate stage during trial. It has been submitted that there is no force in the instant petition and the same may be dismissed.

22. I have heard learned counsel for the parties in extenso and perused the record.

23. Before adverting to consider the contentions raised by learned counsel for the petitioners it is relevant to discuss the relevant provisions.

24. Section 44 of the Act provides that whoever contravenes the provisions of Section 25 or Section 26 of the Act of 1974 shall be punishable with imprisonment for a term which shall not be less than six months but which may be extend to six years and with fine.

25. Section 25 of the Act of 1974 deals with the restrictions on new outlets and new discharges and postulates that subject to the provisions of this section, no person shall, without the previous consent of the State Board, bring into use any new or altered outlet for the discharge of sewage or trade effluent into a stream or well.

26. Section 26 of the Act of 1974 provides that where immediately before the commencement of this Act any person was discharging any sewage or trade effluent into a stream or well, the provisions of Section 25 shall, so far as may be, apply in relations to such person as they apply in relation to the person referred to in that section subject to the modification that the application for consent to be made under sub-section (2) of that section shall be made within a period of three months of the constitution of the State Board.

27. Now before discussing the provisions of Section 49 of the Act of 1974 it is necessary to make it clear that the provisions of Section 49 of the Act of 1974 has undergone drastic changes by Act No.53 of 1988 published in the Gazette of India on 03.10.1988 whereby old provisions of Section 49 have been repealed and in its place new provisions have been substituted. Thus, since the amendment came into force with effect from 03.10.1988 and the complaint in question was filed on 26.05.1988, i.e. prior to the amendment, therefore, the complaint in question was required to have been filed in accordance with the unamended provisions of Section 49 of the Act, so, for the decision of this case, provisions of Section 49 as they stood on the date of complaint, are relevant and they read as under:

"49. COGNIZANCE OF OFFENCES:--

(1) No Court shall take cognizance of any offence under this Act except on a complaint made by, or with previous sanction in writing of the State Board, and no Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence punishable under this Act.

(2) Not With Standing anything contained in S. 32 of the Code of Criminal Procedure 1898 (5 of 1898) it shall be lawful for any Magistrate of the first class or for any Presidency Magistrate to pass a sentence of imprisonment for a term exceeding two years or of fine exceeding two thousand rupees on any person convicted of an offence punishable under this Act."

28. A perusal of above quoted provision makes it crystal clear that if the complaint is filed by the Board, the provision does not require any sanction and if the complaint is filed by person other than the Board, there should be previous sanction of the Board. It would not be out of place to mention here that the provisions of Section 49 of the Act of 1974 as they stand today do not require any sanction of the Board irrespective of the fact whether the complaint is filed by the Board or any other person.

29. In the instant case, the application under Section 245 Cr.P.C. was filed before

the Court below for discharging the petitioners from all the charges as levelled against them. Vide order dated 11.11.2019, the Special Judicial Magistrate (Pollution)/CBI, Lucknow rejected the said application recording the following reasons:-

पत्रावली के अवलोकन से यह स्पष्ट है कि परिवादी की ओर से पत्रावली में संलग्न प्रपत्र छायाप्रतियां हैं। प्रस्तुत परिवाद उन्मोचन प्रार्थनापत्र के स्तर पर है। दौरान विचारण यह सिद्ध करने का भार परिवादी पर है कि वह अपने प्रपत्रों तथा अभियुक्तगण के उत्तरदायित्व को संदेह से परे सिद्ध करे। माननीय उच्चतम न्यायालय की विधि व्यवस्था उड़ीसा राज्य बनाम देवेन्द्र नाथ पादी में माननीय उच्चतम न्यायालय ने यह अभिनिर्धारित किया कि आरोप विरचन के स्तर पर न्यायालय को मात्र यह देखना है कि क्या प्रथम दृष्टया मामला अभियुक्तगण के विरूद्ध बनता है या नहीं। न्यायालय इस स्तर पर सूक्ष्म साक्ष्य विश्लेषण एवं मिनी ट्रायल नहीं कर सकता है। अतः उपरोक्त समस्त विश्लेषण के आधार पर न्यायालय का यह मत है कि अभियुक्त संख्या अभियुक्त संख्या 1, 2, 3561314 तथा 15 की ओर से प्रस्तुत उन्मोचन प्रार्थनापत्र दिनांक 26.09.2019 न्यायहित में स्वीकार किये जाने योग्य नहीं है।

आदेश

अभियुक्त संख्या 1, 2, 3, 5, 6,13, 14 तथा 15 की तरफ से प्रस्तुत उन्मोचन प्रार्थनापत्र दिनांकित 26.09.2019 निरस्त किया जाता है। तद्नुसार प्रार्थनापत्र निस्तारित। पत्रावली वास्ते आरोप विरचन दिनांक 18.11.2019 को पेश हो। प्रस्तुत

30. The revisional Court while dismissing Criminal Revision No.688 of 2019 vide order dated 17.07.2020 assigned the following reasons:-

पुनरीक्षणकर्ता /अभियुक्तगण के विद्वान अधिवक्ता द्वारा यह भी तर्क दिया गया है कि सी०बी० सिंह की मृत्यु वर्ष 1995 में हो गयी, जबकि उनके बाद प्रखर कुमार, सहायक पर्यावरण अभियन्ता को वाद की कार्यवाही संचालित करने का प्रार्थना.पत्र दिनांक 29-04-2019 को परिवादी बोर्ड की अनुमति से प्रस्तुत किया गया, जिसे विद्वान अवर न्यायालय द्वारा दिनांक 11- 09-2019 को धारा 305 दण्ड प्रक्रिया संहिता के अन्तर्गत स्वीकार करते हुए उन्हें परिवाद संचालित करने की अनुमति दी गयी। अवर न्यायालय का आदेश दिनांकित 11-09-2019 अवैध है। प्रखर कुमार को लम्बे अन्तराल के बाद परिवाद संचालित करने की अनुमति नहीं दी जा सकती थी। परिवादी बोर्ड के अधिवक्ता द्वारा उपरोक्त का प्रतिवाद किया गया है/ स्पष्ट है कि प्रस्तुत पुनरीक्षण याचि पुनरीक्षणकर्ता/अभियुक्तगण द्वारा विद्वान अवर न्यायालय के आदेश दिनांकित 11-11-2019 के विरुद्ध संस्थित की गयी हैए जिसके द्वारा अवर न्यायालय द्वारा पुनरीक्षणकर्ता / अभियुक्तगण के उन्मोचन का प्रार्थना.पत्र निरस्त किया गया। यदि पुनरीक्षणकर्ता/अभियुक्तगण को अवर न्यायालय के आदेश दिनांकित 11-

09-2019 की वैधानिकता पर कोई संदेह था तो उनके पास उक्त आदेश के विरुद्ध सक्षम न्यायालय में पुनरीक्षण याचिका संस्थित करने का अधिकार प्रापत था, इस पुनरीक्षण याचिका में उक्त आदेश की वैधानिकता को चुनौती दिये जाने का कोई औचित्यपूर्ण आधार नहीं है। वैसे भी अवर न्यायालय की धारा 305 दण्ड प्रक्रिया संहिता के अधीन परिवाद संचालित करने की अनुमति देने की अधिकारिता एवं शक्ति प्राप्त थी और यदि अवर न्यायालय द्वारा अपनी उक्त अधिकारिता एवं शक्ति का प्रयोग वैवेकिक रूप से किया गया तो उक्त के सम्बन्ध में अन्य आदेश के विरुद्ध संस्थित पुनरीक्षण याचिका में विचार करके विश्लेषित किये जाने का कोई औचित्यपूर्ण आधार नहीं है।

पुनरीक्षणकर्ता/अभियुक्तगण के विद्वान अधिवक्ता द्वारा अन्त में यह भी तर्क दिया गया कि अवर न्यायालय द्वारा प्रश्नगत आदेश दिनांकित 11-09-2019 में उनके द्वारा उन्मोचन प्रार्थना.पत्र में उल्लेखित अनेक बिन्दुओं के सम्बन्ध में विश्लेषण एवं निष्कर्ष नहीं दिया गया, इसलिए प्रश्नगत आदेश अवैध एवं अनियमित है। परिवादी बोर्ड के विद्वान अधिवक्ता द्वारा उक्त पर प्रतिवाद किया गया है यह स्पष्ट है कि उन्मोचन प्रार्थना. पत्र में उपरोक्तानुसार जिन बिन्दुओं के सम्बन्ध में अपना तर्क प्रस्तुत किया गया, उन बिन्दुओं को इस न्यायालय द्वारा उपरोक्त के सम्बन्ध में उपरोक्तानुसार विश्लेषण किया गया है और विद्वान अवर न्यायालय द्वारा भी अपने आदेश में उन्मोचन प्रार्थना.पत्र के अनेक बिन्दुओं पर विश्लेषण करके निष्कर्ष दिया गया है, जिसमें प्रत्यक्षतः कोई अवैधानिकता, अनियमितता, अनौचित्यता एवं अशुद्धता 65प्रदर्शित नहीं होती है। कदाचित यदि कुछ एक बिन्दु अवर न्यायालय से प्रश्नगत आदेश में विश्लेषित या निष्कर्षित होने से शेष रह गये तो मात्र उक्त के आधार पर तब जबकि विद्वान अवर न्यायालय का अन्तिम निष्कर्ष एवं आदेश में कोई अवैधानिकता या अशुद्धता नहीं हैए सम्पूर्ण आदेश को अवैधानिक या अशुद्ध नहीं माना जा सकता है।

उपरोक्त सम्पूर्ण विश्लेषण से स्पष्ट है कि विद्वान अवर न्यायालय के प्रश्नगत आदेश दिनांकित 11-11-2019 में प्रत्यक्षतः कोई अवैधानिकता, अनियमितता, अशुद्धता या अनौचित्यता नहीं है। तदनुसार प्रस्तुत दाण्डिक पुनरीक्षण याचिका बलहीन है और निरस्त किये जाने योग्य है।

आदेश

प्रस्तुत दाण्डिक पुनरीक्षण याचिका बलहीन होने के कारण निरस्त की जाती है। विद्वान अवर न्यायालय का प्रश्नगत आदेश दिनांकित 11-11-2019 पुष्ट किया जाता है

पुनरीक्षणकर्ता/अभियुक्तगण अवर न्यायालय के रामक्ष दिनांक 03-08-2020 को अग्रिम कार्यवाही हेतु उपस्थित हों। निर्णय/आदेश की एक प्रति अवर न्यायालय की पत्रावली के साथ अवलोकनार्थ अविलम्ब प्रेषित हो।

बाद आवश्यक कार्यवाही दाण्डिक पुनरीक्षण की पत्रावली नियमानुसार दाखिल दफ्तर हो।

31. At the outset, before I decide the legality of the order passed by Special

Judicial Magistrate (Pollution)/CBI, Lucknow while rejecting the application for discharge and order of revisional Court, it would be appropriate to discuss Section 245 (1) of Cr.P.C. and scope of criminal revision under Section 397 Cr.P.C. Section 245 (1) of Cr.P.C. reads as under:-

"245. When accused shall be discharged.

(1) If, upon taking all the evidence referred to in section 244, the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him."

32. Section 245(1) Cr.P.C. begins with the words that, if upon such consideration. It shows that the Magistrate should consider the evidence adduced under Section 244 Cr.P.C. and if he sees that no case has been made out against the accused, that is, if unrebutted it would warrant a conviction, there is prima facie case, then he will not discharge the accused from the case under Section 245(1) Cr.P.C. Otherwise, he will frame a charge under Section 246(1) Cr.P.C.

33. The quality of consideration, which a criminal court undertakes, of the materials available before it, must certainly vary from circumstance to circumstance and stage to stage. At the initial stage of Section 203/204 Cr.P.C., a criminal court considers the materials available before it for the short purpose of deciding whether "there is sufficient ground to proceed against the accused." In a private complaint alleging commission of a warrant offence under Section 245 Cr.P.C., after the enquiry under Section 244 Cr.P.C., a criminal court is expected under Section 245(1) only to consider whether such a case has been made out "which, if unrebutted, would warrant a conviction." The quality of consideration of the materials available before the court at a later stage of the proceedings - at the stage of deciding whether the accused deserve to be convicted or acquitted - is totally different and more exhaustive. It is at that stage that the exercise of weighing the evidence in golden scales will, can and should be resorted to by a court.

34. It is true that courts have loosely employed the expression *"prima facie case"* at the stage of Section 203/204 Cr.P.C. and Section 245/246 Cr.P.C. That expression is not used in the Code of Criminal Procedure. But it must be noted that the quality of consideration at the stage of Section 203/204 Cr.P.C. and Section 245/246 Cr.P.C. are definitely different. There is a real and reasonable difference between the quality of consideration of the materials at these two stages. Though loosely referred to as *"prima facie case"* by courts in some decisions, one cannot jump to a conclusion that the quality of consideration of the materials at these two stages are identical. They are certainly different.

35. It is crucial to note that it is not the mandate under Section 245(1) Cr.P.C. that evidence if unrebutted would warrant a conviction, charge has to be framed. The language of Section 245(1) makes it very clear that evidence will have to be adduced and thereafter the court will have to consider whether a case, which, if unrebutted, would warrant a conviction is made out. It is not the mandate of law that the court need only consider whether "evidence if unrebutted, would warrant a conviction." What should be considered is

whether a case if unrebutted, would warrant a conviction. I must note that there is a distinction between these two circumstances. A *bona fide* complainant must be given a fuller opportunity to substantiate his allegations. The complainant actuated by oblique motive will have to be shown the door. An innocent accused who does not deserve to endure the trauma of a prosecution must be saved of such predicament.

36. At this stage of Section 245/246 Cr.P.C. the question is certainly not whether the evidence if accepted would warrant a conviction. The question is only whether the case established, from the materials placed before the court, if unrebutted, would warrant a conviction. In that view of the matter, the consideration of the stage of Section 245/246 Cr.P.C. is one which is more sublime. According to me, the case is certainly one to be considered under Section 245(1) Cr.P.C. When so considered, broad improbabilities in the evidence rendered by P.W. 1 and P.W. 2 and the inherent infirmity in the case or the complainant must all necessarily be taken into account to decide whether such a case which if unrebutted would warrant a conviction has been established.

37. A bare reading of Section 245(1) Cr.P.C., would reveal that it contemplates the discharge of the accused after recording all the evidence which may be produced under Section 245 Cr.P.C. on behalf of the complainant only if such evidence does not make out any such case against the accused, which if unrebutted, would entail his conviction. In the instant case, the Court below has dealt with each and every points raised by the petitioners in their applications under Section 245(2) Cr.P.C. in detail and found that *prima-facie* evidences are available on record that would warrant a conviction to the petitioners.

38. In the case of ***Dr. Z. Kotasek v. The State of Bihar - 1984 Cri LJ 683***, the Patna High Court ruled that *"when the complainant was the Board itself and not any of its officers and the Board had passed a resolution for filing a complaint against the accused company, there was compliance of the provisions of sanction as laid down in Section 49 of the Act. In the instant case, the complainant is the Board and the Board has passed a resolution for filing a complaint. Thus, there is sufficient compliance of Section 49 of the Act. In this context it is necessary to clarify the legal position that the Board can sue and be sued in its own corporate name, as Board by prescription is a Board of such antiquity that the consent of the sovereign may be presumed. The Board can sue and be sued, but only through its authorised officers, this position is undisputed. Thus, to satisfy the requirements of Section 49 of the Act, it is sufficient that the Board passed the resolution to file complaint and authorised its officer, to be nominated by the Assistant Secretary, to file the complaint."*

39. In the instant case, the available materials on record when considered in its totality must certainly lead the Court to the conclusion that such a case had been made out which, if unrebutted, would warrant a conviction of the accused persons. Therefore, the learned Special Judicial Magistrate (Pollution)/CBI, Lucknow was perfectly right in rejecting the application for discharge of the petitioners. On reading the complaint and other materials on record, it cannot be said that the learned Special Judicial Magistrate was wrong in dismissing the said application for

discharge. In such circumstances, I do not find any force in the arguments advanced by learned counsel for the petitioners for setting aside order of the learned Special Judicial Magistrate (Pollution)/CBI, Lucknow while exercising extraordinary jurisdiction under Section 482 Cr.P.C.

40. I am now required to determine the scope of criminal revision under Section 397 read with Section 398 Cr.P.C. At this stage, it would be appropriate to reproduce Sections 397 & 398 Cr.P.C.

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.*

398. Power to order inquiry. *- On examining any record under section 397 or otherwise, the High Court or the Sessions Judge may direct the Chief Judicial Magistrate by himself or by any of the Magistrate subordinate to him to make, and the Chief Judicial Magistrate may himself make or direct any subordinate Magistrate to make, further inquiry into any complaint which has been dismissed under section 203 or sub- section (4) of section 204, or into the case of any person accused of an offence who has been discharged:*

Provided that no Court shall make any direction under this section for inquiry into the case of any person who has been discharged unless such person has had an opportunity of showing cause why such direction should not be made.

41. A perusal of the aforesaid provisions portray that revisionary power is exercised either by the Sessions Judge or by High Court and a dismissal of the complainant by Magistrate under Section 203 Cr.P.C., may be assailed in a criminal revision under Section 397 Cr.P.C. Therefore, the scope of criminal revision under Section 397 Cr.P.C. is very limited and the law in this regard is now well settled by a catena of decisions of the Hon'ble Supreme Court. It is well settled that the revisionsal Court while exercising its revisional jurisdiction cannot be interfered with the order of the Court below i.e. Special Judicial Magistrate, unless it is perverse.

42. The Sessions Judge who is exercising revisional power under Sections 397 & 399 Cr.P.C. has only to address himself to the correctness, legality or propriety of the order passed by the learned Magistrate. He cannot examine the case on merits with a view to find out whether or not the allegation in the complaint, if proved, would ultimately aid in conviction of the accused, and further cannot substitute his own discretion for consideration of the Magistrate.

43. In the present case, the revisional Court examined the order passed by Special Judicial Magistrate

(Pollution)/CBI, Lucknow dated 11.11.2019 minutely and did not find any error in the said order. Sub-section 1 of Section 47 of the Act of 1974 shifts the burden on the delinquent officer or servant of the company responsible for commission of offence. The burden is on him to prove that he did not know of the offence or connived in it or that he had exercised all due diligence to prevent the commission of such offence. The non obstante clause in sub-section 2 expressly provides that notwithstanding any contained in sub-section 1, where an offence under the Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or, is attributable to any neglect on the part of any director, manager, secretary or other officer, they shall also be deemed to be guilty of that offence, and shall be liable to be proceeded against and punished accordingly.

44. While rejecting the criminal revision filed by the petitioners by way of passing a speaking and reasoned order, the learned revisional Court has not found any illegality or perversity in the order passed by learned Special Judicial Magistrate (Pollution)/CBI, Lucknow. In such circumstances, I do not find any good ground to interfere in the order passed by the revisional Court in the instant case. I also do not find any force in the submissions of learned Senior Counsel appearing for the petitioners that the Courts below while adjudicating the application for discharge has totally lost the vision that there were serious violation of the statutory violation.

45. The scope of enquiry under Section 482 has been elaborated in the following judgments:

1.*U.P. Pollution Control Boardv.Dr. Bhupendra Kumar Modi*, 2009 (1) CTC 84 (SC) : 2009 (1) SCC (Cri) 679;

2.*Central Bureau of Investigationv.A. Ravishankar Prasad*, 2009 (6) SCC 351;

3.*Central Bureau of Investigationv.V.K. Bhutiani*, 2009 (10) SCC 674;

4.*V.P. Shrivastavav.Indian Explosives Limited*, 2010 (10) SCC 361;

46. In ***U.P. Pollution Control Board v. Dr. Bhupendra Kumar Modi and Anr - (2009) 1 SCC (Cri) 679***, the following has been held by the Hon'ble Supreme Court:-

40. It is true that it is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. While exercising inherent powers either on civil or criminal jurisdiction, the Court does not function as a court of appeal or revision. The inherent jurisdiction though wide has to be exercised sparingly, carefully and with caution. It should not be exercised to do real and substantial justice and if any attempt is made to abuse that authority so as to produce injustice, the Court has power to prevent abuse. When no offence is disclosed by the complainant, the Court may examine the question of fact. When complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant had alleged and whether any offence is made out even if the allegations are accepted in toto.

41. When exercising jurisdiction under Section 482 of the Cr.P.C., the High Court could not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it the accusation would not be sustained. To put it clear, it is the

function of the trial Judge to do so. The Court must be careful to see that its decision in exercise of its power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. If the allegations set out in the complaint do not constitute offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of the inherent powers under Section 482 of the Cr.P.C. However, it is not necessary that there should be meticulous analysis of the case before the trial to find out whether the case would end in conviction or acquittal."

47. In ***Central Bureau of Investigation v. A. Ravishankar Prasad - 2009 (6) SCC 351***, it has been held as follows:

"23. The powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. The Court must be careful to ensure that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. The High Court should normally refrain from giving aprima faciedecision in a case where all the facts are incomplete and hazy, more so, when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of such magnitude that they cannot be seen in their true perspective without sufficient material. Of course, no hard-and-fast rule can be laid down with regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceedings at any stage.

40. Both English and the Indian Courts have consistently taken the view that the inherent powers can be exercised in those exceptional cases where the allegations made in the First Information Report or the Complaint, even if are taken on their face value and accepted in their entirety do notprima facieconstitute any offence or make out a case against the Accused. When we apply the settled legal position to the facts of this case it is not possible to conclude that the Complaint and the charge-sheetprima faciedo not constitute any offence against the Respondents."

48. In the judgment reported in **Inder Mohan Goswamiv.State of Uttaranchal - 2007 (5) CTC 614 (SC) : 2007 (12) SCC 1 : 2008 (1) SCC (Cri) 259,** it has been held as follows:

"Inherent powers under Section 482, Cr.P.C. though wide have to be exercised sparingly, carefully and with great caution and only when such exercise is justified by the tests specifically laid down in this section itself. Authority of the Court exists for the advancement of justice. 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 specific provisions in the statute."

The Court inGoswami case (supra) also observed that: "inherent power should not be exercised to stifle a legitimate prosecution."

49. Similarly in ***Dinesh Duttv.State of Rajesthan - 2001 (8) SCC 570,*** it has been held as follows:

"6. ..The principle embodied in the Section is based upon the maxim:quando lex aliquid alicui concedit,

concedere videtur et id sine quo res ipsae esse non potest i.e., when the law gives anything to anyone, it gives also all those things without which the thing itself would be unavailable. The Section does not confer any new power, but only declares that the High Court possesses inherent powers for the purposes specified in the Section. As lacunae are sometimes found in procedural law, the Section has been embodied to cover such lacunae wherever they are discovered. The use of extraordinary powers conferred upon the High Court under this Section are however required to be reserved, as for as possible, for extraordinary cases."

50. In the case of ***M.C. Mehta v. Kamal Nath & Ors. - (1997) 1 SCC 388***, the doctrine and public trust has been propounded and has been adopted in our legal system. In this case vast area of forest has been given for construction of Motel in Kullu-Manali Valley in the river Beas. By various constructions work, the flow of the river was diverted and forest land was destroyed. Hence, for protecting the environment and to restore the public trust, the provisions and statute relating to the environment should be implemented in a very strict manner.

51. In the case on hand which had commenced its journey in the year 1989, nonetheless lapse of such a long period cannot be a reason to absolve the respondents from the trial. In a matter of this nature, particularly, when it affects public health if it is ultimately proved, courts cannot afford to deal lightly with cases involving pollution of air and water. The message must go to all persons concerned whether small or big that the courts will share the parliamentary concern and legislative intent of the Act to check the escalating pollution level and restore the balance of our environment. Those who discharge noxious polluting effluents into streams, rivers or any other water bodies which inflicts (sic harm) on the public health at large, should be dealt with strictly dehors the technical objections. Since escalating pollution level of our environment affects the life and health of human beings as well as animals, the courts should not deal with the prosecution for offences under the pollution and environmental Acts in a casual or routine manner.

52. When exercising jurisdiction under Section 482 of the Cr.P.C, the High Court could not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it the accusation would not be sustained. To put it clear, it is the function of the trial Judge to do so. The Court must be careful to see that its decision in exercise of its power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. If the allegations set out in the complaint do not constitute offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of the inherent powers under Section 482 of the Criminal Procedure Code. However, it is not necessary that there should be meticulous analysis of the case before the trial to find out whether the case would end in conviction or acquittal.

53. The last argument of learned counsel for the petitioners that all the private persons are old aged persons and therefore, they may be exempted to appear before the Court below during the trial, has already been adjudicated by Hon'ble

Supreme Court vide judgment and order dated 05.07.2018 rendered in Special Leave to Appeal (C) No(S). 1944 of 2017 whereby presence of petitioners no.3 to 8 herein have already been dispensed with. Vide the said order the trial Court was also directed to conclude the trial as early as possible, preferably within a period of 1 and 1/2 years.

54. In the light of the above discussion and in view of the specific averments in the complaint as well as the other documents on record coupled with statutory provisions namely Sections 25, 26, 44 & 47 of the Act of 1974, I am unable to find out any good ground to interfere in the orders impugned passed by the Courts below by way of exercising jurisdiction under Section 482/483 Cr.P.C.

The Special Judicial Magistrate (Pollution)/CBI, Lucknow is directed to proceed with the complaint and dispose of the same in accordance with law expeditiously, preferably within 1 and 1/2 year from today.

I make it clear that I have not expressed anything on the merits of the contents of the complaint. It is so far the Special Court to decide the same in accordance with law.

55. In view of the above, the instant petition is ***dismissed***.
